

आयकर अपीलीय अधिकरण पुणे न्यायपीठ एक-सदस्य मामला पुणे में

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "SMC", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM

आयकर अपील सं. / ITA No.330/PUN/2017
निर्धारण वर्ष / Assessment Year : 2012-13

Smt. Rajeshwari Sureshprasad Tiwari
Flat No.303, "Saimurari" Apartment,
Bodhe Nagar,
Latur – 413531
PAN: AKUPT9407E

.... अपीलार्थी/Appellant

Vs.

The Income Tax Officer,
Ward 2, Latur

.... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri M.K. Kulkarni
प्रत्यर्थी की ओर से / Respondent by : Shri M.K. Verma

सुनवाई की तारीख / Date of Hearing : 08.10.2018	घोषणा की तारीख / Date of Pronouncement: 28.11.2018
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by the assessee is against the order of CIT(A)-2, Aurangabad, dated 05.01.2017 relating to assessment year 2012-13 against order passed under section 144 r.w.s. 147 of the Income-tax Act, 1961 (in short 'the Act').

2. The assessee has raised the following grounds of appeal:-

- 1) *On the facts and circumstances of the case and in law the Ld. CIT(A) was not justified in rejecting the claim of the assessee that the Long Term Capital Gain would be assessable only in the year in which the entire consideration was received from the Developer as per*

Development Agreement. The assessment under appeal be cancelled as the capital gain is not assessable in the year under appeal as per law.

- 2) *On the facts and circumstances of the case and in law the Ld. CIT(A) was not justified in rejecting the claim of the assessee family that the family was partitioned on 21-08-2000 and each of the members were independent owners of the property. Such capital gain was assessable in their own hands.*
- 3) *On the facts and circumstances of the case and in law the Ld. CIT(A) was not justified in rejecting the claim of partition in the family since partition deed was not registered. According to Hon'ble Supreme Court (2016) 8 SCC 705 it was a family arrangement and can be oral also as it can be used as corroborative evidence explaining the arrangement and conduct of the parties receiving the property. The Ld. CIT(A) was duty bound to consider the verdict of the supreme Court as judicially it is presumed that it was before him since the Supreme Court judgment relates back to the date of enactment.*
- 4) *On the facts and circumstances of the case and in law the Ld. CIT(A) was not justified in rejecting the claim of the assessee being Manager/Karta of the HUF. By virtue of the new provisions of the Hindu Law a daughter of a co-parcener could also become Karta of the HUF. This is also the opinion of Law Commission expressed in its 174th Report "there is no reason why they could be deprived of the right and privilege of managing HUF as their Karta. The Ld. CIT(A) was required to accept the proposition put before him. It be held accordingly.*
- 5) *On the facts and circumstances of the case and in law the Ld. CIT(A) was not justified, in response to arguments of the assessee, that the Karta should be only male member of the family and thus a woman could never be a de jure karta of HUF. This runs counter to the judicial opinion and Law Commission Report. It be held accordingly.*
- 6) *On the facts and circumstances of the case and in law the Ld. CIT(A) was not justified in assessing the Long Term Capital Gain in the hands of the assessee but it should have been assessed in the hands of the members independently as claimed due to partition/family arrangement.*
- 7) *On the facts and circumstances of the case and in law the levy of interest u/s 234A, 234B and 234C is not justified.*

3. The ground of appeal No.1 raised by assessee is against the assessment of income from long term capital gains in the hands of assessee in the year when the assessee had entered into Development Agreement.

4. Briefly, in the facts of the case, the case of assessee was reopened by recording reasons for reopening the same and notice under section 148 of the Act was issued. Thereafter, the Assessing Officer issued various notices under

section 142(1) of the Act, but the assessee failed to appear before the Assessing Officer. Some information under section 142(1) of the Act was filed. Hence, the assessment was made *ex-parte* the assessee under section 144 r.w.s. 147 of the Act. The reasons for reopening the assessment were that the assessee had entered into Development Agreement with M/s. Shree Sai Developers on 03.08.2011 for the development of plot of land and had received advance from the developer. The transfer of rights to the developer to develop the plot, as per the Assessing Officer attracted capital gains. Since the assessee had not furnished any return of income, the Assessing Officer considered some of the explanations filed by assessee during the course of assessment proceedings. The Assessing Officer notes that the assessee in view of the transfer / relinquishment of development rights had to receive 40% of built-up area and ₹ 15 lakhs as security deposit. The said document was signed on 03.08.2011 and hence, assessable as capital gains in the hands of assessee. Another point which was noted by the Assessing Officer was that Development Agreement was entered into by assessee in her individual capacity and the family members of assessee were consenting parties for the Development Agreement. The plea of assessee that it was joint family property which was purchased on 21.07.1989 in the name of assessee was not accepted. On the other hand, the Assessing Officer was of the view that the assessee was not working and had no income and her husband was working in the Government Department as Veterinary doctor. Her husband had purchased the said residential house in her name on 21.07.1989 for ₹ 75,000/-. All the family members were residing in the said property but since the sons and daughters had got married, they were living separately from father and mother. The partition was made in the year 2000 and as on 01.10.2011, the assessee and her sons and daughters had entered into Agreement for

Development of the said house with the builder and hence, the names of other members were as consenting parties in the Development Agreement. The plea of assessee was not accepted and the Assessing Officer held that the said property was exclusively held by the assessee. Therefore, the income from long term capital gains on transfer / relinquishment of rights of capital assets to the developer arose in the hands of assessee in her individual capacity, hence income from capital gains was assessed in the hands of assessee.

