

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री अब्राहम पी. जॉर्ज, लेखा सदस्य के समक्ष।
[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER]

आयकर अपील सं./I.T.A. No. 621/CHNY/2018
& C.O.NO.61/CHNY/2018

निर्धारण वर्ष /Assessment year : 2010-2011.

The Assistant Commissioner
of Income Tax,
Non Corporate Circle 7(1)
Chennai-34.

Vs. M/s. Indus Valley Housing,
A-68, Anna Nagar East,
Chennai 600 102.

[PAN AACFI 2508P]

(अपीलार्थी/Appellant)

(Respondent/ Cross Objector)

अपीलार्थी की ओर से/ Appellant by : Shri. Sailendra Mamidi, PCIT.
प्रत्यर्थी की ओर से /Respondent by : Shri. T. Banusekar, C.A.

सुनवाई की तारीख/Date of Hearing : 24-07-2018
घोषणा की तारीख /Date of Pronouncement : 24-07-2018

आदेश / ORDER

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

These are appeal and cross objection of the Revenue and assessee respectively directed against an order dated 15.12.2017 of Id. Commissioner of Income Tax (Appeals)-7, Chennai. Grounds taken

by the Revenue are three in numbers of which grounds 1 & 3 are general, needing no specific adjudication.

2. Ground No.2 is reproduced hereunder:-

'2.1 The Commissioner of Income Tax (Appeals) erred in relying the decision of the ITAT, Chennai in the assessee's own case for the AYs 2009-10 & 2011-12 by holding that the assessee's real estate dealing are to be treated as "Capital gains" which was not accepted by the Department and further appeal is pending before Hon'ble High Court of Chennai

2.2 The Commissioner of Income Tax (Appeals) ought to have appreciated the fact that the manner in usage of land, the dominant intention of the assessee firm, and even the formation of the assessee firm itself- all lead us to the inescapable conclusion that the land was always a stock-in-trade in assessee firm's hands, hence, it should be taxed under the head "income from business".

3. Ld. Counsel for the assessee at the outset submitted that Id. Commissioner of Income Tax (Appeals) had followed an order dated 17.06.2016 of this Tribunal in ITA Nos.230 &231/Mds/2016, in assessee's own case for assessment years 2009-2010 and 2010-2011 where a similar issue was considered. As per the Id. Authorised Representative, question raised in this year also was on the nature of the income arising from sale of the land at Nolambur held by the assessee. Submission of the Id. Authorised Representative was that in the preceding as well as subsequent assessment years where also Id.

Assessing Officer treated the gains as income under the head "business income", this Tribunal held it to be assessable under the head "capital gains". As per the Id. Authorised Representative, fact situation being the same, the order of the Id.CIT (Appeals) had to be upheld.

4. On the other hand, Id. Departmental Representative submitted that Id. Commissioner of Income Tax (Appeals) though he followed an earlier order of the Tribunal in assessee's own case, still facts could show that assessee was doing a business of real estate.

5. We have considered the rival contentions and perused the orders of the authorities below. Ld. Assessing Officer had treated the income returned by the assessee under the head "income from capital gains" as "income from business". The land and the flats therein which was sold and from which assessee derived the gains was situated in Nolambur. Payments for purchase of this land was made by one M/s. Petro Plast Industries Ltd in February and March 2005. The question whether income arising from sale of the flats and undivided share in such land could be assessed under the head income from business or capital gains had come up before this Tribunal in assessee's own case for assessment years 2009-2010 and 2011-2012.

What was held by this Tribunal at para 7 to 10 of its order dated 17.06.2016 is reproduced hereunder:-

"7. We have considered the rival submissions on either side and perused the relevant material available on record. The question arises consideration is whether the investment made by the assessee in the land at Nolambur is a stock-in-trade or capital asset? If the land is stock-in-trade, then naturally the profit on sale has to be considered as income from business. If it is considered as capital asset, then the profit has to be treated as capital gain. To ascertain whether the land in question is capital asset or stock-in-trade, the intention of the assessee at the time of purchase of the property has to be ascertained. It is not in dispute that the assessee-partnership firm was formed on 05.04.2005 by means of partnership deed. However, the payment for purchase of land at Nolambur was made by M/s Petro Plast Industries Ltd. in February-March, 2005. Therefore, it is obvious that before formation of partnership firm, the partners, namely, the members of the Agarwal family decided to purchase the property by making payment. Therefore, the intention of the partners of the firm has to be ascertained as to whether they intended to trade in real estate or they intended to keep the land as investment. Even though the entries in the books of account would not determine the nature of the land held by the assessee, however, the entries in the books are circumstantial factors to be taken into consideration for the purpose of ascertaining the intention of the parties. The fact that the payment was made before the formation of partnership firm and the partnership firm was formed only on 05.04.2005, consequently the land was registered on 23.05.2005 in the name of the assessee-firm and the land was treated as fixed asset in the books of the firm, would indicate that at the time of purchase of the property, the intention of the partners was to treat the same as capital asset. This Tribunal is of the considered opinion that the entire circumstances and the material facts need to be taken into consideration to ascertain the intention of the partners at the time of purchase of the property. After considering all the facts available on record, including the payment made before the date of formation of partnership firm, this Tribunal is of the considered opinion that the land in question was intended to be treated as capital asset by the partnership firm.

8. The next question arises for consideration is when the partnership firm itself was formed for purchase and sale of land, can the subject land be held as capital asset? This Tribunal is of the considered opinion that a company / partnership firm can have two portfolios, one is stock-in-trade and another is investment. Even a partnership firm, which is engaged in purchase and selling of land, can retain part of land as stock-in-trade and part of land as investment. When the intention of the assessee is to treat the land as investment, merely because the same was used for development by entering into a Memorandum of Understanding within a short span of time, that cannot be a reason to treat the subject land as stock-in-trade. The assessee in order to generate funds for business might have entered into Memorandum of Understanding with another trader who is dealing in real estate. If the intention of the assessee is to deal in real estate, the assessee would have developed the land by itself. In the case before us, the assessee has not dealt with the land by itself. The land was in fact handed over to other trader in real estate for development. The matter would be entirely different if the assessee constructed the multistory building and developed the land. Since the land was simply handed over to other trader for development, this Tribunal is of the considered opinion that the land in question has to be treated as capital asset.

9. We have carefully gone through the order of the Administrative Commissioner, a copy of which is available at page 3 of the paper-book. Mrs. Saroj Agarwal, one of the co-owners of the land in which the project was developed by M/s Deluxe Apartments & Building Company, treated the transaction as business transaction and claimed the profit as business income. The Administrative Commissioner by exercising his power under Section 263 of the Income-tax Act, 1961 (in short 'the Act') found that the assessee never engaged in the business and the land was sold without even improvement. No supplementary work was made by the assessee other than entering into Memorandum of Understanding for development with some builder to which the present has entered into. The Administrative Commissioner in the case of Mrs. Saroj Agarwal found that part of the land was capital asset. Accordingly, he directed the Assessing Officer to treat the gain as capital gain. This order of the Administrative Commissioner, passed under Section 263 of the Act attained finality. In this case also, even though the partnership firm was formed 05.04.2005 and the land was registered in the name of the firm on

23.05.2005, the assessee has not commenced any business activities; no other land appears to have been purchased; no supplementary work was carried on by the assessee-firm in the subject land; no organized effort was made other than simply entering into Memorandum of Understanding with the builder. As all risks and rights relating to construction of building were vested with the builder and the assessee has not taken any risk in the construction and development of flats, this Tribunal is of the considered opinion that the profit on sale of the land in the hands of the assessee-firm cannot be treated differently than as it was treated in the case of Mrs. Saroj Agarwal.

10. In view of the above, this Tribunal is of the considered opinion that the profit on sale of land has to be necessarily assessed as capital gain and not as business income. Accordingly, the orders of the authorities below are set aside and the Assessing Officer is directed to treat the profit on sale of land as capital gain”.

The fact situation being very same for the impugned assessment year also, we are of the opinion that Id. Commissioner of Income Tax (Appeals) was justified in following the order reproduced (supra). We do not find any reason to interfere with the order of the Id. Commissioner of Income Tax (Appeals).

6. Assessee in its cross objection assails the reopening done for the impugned assessment year. Since we are dismissing the appeal of the Revenue, the cross objections have become infructuous.

7. In the result, both appeal of the Revenue as well as Cross

Objection of the assessee are dismissed.

Order pronounced on Tuesday, the 24th day of July, 2018, at Chennai.

Sd/-

(एन.आर.एस. गणेशन))

(N.R.S. GANESAN)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(अब्राहम पी. जॉर्ज)

(ABRAHAM P. GEORGE)

लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated:24th July, 2018

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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