

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES : "C", BANGALORE**

**BEFORE SHRI B.R.BASKARAN, ACCOUNTANT MEMBER
AND**

SMT.BEENA PILLAI, JUDICIAL MEMBER

**ITA No.771(Bang)/2016
(Assessment year : 2010-11)**

Shri H R Diwakar Reddy,
No.9, Royal Placit, 3rd Stage,
Haralur, Agara Post,
Bangalore-560 035
PAN No.AHFDP5064M

Appellant

Vs

The Income Tax Officer,
Ward-7(1),
Bangalore

Respondent

**Appellant by : Shri V. Srinivasan, Advocate
Revenue by : Dr.P.V.Pradeep Kumar, Addl.CIT**

**Date of hearing : 05-08-2019
Date of pronouncement :**

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER :

Present appeal has been filed by assessee against order dated 11/02/16 passed by Ld. CIT (A)-4, Bangalore for assessment year 2010-11 on following grounds of appeal:

1. *The orders of the authorities below in so far as it is against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.*
2. *The learned CIT [A] is not justified in upholding the assessment of short term capital gains in respect of the appellant's sale of land at Haralur Village, Bangalore, overlooking the fact that the sites sold by the appellant was only to realize the consideration due to the appellant on the sale of his share in the land in Sy.Nos 48/1, Haralur Village to M/s. Reliable Silver Oak, which was held for more than 3 years and therefore, the capital gains that arose to the appellant was a long term capital gain and not short term capital gain under the facts and in the circumstances of the appellant's case.*
3. *The learned CIT[A] further failed to appreciate that the total consideration received by the appellant for the sale of his interest in land at Haralur Village was Rs.57,48,891 /- and the amount mentioned in the sale deed to the extent of Rs.18,60,000/- was not the full value of consideration for the transfer of the appellant's land to M/s. Reliable Silver Oak, and consequently, there was no justification for assessing a sum of Rs.18,60,000/- under the head "Capital Gain" and bringing to tax the balance of Rs.38,91,797/- as income under the head "Other Sources" under the facts and in the circumstances of the appellant's case.*

4. *The learned CIT[A] is not justified in sustaining the disallowance of Rs.2,37,500/- out of brokerage and commission, holding that the aforesaid expenses are not attributable to the sale of sites under the facts and in the circumstances of the appellant's case deserves to be cancelled.*
5. *The learned CIT[A] is not justified in holding that the appellant is not entitled to exemption u/s.54F of the Act, on account of the contravention of section 54E[2] of the Act, under the facts and in the circumstances of the appellant's case deserves to be cancelled.*
6. *Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies himself liable to be charged to interest u/s. 234-B and 234-D of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.*
7. *For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.*

Brief facts of the case are as under:

2. Assessee filed his return of income on 29/09/10 declaring total income of Rs.4,18,281/-being income from business, capital gains and other sources. Case was selected for scrutiny and notice under section 143(2) along with notice under section 142(1) and

questionnaire was issued to assessee. In response to statutory notices representative of assessee appeared before Ld. AO and filed requisite details.

2.1 Ld. AO observed from details/documents filed by assessee that assessee was absolute owner of land bearing survey No. 48/1, Haralur Village, Varthur Hobli, which was purchased on 16.06.2005. Subsequently, M/s Reliable Silver Oak, a partnership firm approached assessee for acquiring the said land in consideration of allotment of three site by the firm. General Power of Attorney dated 01/07/09 acquiring survey No.48/1 by M/s reliable Silver Oak is placed at page 23-34 of paper book. The firm in consideration, allotted three sites bearing site No.28, 41 and 73 in the said layout called Reliable Silver Oak. Ld.AO observed that, said three sites came into possession of assessee by virtue of three General Power of Attorney two of them being unregistered dated 17/06/09 for sight No. 28 and 73 and another registered power of attorney dated 29/06/09 for sight No.41. A copy of general power of attorney is placed at page 35-56 of paper book.

2.2. Ld. AO observed that assessee sold three sites on 06/07/09 (site No.28) 03/09/09 (site No.41) and 20/10/09 (site No.73) by indenture of absolute sale deeds, wherein assessee was Power of Attorney Holder for sight No.41 and consenting witness for sight No.28 and 73. In support of, assessee placed relevant documents in paper book at pages 57-104.

2.3. Ld.AO observed that assessee in consideration for sale of three plot received a sum of Rs.18,60,000/- as per agreement, whereas

assessee claimed to have received Rs.57,48,891/-. Ld.AO treated sale consideration of Rs.18,60,000/- as STCG as against LTCG and brought to tax balance 38,91,797/-(being difference between 57,48,891/- and 18,60,000/-) as income from other sources.

2.4. Ld. AO also disallowed a sum of Rs.2,37,500/-out of assessee's total expenditure under the head brokerage/commission for reason that, assessee could only prove sum of Rs.1,90,000/-as attributable to sale of three sites. Assessing officer also denied assessee's claim under section 54F on the ground that assessee constructed new residential property in September 2010 (being the new asset) and gifted the same to his sister by way of gift deed dated 08/11/10. Ld.AO was of the opinion that the same was hit by provisions of section 54F(3)of the Act.

3. Aggrieved by additions made assessee preferred appeal before Ld.CIT (A), who upheld observations of Ld.AO and confirmed additions.

4. Aggrieved by order passed by Ld.CIT (A), assessee is in appeal before us now.

Grounds raised by assessee could be categorized into issues being:

Issue No.1: Wherein assessee alleges that plots sold are long term capital asset as against short term held by Ld.AO.

Issue No.2: Wherein assessee alleges that value recorded in sale deed amounting to Rs.18,60,000/- was not full value of consideration for transferring of land at survey No.48/1 to M/s Reliable Silver Oak. It is alleged that assessee actually received sum of Rs.57,48,891/- against sale of 3 plots.

Issue No.3: assessee alleges that he is entitled to exemption under section 54F of the Act, and there is no contravention of section 54EC (2) of the Act.

5. Issue 1 (Grounds 2-3)

He submitted that three plots of land received by assessee from M/s Reliable Silveroak is in lieu of transfer of plot bearing survey No. 48/1 by assessee to M/s.Reliable Silveroak. Ld.AR thus submitted that there is exchange of plots by way of general power of attorney as consideration to each other. Ld.AR submitted that assessee sold 3 plots on the basis of general power of attorney received from M/s.Reliable Silveroak and consideration so received should be treated as long term capital gain as it actually reckons to consideration received by assessee for transfer of plot bearing survey No.48/1 owned by assessee to M/s Reliable Silveroak.

It has been submitted that assessee filed confirmatory letters from Reliable Developers and bank account extracts in support of assessee's contentions that assessee had actually received sum of Rs.57,48,891/-against sale of 3 plots by assessee through general power of attorney dated 17/06/09 (being unregistered) and 29/06/09 (being registered).

5.1 Ld.AR submitted that Ld.CIT(A) failed to appreciate submissions of assessee, since confirmatory letters were incomplete and did not assist in any manner, substantiate submissions by assessee.

5.2 Ld.CIT, DR on the contrary, submitted that authorities below was right in considering the sale of plots as short term capital gain since assessee sold the plots within a period of 3 months from the date of allotment. She also submitted that Ld.AO was right in considering value as per sale deed, received by assessee in absence of any concrete evidence of balance sum of Rs.38,91,707/- having received by assessee as part of sale consideration.

5.3. Additional Ground raised:

Assessee has raised following additional ground:

“1.The authorities below are not justified in computing the capital gains without allowing the cost of acquisition and thereby the extent of capital gains determined by the authorities below is highly excessive and liable to be reduced substantially.

2. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and justice rendered.”.