5. The CIT(A) has upheld the order of Assessing Officer on both the issues.

6. The assessee is in appeal against the order of CIT(A).

7. The ground of appeal No.1 raised by the assessee is against assessability of income from capital gains in the year under appeal i.e. the year in which the assessee had entered into Development Agreement and had not sold the property. The second issue which is raised by the assessee vide grounds of appeal No.2 to 6, wherein the plea of assessee of partition of family property has not been accepted.

8. The learned Authorized Representative for the assessee pointed out that during the year under consideration the assessee had only received an advance of ₹ 30 lakhs and the balance consideration in the form of developed flats was not received. However, the Assessing Officer has taxed entire capital gains in the year of development. Another point which was raised was against the order of Assessing Officer in not accepting the plea of assessee that the said property was acquired out of joint family funds and though registered in the name of assessee but belongs to different family members.

9. The learned Departmental Representative for the Revenue placed reliance on the orders of authorities below.

10. On perusal of record and after hearing both the learned Authorized Representatives, the issue which arises in the present appeal is whether the income from capital gains is to be assessed in the hands of assessee in the year under appeal. The assessee had acquired the property in the year 1989 which was registered in the name of assessee. The Assessing Officer holds that the said property was acquired out of funds of husband as the assessee had no income. On the other hand, the plea of assessee was that the said property was acquired out of joint funds and jointly belongs to all the members of family i.e. assessee, her husband and her sons and daughters. The assessee in the year under consideration had entered into Development Agreement and had received an advance of ₹ 5,50,000/- which was in the form of security deposit. The assessee was entitled to receive constructed portion after development of the project and all the other family members were also entitled to receive constructed flats in the project so developed. In the year under consideration, the assessee had entered only into Development Agreement dated 01.10.2011, copy of which is placed at pages 61 to 73 of Paper Book. The perusal of said document reflects the intentions of parties to develop the said property and upon development, the assessee was to receive constructed flats in the developed project. The assessee along with family members was to individually receive flats as mentioned in clause (1) of Development Agreement. As per clause (2), it was expressly agreed between the parties that the developer shall develop the said property in accordance with construction permission at their own cost, expenses, risk and responsibility. The developer would be entitled to obtain and modify the

approved construction permission and building plans with due permission of the Competent Authorities. The developer had to develop at his own cost. By executing agreement, the owner granted to the developer license to enter upon the said property as bare licensee for enabling them to develop the said property and accordingly, handover the vacant possession of the said property, as per clause (4) of the Agreement. It was also agreed that the owner and the developer shall jointly own the portion of the developed property, under which developer was constructing ground + four storied building over the said plot of land. The said Development Agreement was executed on 01.10.2011. The assessee is in appeal for assessment year 2012-13 i.e. the financial year in which the Development Agreement was entered into between the parties. At the time of entering into Development Agreement, the assessee received only sum of ₹ 5,50,000/- which was though called as entire consideration amount, was actually part of consideration amount since the assessee was also entitled to receive six constructed flats on different floors in the proposed building. The main part of consideration i.e. value of constructed portion to be received by the assessee, was definitely in future. In such circumstances, where the assessee though had parted with the possession of property for the purpose of development of the said project and had also received so-called consideration for the property, but had not received the main part of consideration i.e. constructed flats, then such a transaction of entering into Development Agreement would not make the assessee liable to pay capital gains tax on entering into such Development Agreement. The said transaction does not amount to transfer under section 2(47) of the Act and in the absence of the same, the assessee is not liable to pay capital gains tax under section 45 of the Act.

11. Similar issue arose before the Hon'ble High Court of Punjab & Haryana High Court in C.S. Atwal Vs. CIT in ITA No.200 of 2013 (O&M), judgment dated 22.07.2015 and the Hon'ble High Court overturning the order of Tribunal held that where the development of project had to still take place and the assessee had to receive flats in the said developed project, in such cases it could not be said that the assessee had parted with the possession because the possession was handed over for the limited purpose of development of the property. The Hon'ble High Court thus, held that the assessee was not liable to pay capital gains tax on entering into such Development Agreement. The Hon'ble Supreme Court in Civil Appeal No.15645 of 2017 arising out of Special Leave Petition (Civil) No.1565 of 2016, judgment dated 04.10.2017 had held in similar circumstances that section 2(47)(v) of the Act is not attracted in the facts of the case.

12. Applying the said ratio to the facts of the present case, I hold that no capital gains has arisen in the hands of assessee on the date of entering into Development Agreement and the computation of long term capital gains in the hands of assessee is not warranted, since the property has not been developed and the assessee has not received constructed portion which is allocated to her share. In such circumstances, order of CIT(A) is reversed and hold that there is no merit in assessing the income from capital gains in the hands of assessee in the year under consideration. The ground of appeal No.1 raised by the assessee is thus, allowed.

13. Now, coming to the second issue raised by the assessee i.e. whole capital gains are not to be assessed in the hands of assessee since the assessee was holding the said property on behalf of its family and after family

partition, each of the family member shall have equal share. In view of holding that the capital gains do not arise in the year under consideration, the said issue becomes academic at present and hence, I do not address the same. The grounds of appeal No.2 to 6 are thus, decided as indicated above.

14. In the result, appeal of assessee is allowed as indicated above.

Order pronounced on this 28th day of November, 2018.

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 28th November, 2018.

GCVSR

आदेश की प्रतिलिपि अद्योषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-2, Aurangabad;
4. The Pr.CIT-2, Aurangabad;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे, एक-सदस्य
मामला / DR 'SMC', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune