

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B.R. BASKARAN, ACCOUNTANT MEMBE

ITA No.1324/Bang/2018
Assessment year : 2013-14

Dr. Suchitra Rao, Door No.15-3-148, SCS Hospital, Bendore, Mangaluru – 575 002. PAN: ABEPR 4423K	Vs.	The Income Tax Officer, Ward 2(1), Mangaluru.
APPELLANT		RESPONDENT

Appellant by	:	Smt. Sheetal Borkar, Advocate
Respondent by	:	Dr. P.V. Pradeep Kumar, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	05.09.2019
Date of Pronouncement	:	20.09.2019

ORDER

Per N V Vasudevan, Vice President

This appeal by the assessee is against the order dated 15.02.2018 of the CIT(Appeals), Mangaluru relating to assessment year 2013-14.

2. The issue in this appeal is, whether the capital gain on sale of property by the assessee is to be regarded as long term or short term

capital gain. As per definition of long term capital gain u/s. 2(29B) of the Income-Tax Act, 1961 ["the Act"], long term capital asset means an asset, which is not a short term capital asset. Short term capital asset means a capital asset held by the assessee for not more than 36 months. In other words, to claim a gain on sale of property as a long term capital gain, an assessee should hold the property for a period of more than 36 months.

3. The assessee is a Doctor by profession and owns non-agricultural immovable property in Kadri Village of Mangalore Taluk, Karnataka State. She entered into a joint development agreement dated 21.07.2006 with 3 persons, Mr. Peter Mascarenhas, Mr. Paul Mascarenhas & Mr. Krishnappa Uchil, (hereinafter referred to as 'Developers') whereby the developers agreed to develop the property owned by assessee by construction commercial shops/space, with an understanding that cost of construction will be borne by developers and 50% of the constructed area will be given to the assessee and remaining 50% taken as share of the developer. There was also a maintenance agreement dated 15.11.2010 between the assessee and the developer, whereby the Assessee and the developer agreed on the mode of maintenance and management of common areas and facilities in the building. After the construction of building, the assessee and the developer had together sold some commercial units in the built-up area and were in possession of remaining area.

4. On 25.11.2011, there was a deed of partition whereby the assessee and developers divided the built-up area developed by the developers. As per the shares agreed under the joint development agreement dated 21.7.2006. Schedule A1 of the said partition deed gives the details of the area allotted to the assessee and the same is as follows:-

Schedule A-1.**Description of property allotted to the share of the party no: 1.**

SI No	Floor	Shop no	Door no	Total Floor Area	Percentage of undivided right in the lands mentioned in Schedule 'A'
1	Basement floor	1	15-13-707/1 (A)}	2175	3.76
		2	15-13-707/1 (B)	2176	3.77
2	First floor	1	15-13-707 5	2640	4.56
		3	15-13-707/7	3145	5.43
3	Second floor	4	15-13-707/12	3610	6.23
4	Third floor	1	15-13-707/ 13	2640	4.56
		2	15-13-707/14	3145	5.43
5	Terrace floor	1	-----	4020	6.94

5. In AY 2012-13, the assessee declared long term capital gain on joint development agreement dated 21.7.2006 and computation of capital gain in that year as done by the AO was as follows:-

Calculation of Sale consideration

Total Cost of Project of Time square-(No costly: Terrace) (As per the statement attached of Archi-Technics, certified Architects of the Building)	Rs. 4,94,46,500
Plinth Area (Excluding Terrace) (As per the statement attached of Archi-Technics, certified Architects of the Building)	Sq.ft. 53327
Total Super-Built Up/saleable area (Excluding Terrace)	Sq.ft. 48656
Cost of Super-Built up/ saleable area per Sq.ft. (no Cost of Terrace) (Rs. 4,94,46,500/48656)	1016.25
Assessee's Share as per Partition Deed (Excluding Terrace) (As per the Partition attached dr. 25-11-2011)	Sqft. 19531.00
Assessee's Share at Ground Floor (which is not part of Partition Deed)	Sq.ft. 3697.50
Assessee's Share unsold as on 25-11-2011 and declared for Capital Gain	23228.50
Total Sale Consideration FY. 2011-12 (2322&50 sq. ft. @ Rs. 1,016.25/-)	2,36,05,963

6. The AO adopted Rs.1175/sq.ft as the cost of construction and made addition on account of the difference (1175-1016.25) in the order u/s.143(3) for AY 2012-13. The Assessee accepted the addition and there is no dispute in this regard AY 2012-13.

7. In AY 2013-14, which is the assessment year in the present appeal, the assessee sold part of her share of constructed area, which she got from the developers under the development agreement dated 21.7.2006. The assessee claimed that gain on such sale should be taxed as long term capital gain. According to assessee, the property that was sold by her in AY 2013-14 was obtained by her in AY 2006-07 i.e., when the development agreement dated 21.7.2006 was entered into by the developers. The assessee therefore claimed that property was held by her for more than 36 months.

8. The AO, however, was of the view that the assessee got the property that was sold in AY 2013-14 only under partition deed dated 25.11.2011 and therefore the gain on sale of property was a short term capital gain as the asset was held by the assessee for less than 36 months.

9. Consequent to the AO's conclusion that gain was short term capital gain, deduction u/s. 54F was denied to the assessee.

10. On appeal by the assessee, the CIT(Appeals) upheld the order of AO observing as follows:-

“5.7 The submission of the appellant and the assessment order were carefully considered. The appellant entered into a Joint Development Agreement with the developers on 21.7.2006. Subsequently, on 25.11.2011, the Appellant entered into a Partition Deed to get her share in the built up area. Accordingly, the appellant herself offered the cost of construction of the built up area received by her (as per the partition deed dated 25.11.2011) in the AY 2012-13 as the sale consideration. The AO

accepted the appellants contention and the assessment for AY 2012-13 reached finality. There is no dispute in AY 2012-13.

5.8 During the AY 2013-14, the appellant sold some portion of the built area (which was received in AY 2012-13) and the sale consideration was offered to tax under the head 'long term capital gains' claiming deduction u/s.54F, being investment in new residential property. The Assessing Officer (AO) in the assessment order for AY 2013-14 treated the transaction as short term capital gains and disallowed the deduction claimed by the appellant u/s.54F amounting to Rs.29,30,4001-.

5.9 Before me, the AR claimed that the period of holding should be calculated from the date of Joint Development agreement and not from the date of partition deed. There is no merit in the argument of the AR. The appellant did not offer the cost of construction in relevant assessment year for taxation as per the date of Joint Development Agreement. The cost of construction was offered to tax in the assessment year 2012-13 voluntarily as per the partition deed. Therefore, the sale consideration received during the current A.Y.2013-14 on sale of the built up area (received during the AY 2012-13 as per partition deed) is clearly a short term capital gains as it was held for less than 36 months. The AO clearly dealt with the issue in the assessment order. There is no reason to interfere with the assessment order. The grounds are rejected.

5.10. The various case laws relied on by the AR are not relevant to the facts of the case and hence not considered.”

11. Aggrieved by the order of CIT(Appeals), the assessee is in appeal before us.

12. We have heard the rival submissions. At the time of hearing, it was agreed by the parties that the period of holding of asset by the assessee should be reckoned from the date on which the construction of the building was completed by the developer. None of the authorities below have examined this aspect which, in our view, is very crucial. It is only from the date on which the construction is completed that it can be said that the

capital asset in the form of building has come into existence and can be held by the Assessee. The holding period of the asset has to be considered only from the date of completion of the building. Even in respect of the asset transferred by the assessee, there are two components viz., built-up area and undivided share and right in the land, over which the building was constructed. There should be bifurcation of consideration between the built-up area and undivided share of land. As far as undivided share of land is concerned, the assessee owned the land even as early as 2006 and therefore to the extent of the sale consideration attributable to the undivided share of land, the gain should be computed separately and assessed as long term capital gain.

13. As far as sale of building is concerned, once the completion of construction is ascertained, then from that date holding period of the building should be considered and to the extent sale consideration is attributable to the building capital gain should be assessed [long term or short term]. We are also of the view that the fact that assessee declared capital gain in AY 2012-13 on the joint development of the property with the developer is of no consequence and that should not stand in the way of determination of the holding period in AY 2013-14 is concerned. In this regard, it is also seen that in the partition deed dated 15.11.2011, the parties have acknowledged that after construction of the building, the assessee and the developer have jointly sold some commercial units and were in possession of remaining commercial units, which was being partitioned between them. We are therefore of the view that the issue with regard to computation of capital gain in AY 2013-14 should be decided afresh by the AO in the light of directions given above. The order of CIT(Appeals) is accordingly set aside and issue remanded to the AO for fresh consideration, after affording opportunity of being heard to the assessee.

14. In the result, the appeal of assessee is treated as partly allowed.

Pronounced in the open court on this 20th day of September, 2019.

Sd/-

(B R BASKARAN)
ACCOUNTANT MEMBER

Sd/-

(N.V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 20th September, 2019.

/ Desai Smurthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.