

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD ' B ' BENCH, HYDERABAD.**

**BEFORE SHRI S.S. GODARA, JUDICIAL MEMBER AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER
(Through Virtual Hearing)**

ITA No. & Asst. Year	Appellant	Respondent
1. 350/Hyd/2011 2007-08	Sri Nimmala Srinivas HUF), 8-2-293/82/L/51/B/1, Road No.12, Banjara Hills, Hyderabad. PAN BMYP5 8537H	Asst. Commissioner of Income Tax, Circle 6(1), Hyderabad.
2. 475/Hyd/2011 2007-08	ACIT, Circle 6(1), Hyderabad.	Shri Nimmala Srinivas, Hyderabad.
3. 1229/Hyd/2013 2007-08	Shri Nimmala Raghupathi, Hyderabad. PAN ASLPR 0734P	DCIT, Circle 6(1), Hyderabad.
4. 933/Hyd/2015 2007-08	DCIT, Circle 14(1), Hyderabad.	Shri Nimmala Srinivas, Hyderabad.
5. 1038/Hyd/2016 2007-08	Smt. Nimmala Suchitra, Hyderabad. PAN BMYP5 8537H	ACIT, Cir. 6(1), Hyderabad.

Appellant By :Shri P.C. Yadav.

Respondent By :S/Shri M. Dayasagar &
Rohit Majumdar (D.Rs.)

Date of Hearing :27.05.2021.

Date of Pronouncement : 04.06.2021.

.

O R D E R

Per S.S. Godara, J.M. :

The instant batch of five appeals for Assessment Year 2007-08 pertains to four assessees. First assessee Sri Nimmala Srinivas (HUF)'s and Revenue's cross appeals ITA Nos.350 & 475/Hyd/2011 are directed

against the CIT(A) -IV, Hyderabad's order dt.30.12.2010 passed in case No.563/ACIT 6(1)/CIT(A)-IV/09-10. Second assessee Sri Nimmala Raghupati has filed ITA No.1229/Hyd/2013 against the CIT(A)-III, Hyderabad's order dt.21.3.2013 in case No.263/CIT-III/2012-13; Revenue's appeal ITA No.933/Hyd/2015 in case of third assessee Sri Nimmala Srinivas (Individual) is directed against the CIT(Appeals)-IV, Hyderabad's order dt.13.03.2015 passed in case No.0456/2014-15/Dy.CIT, Cir.6(1)/CIT(A)/Hyd/2014-15 and last assessee Smt. Nimmala Suchitra's appeal ITA No.1038/Hyd/2016 arises against the CIT(A)-VI, Hyderabad's order dt.28.4.2016 in case No.0957/2014-15/CIT(A)-6 involving proceedings u/s. 143(3) in former two, sec. 263 in third and sec. 143(3) r.w.s. 147 of the Income Tax Act, 1961; in short 'the Act', in fourth and fifth cases, respectively.

Heard assessee's A.R. as well as department representative(supra)) Case files perused.

2. We proceed appeal-wise for the sake of convenience and brevity. First assessee's appeal ITA 350/Hyd/2011 raises the following substantive grounds :

“ 1. The impugned assessment order is passed much against the weight of evidence and contrary to law and as such, the said order is liable to be set aside.

2. The authorities below erred in taxing the sale transaction in respect of agriculture lands. They failed to appreciate the fact that the lands which were sold were agricultural one and is not a capital asset within the meaning of section 2(14)(iii) of the IT Act, 1961.

3. The authorities below erred in not deducting the amount of commission paid in the sale transaction. They failed to appreciate the evidence on record which clinically proved the fact of payment of the commission and as such, the same may be deducted from the sale consideration while computing the capital gains.

4. The authorities below erred in taking the FMV on the sold property as on 1.4.1981 at Rs.6,000 per acre against the claim of the appellant at Rs.70,000 per acre. The FMV adopted by the Assessing Officer is ridiculously

low and in uncertain term does not reflect the actual value. It is indeed surprising to note that the Sub-Registrar office has intimated the market value at Rs.1/- per sq. yd. and the learned officer has not provided an opportunity to substantiate the FMV adopted by the appellant.

5. *The learned Assessing Officer erred in charging interest u/s. 234C of the IT Act, 1961. Under the facts and circumstances of the appellant's case, no interest is leviable. In any event, the calculation of interest is also not correct and as such, liable to be deleted."*

3. Learned AR submitted at the outset that the assessee is not pressing for its second substantive ground raising the issue of application of section 2(14)(iii) of the Act. The same is rejected as not pressed therefore.

4. Coming to the assessee's third substantive grievance that both the learned lower authorities have erred in law and on facts in disallowing its commission expenditure claim of Rs.5 lakhs involving brokerage services, Mr. Yadav, invited our attention to page 14 of paper book containing the corresponding brokers' names/signatures.

It nowhere emerges from a perusal thereof as to whether the assessee/HUF had incurred the impugned commission expenditure qua the corresponding land transaction as per the agreement and sale deed or not. And also that it's eponymous karta; who had paid the impugned sum has not clarified all these details. We hold in this backdrop that both the learned lower authorities have rightly disallowed the assessee's impugned claim of Rs.5 lakhs. It fails in third substantive ground therefore.

5. Next comes assessee's third substantive grievance regarding FMV of the property in question as on 1.4.1981 claimed @ Rs.70,000 per acre as against that granted @ Rs.6,000/- per acre only. Suffice to say, we notice from page 52 in assessee's paper book that the learned lower authorities have already accepted Sri Nimmala Anjaiah's (individual/brother)'s claim of Rs.70,000 for the very asset(s). These clinching facts have got unrebutted from the Revenue's side. We thus issue necessary directions to the Assessing Officer to adopt the impugned FMV/assessee's land cost of acquisition @ Rs.70,000 per

acre as on 1.4.1981 to be followed by necessary consequential computation. This third substantive ground is accepted in assessee's favour.

No other ground has been pressed before us. This first and foremost appeal 350/Hyd/2011 is partly accepted in above terms.

6. We next take up Revenue's cross appeal 475/Hyd/2011. It transpires at the outset that the department has sought to raise two substantive grounds involving corresponding sum(supra) of Rs.80 lakhs and Rs.20.50 lakhs i.e. less than having the prescribed tax effect of Rs.50 lakhs as per CBDT Circular dt.08.08.2019 having retrospective effect qua pending appeals as well. This appeal ITA 475/Hyd/2011 is dismissed for involving lower tax effect of less than Rs.50 lakhs therefore.

7. We now take up second assessee Sri Nimmala Raghupati's appeal ITA No.1229/Hyd/2013 he has sought to reverse the CIT(A)'s order passed in section 263 revision proceedings thereby forming the corresponding assessment /reassessment dt.18.11.2010 as

an erroneous on causing prejudice to interest of the Revenue. We notice at the outset from a perusal of the CIT's order that he has nowhere held the said assessment as both erroneous as well as causing prejudice to the interest of revenue; simultaneously, as it is held mandatory in Malabar Industrial Co, Vs. CIT 243 ITR 83 (SC) and other judicial precedents. We thus reverse the learned CIT's impugned order for this precise reason alone. All other pleadings are rendered infructuous. The second assessee's appeal ITA 1229/Hyd/2013 is accepted.

8. We now take up Revenue's appeal in ITA 933/Hyd/2015 in case of third assessee **Sri Nimmala Srinivas (Individual)**. It's is only the case that the Assessing Officer had rightly assessed the impugned Long Term Capital Gains (LTCG) in the individual's hands. The same however goes contrary to the admitted factual position that the department has itself assessed the eponymous HUF (supra) for the very same income. The CIT(A)'s detailed discussion to this effect read as under :

“2. Sri Nirmala Srinivas filed Return of Income for the A.Y. 2007-08 on 21/09/2007 in the status of HUF by admitting an income at Rs.1,61,34,340/- which includes the long term capital gain of rs.1,57,05,993/-. The A.O. noticed that the assessee HUF filed the

return for AY 2007-08 quoting the PAN of assessee. In the return the assessee admitted the sale consideration at Rs.3,44,32,250/- and calculated the LTCG at Rs.1,57,05,993/-.

3. During the assessment of the assessee HUF, it was noticed that during the previous year, the assessee along with his two brothers namely, Sri Nimmala Anjaiah and Sri Nimmala Raghupathy have sold two properties through two separate registered agreements of sale cum irrevocable GPA bearing No.s 773/2007 and 377/2007 dated 18/01/2007. As per the registered sale deeds, the total consideration was paid to Sri Nimmala Srinivas, Sri Nimmalal Anjaiah and Sri Nimmala Raghupathy and their family members. The original assessment in the case of the assessee HUF was completed u/s. 143(3) on 31/12/2009 determining the taxable income at Rs.4,49,20,250/- and agricultural income at Rs.12,000/-, by adopting the total consideration on sale of the land at Rs.4,44,32,250/- as against Rs.3,44,31,250/- admitted by the assessee. The assessment in the status of HUF was completed on protective basis.