5.4. It has been submitted that this ground was inadvertently missed out to be raised by assessee. Ld.AR placing reliance upon decisions of *Hon’ble Supreme Court* in case of *National Thermal Power Co.Ltd.*, reported in 229 ITR 383, *Hon’ble Karnataka High Court* in case of *Gundathur Thimappa and Sons* reported in 70 ITR 70 and *Sankeshwar Printers Pvt.Ltd.*, reported in 218 Taxman 360 submitted that no new facts is involved for adjudicating additional ground raised and prayed for admission of the same.

5.5. Ld.Sr.DR though objected for admission of additional ground, but could not controvert the fact that, it emanates from assessment records.

5.6 We have perused submissions advanced by both sides in light of records placed before us.

Though, this ground was not raised before Ld.CIT(A), the issue raised does emanates from assessment records and relates to computation of capital gains.

Therefore, respectfully following ratio of Hon'ble Supreme Court(supra), in the interest of natural justice, we admit additional ground raised by assessee.

6. We have perused submissions advanced by both sides in light of records placed before us. There are two distinct transactions that needs to be considered along with additional ground..

Transaction No.1

It is observed that M/s Reliable Silveroak approached assessee for acquiring land bearing survey No.48/1. As there was no approach road to the land owned by assessee, assessee was left with no option but to accept the offer. Ld.AO has recorded that in consideration thereof M/s Reliable Silveroak allotted 3 sites bearing site No. 28, 41 and 73 in layout of M/s Reliable Silveroak, which was not in the same survey number of the plot owned by assessee. It has been submitted that these plots were allotted to assessee by virtue of 3 general power of attorney, two being unregistered dated 17/06/09 4 site No. 28 and 73 and another being registered part of attorney dated 29/06/09 for site No.41. This exchange of plots

admittedly amounts to transfer of land purchased in 2005 and the same would result in LTCG for the assessee.

Transaction No.2

Subsequently, assessee sold three plots vide indenture dated 06/07/09 being site No.28, 03/09/09 being site No.41 and 20/10/09 being site No.73, wherein assessee was a power of attorney holder for site No.41, whereas for site No.28 and 73 assessee was a consenting witness.

6.1. As per sale agreements placed at paper book page 70-112, sale consideration received for sale of three plots was Rs.18,60,000/-, whereas assessee submitted that he received sum of Rs.57,48,891/- as consideration through cheques. Assessee treated such gains as long term capital gains. Whereas Ld.AO treated it as short term capital gains as assessee sold the 3 capital asset within less than 36 months from the date of it coming into assessee's possession and also taxed the difference sale consideration as income from other sources.

7. Now, issue therefore, revolves around following factors:

1. Whether three plots allotted to assessee amounts to LTCG or STCG asset?
2. What is the cost of acquisition of such plots.

It is observed that in present case, primary issue relates to period of holding of asset, and for deciding it, provisions of section 2(29A) and 2(42A) of the Act comes into play.

Section 2(29A) of the Act, defines 'long term capital asset' as under:

“Section 2(29A):

Long-term capital asset” means a capital asset which is not a short-term capital asset;”

The section says that any asset which is not a short term capital asset is a long term capital asset. Thus, in order to determine whether an asset held by the assessee is a long term capital asset or not one has to analysis definition of the term, short term capital asset. Section 2(42A) of the Act defines ‘short term capital asset’ as under:

“Section2(42A):

Short-term capital asset means a capital asset held by an assessee for not more than [thirty-six] months immediately preceding the date of its transfer:”

7.1 From the above definition, it is crystal clear that any asset ‘held’ by the assessee for more than 36 months, is a long term capital asset. The section emphasizes on the words, ‘*held by an assessee*’. The word, ‘*owner*’ has designedly not been used by Legislature. The word used by legislature is “*held*”, which, according to dictionary means, to possess, be owner, holder or tenant of the property. Thus, a person can be said to hold a property as an owner, lessee, mortgagee or as an allottee and, therefore, ‘*possession*’/‘*owner*’ is not relevant for computing period of holding of a capital asset for this purpose.

Thus, to determine taxability of capital gain (Short term or Long term) arising from sale of property, it is date of allotment of property which is relevant for purpose of computing holding period.

7.2. There is no quarrel by revenue in respect of mutual exchange of plots between assessee and M/s.Reliable Silveroak. Subsequently, assessee sold plots vide, sale deed dated 03/09/2009, 20/10/2009 and 06/07/2009, which was allotted vide General Power of Attorney dated 17/06/2009 and 29/06/2009. Thus, as per definition of Short term Capit

7.3. al asset, plots were sold in less than 36 month from the date of allotment by assessee.

Thus in our considered opinion, authorities below are right in treating the gain from Transaction 2 to be short term.

However, transaction No.1, being exchange of land for three plots would result in LTCG. Cost of acquisition of land purchased by assessee on 16.06.2005 would be actual sale consideration paid. Since transaction No.1 is a case of exchange, sale consideration needs to be ascertained for determining LTCG. The three plots allotted to the assessee on 17-06-2009 and 29-06-2009, by way of exchange were sold for Rs.18,60,000/- on 06-07-2009, 03-09-2009 and 20-10-2009. Since gap between date of allotment of three plots and date of their sale is less, in our view, the very same sale consideration of Rs.18,60,000/ may be adopted for determining LTCG of land acquired in 2005. Accordingly, we direct the AO to

compute LTCG on exchange of land by adopting sale consideration as Rs.18,60,000/-.

7.3 With regard to transaction No.2, we have already held that their transaction will give rise to STCG. However, their purchase cost shall be taken as Rs.18,60,000/- being the value adopted as sale consideration on exchange of land. In that case STCG will be 'nil', as both purchase cost and sale consideration stand at Rs.18,60,000/-. We order accordingly.

8. Further, it is observed that Ld.CIT (A) casted doubt in respect of sum alleged to be received by assessee over and above Rs.18,60,000/- from purchasers, as per sale deed placed at page 70-112 of paper book. It has been observed that assessee could not bring any evidence in support of excess value alleged to have been received by assessee. In fact, Ld.CIT(A) has recorded a finding upon verifying credits appearing in Vijaya Bank account that there is no specific narration against entries highlighted therein. Ld.CIT(A) also records that there is nothing brought on record by assessee to discharge its onus that the additional sum of Rs.38,91,797/- pertains to specific sale of lands.

Even before us, Ld.AR has not placed anything on record to establish alleged additional sum pertains to sale of lands under consideration. We are therefore unable to appreciate arguments advanced by Ld.AR.

Accordingly ground No. 2-3 and additional ground allowed for statistical purposes.

8.1 Ground No. 4 is in respect of claim of brokerage being disallowed amounting to Rs.2,37,500/-.

8.2 Ld.CIT(A) disallowed the said sum out of total brokerage amounting to Rs.4,27,500/- as assessee could not produce any evidence regarding the parties to whom such payments were made. It has been submitted that total brokerage claimed by assessee was Rs.4,27,500/-, out of which assessee could prove by way of Ledger account only sum of Rs.1,90,000/- being attributable to sale of three sites in question.

Even before us, assessee has not established any such details. We therefore, do not find any infirmity in decision of Ld.CIT (A) and the same is upheld.

Accordingly this ground raised by assessee stands dismissed.

9. Ground 5 is in respect of denial of deduction under section 54F. Since the breach of condition specified in Sec.54F(3) has occurred on 08-11-2010, the cause of action will arise in AY: 2011-12 and during the year under consideration.

In the result, appeal filed by assessee stands partly allowed.

Order pronounced in the open court on

(B.R.BASKARAN)
ACCOUNTANT MEMBER

(BEENA PILLAI)
JUDICIAL MEMBER

Dated:

***am**

Copy of the Order forwarded to:

- 1.Appellant;
- 2.Respondent;
- 3.CIT;
- 4.CIT(A);
5. DR
6. ITO (TDS)
- 7.Guard File

By Order