4. The assessment was reopened by issuing notice u/s. 148 dated 26/03/2012 and the same was completed vide order u/s. 143(3) r.w.s. 147 dated 31/03/2013. The assessment was completed assessing total income at Rs.4,44,70,259/-. Against the above order, the assessee is in appeal with the following grounds:

- i. *The impugned assessment order, under the facts and circumstances of the appellant's case, is passed contrary to law, without jurisdiction and unsustainable under law and as such, the said order is liable to be annulled.*
- ii. *The issuance of notice/s. 148 of the IT Act, 1961 by the ld. AO is bad in law as much as there is no escapement of income on the part of the appellant and as such, the issuance of notice u/s. 148 may be cancelled.*
- iii. *The ld. AO erred in holding that the income from long term capital gains are to be taxed in the appellant's individual status and not as a karta of his*

HUF as assessed earlier by the same Assessing Officer U/s. 143(3) of the IT Act. Under the facts and circumstances of the appellant's case, the finding is liable to be expunged and the addition made on this count is to be deleted.

- iv. IN ANY EVEN, the impugned assessment order is bad in law and unsustainable under law for the obvious reason that the addition made under the head long term capital gain was already assessed at the hands of the appellant in his HUF by the same AO. More so, the assessment of HUF was completed u/s. 143(3) of the IT Act, 1961 after detailed scrutiny, however, an appeal was preferred before the CIT(A), Hyderabad, and the Appellate Commissioner, after going through the record, disposed off the appeal and the appellant and the AO preferred appeals before the ITAT and the said appeals are pending before ITAT. Under these circumstances, the addition made by the AO for the same income which was already assessed in the assessment of HUF is unwarranted, capricious and untenable under law and the same is liable to be deleted.
- v. The impugned assessment order is bad in law for the obvious reason that the AO has issued notice u/s. 148 of the IT Act, 1961 in case of the HUF for withdrawal of the exemption granted u/s. 5F of the IT Act, 1961, for the same AY i.e. 2007-08 on the ground that the construction of a residential house was not completed within the stipulated period of three years. However, upon the appellant's representation the re-assessment proceedings was closed on the ground that the issuance of notice u/s. 148 of the IT Act, 1961 for the AY 2007-08 is bad in law and it is irrelevant for the assessment year.
- vi. WITHOUT PREJUDICE TO THE ABOVE GROUNDS. The authorities below erred in taxing the sale transaction in respect of agricultural lands. They failed to appreciate the fact that the lands which were sold were agricultural one and is not a capital asset within the meaning of Section 2(14)(iii) of the IT Act, 1961.
- vii. The authorities below erred in not deducting the amount of commission paid in the sale transaction. They failed to appreciate the evidence on record which clingly proved the fact of payment of the commission and as such, the same may be deducted from the sale consideration while computing the capital gains.
- viii. The authorities below erred in taking the FMV of the sold property as on 01/04/1981 at Rs.6,000/- per acre against the claim of the appellant at Rs.70,000/- per acre. The FMV adopted by the AO is ridiculously low and in uncertain term does not reflect the actual value. It is indeed surprising to note that the Sub-Registrar office has intimated the market value at Rs.1/- per sq. yd.
- ix. The authorities below erred in not granting exemption u/s. 54F of the IT Act, 1961 to the extent of Rs.1,35,00,000/- as the appellant utilize the sale proceeds for the purchase of plot of land and construction of a residential

Sri Nimmala Srinivas,
A.Y.2007-08.

house thereon. The AO may be directed to grant exemption u/s. 54F of the IT Act, 1961 as claimed by the appellant.

- x. *The authorities below erred in not granting exemption u/s. 54B of the IT Act, 1961 as the appellant out of sale proceeds purchased another agricultural lands. The AO may be directed to grant exemption u/s. 54B of the IT Act, 1961 as claimed by the appellant*
- xi. *The Id. AO erred in charging interest U/s. 234A & B of the IT Act, 1961. Under the facts and circumstances of the appellant's case, no interest is leviable. In any event, the calculation of interest is also not correct and as such, liable to be deleted. .*

5. The above grounds basically raise the following issues:

- i. Validity of notice u/s. 148 and the subsequent proceedings.
- ii. The status in which the income is to be assessed. This issue is to be dealt w.r.t. the action already taken against the assessee in HUF status.
- iii. Issues related to FMV of property as on 01/04/1981 and allowability of deduction with regard to the computation of capital gains.

The above issues are discussed in subsequent paras.

6. The issues listed at i) and ii) are interconnected which have bearing on the validity of the proceedings and the status in which the income is assessable. The return of income was filed in HUF capacity admitting capital gains was filed on 21/09/2007. The same was scrutinized and order u/s. 143(3) was passed on 31/12/2009. The capital gains was assessed on protective basis. The same was appealed against and CIT(A) passed order dated 30/12/2010 giving partial relief to the assessee. Both the department and the assessee are in appeal before Hon'ble ITAT. The issue of status is not before the Hon'ble ITAT. Once the CIT(A) passed the order, the capital gain stands assessed on substantial basis. As the issue stands settled, the assessment in status of HUF becomes final either as assessed by AO or as modified by the CIT(A). The reason given for reopening stating that the income is assessable in individual status, based on

the material already available record only, amounts to change in opinion and the same is against law. Further, the income stands assessed in HUF status, assessing the same income in the hands of individual amounts to double taxation. The same cannot be made legally. Accordingly, it is held that the income arising of capital gains assessed in individual status is to be deleted. The appellant's appeal, on the grounds related to above issues stands allowed.

8. As the entire capital gains is not held taxable in individual hands, the other issues become infructuous and not dealt with further. Otherwise also the CIT(A) has dealt with the issues in order dated 31/12/2010 of the appellant in HUF status. The other grounds stands disposed accordingly.

It is sufficiently clear from the perusal of the foregoing detailed discussion that once the impugned LTCG has been assessed in HUF's hands, the same has no legs to stand qua the individual assessee herein so as to avoid double taxation. We thus find no merit in Revenue's instant grievance. This appeal ITA 933/Hyd/2015 is rejected therefore.

9. Lastly comes fourth assessee Smt. Nirmala Suchitra in ITA No.1038/Hyd/2016. Her sole substantive ground challenges correctness of both the learned lower authorities' action assessing her for an amount of Rs.20lakhs received in the transfer agreement/sale deed. Her only case before us is that her husband Sri Nimmala

Srinivas (supra) already stands assessed for the very income and therefore, the impugned addition deserves to be deleted. We make it clear that the assessee has not even filed copy of the agreement or the sale deed that the impugned sum does not pertain to her share in the property. Be that as it may, hon'ble apex court's landmark decision in ITO Vs. C.S. Atchaiah 218 ITR 239 (SC) has settled the law long back that the Assessing Officer can and he must tax the right person and the right person alone qua the income in issue. We conclude in this factual and legal backdrop that it is the assessee only who is liable to be assessed qua the impugned sum of Rs.20 lakhs received by her in her individual capacity and not her husband in foregoing terms. Her sole substantive ground as well as the main appeal in ITA 1038/Hyd/2015 is declined.

10. To sum up, first assessee's ITA 350/Hyd/2011 is partly allowed; Revenue's twin appeals ITA 475/Hyd/2011 and 933/Hyd/2015 are dismissed; Second assessee's appeal ITA 1229/Hyd/2013 is `allowed and

ITA Nos.350 & 475/Hyd/2011;
1229/Hyd/2013; 933/Hyd/2015
& 1038/Hyd/2016

last assessee's appeal ITA 1038/Hyd/2016 is dismissed in
above terms. A copy of this common order be placed in
the respective files.

Order pronounced in the open court on 4th June,2021.

Sd/-

Sd/-

(L.P.SAHU)

(S.S. GODARA)

Accountant Member

Judicial Member

Hyderabad, Dt. 04.06.2021.

* Reddy gp

Copy to :

1.	i) Shri Nimmala Srinivas, 8-2-293/82/L/51/B/1, Road No.12, Banjara Hills, Hyderabad. ii) Shri NimmalaRaghupathi, 8-2-293/82/52/B, Sri Venkateshwara Colony, Road No.12, Banjara Hills, Hyderabad-34. iii) Smt. Nimmala Suchitra, H.No.8-2-293/82/L/51/B/1, MLA Colony, Road No.12, Banjara Hills, Hyderabad.
2.	i) ACIT, Circle 6(1), Hyderabad. ii) DCIT, Circle 6(1), Hyderabad.
3.	i) Pr. CIT-6, Hyderabad. ii)Addl. C I T, Range 3, Range 6, Hyderabad.
4.	CIT(A)-III, IV,VI, Hyderabad.
5.	DR, ITAT, Hyderabad.
6.	Guard File.

By Order

Sr. Pvt. Secretary, ITAT, Hyderabad.