

IN THE INCOME TAX APPELLATE TRIBUNAL
‘A’ BENCH : BANGALORE
BEFORE SHRI B.R BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.367/Bang/2018
Assessment Year : 2013-14

Shri Suresh Nagaraja Rao Kestur, No.670/2, 11 th D Main Road, 5 th Block, Jayanagar, Bengaluru-560 041. PAN – AJJPK 1231 F	Vs.	The Income-Tax Officer, Ward-5(3)(3), Bengaluru. RESPONDENT
APPELLANT		

Assessee by	:	Shri Likith R Prakash, Advocate
Revenue by	:	Shri Kannan Narayanan, ACIT (DR)

Date of Hearing	:	08-07-2021
Date of Pronouncement	:	04-10-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against order dated 21/10/2017 passed by the Ld.CIT(A)-5, Bangalore for assessment year 2013-14 on following grounds of appeal:

- “1. The order of the learned Commissioner of Income Tax (Appeals) is opposed to the facts of the case and law applicable to it.*
- 2. The learned Commissioner of Income Tax (Appeals) erred in confirming the order of the Assessing Officer, assessing the profit consequent to sale of land during the previous year under the head business as against capital gains declared by the appellant.*
- 3. The Learned Commissioner of Income Tax (Appeals) erred in not considering the fact that the appellant was never in the business of real*

estate, held the asset as capital asset and the income was therefore assessable under the head capital gains.

4. The Learned Commissioner of Income Tax (Appeals) erred in confirming the order of the Assessing Officer and ignoring the fact that, just an act of conversion from agricultural purposes to industrial purposes would not amount to adventure in the nature of trade and hence the profit consequent to sale was assessable under the head capital gains and not under the head business.

5. The Learned Commissioner of Income Tax (Appeals) erred in holding that, the appellant is not eligible for exemption U/s.54F of the act.

6. The Learned Commissioner of Income Tax (Appeals) erred in holding that, the asset became a capital asset only after conversion and the period of holding for the purpose of determining the period of three years, the date of conversion should be considered as date of acquisition and on the contrary this is not the position of law, original date of acquisition continues to be the date of acquisition.

7. The appellant craves permission to add, delete or alter any of the grounds at the time of hearing.

Prayer

The appellant request the Honourable Tribunal to kindly hold that

i) the asset sold during the previous year is a capital asset and therefore the profit on sale of such asset is assessable under the head capital gains.

ii) The date of the acquisition of the asset for reckoning the period of holding should be the original date of acquisition and not the date of conversion and therefore the asset is a long term capital asset and the income is assessable under the head long term capital gains.

iii) The appellant is eligible for exemption u/s 54F of the act as claimed.”

At the outset, it is submitted that originally the appeal was disposed by order dated 16.10.2017, which was recalled by this Tribunal vide order dated 29.01.2021 in M.P. No. 05/Bang/2021. This Tribunal recalled the order dated 16.10.2017 to be heard afresh based on the reasoning mentioned therein.

Brief facts of the case are as under:

2.The assessee is an individual and filed his return of income for year under consideration on 10/07/2014 declaring total income of Rs.8,28,820/-. The return was processed under section 143(1) of the Act in the case was selected for scrutiny. It is recorded by the Ld.AO that, the case was selected to verify large deduction

claimed by assessee under section 54F of the Act. The assessee was issued notice under section 143(2) and 142(1) of the Act. In response to the statutory notices, representatives of assessee appeared before the Ld.AO and filed requisite details as called for.

2.1 The Ld.AO from the details filed by assessee observed that assessee purchased an agricultural property measuring 6 acers and 20 Guntas situated at survey No.126 and 127 at Medemaranahalli, Harohalli Hobli, Kanakapura Taluka, along with 2 co-owners vide agreement dated 17/09/2005. The Ld.AO observed that the purchase was carried out in accordance with co-ownership Deed entered into between the co-owners dated 15/06/2002.

2.2 The Ld.AO from the details filed observed that, assessee along with the co-owners converted the agricultural land into non-agricultural small-scale industrial purpose on 11/08/2010 and subsequently along with the co-owners sold the land during financial year 2012-13 to 3 different parties.

2.3 The Ld.AO observed that assessee after reducing indexed cost of acquisition, cost of improvement from sale consideration declared his share of capital gain at Rs.66,86,491/-. He also claimed deduction under section 54F of the total capital gains earned as investment in a residential apartment.

2.4 The Ld.AO after considering submissions by assessee held that, assessee carried out business activity and the transaction does not fall under the purview of section 45 of the Act. The Ld.AO observed that the intention of assessee towards purchase of land was to make profit, on the basis that the agricultural land was converted into nonagricultural (industrial) purpose and the

land was sold to 3 different persons as industrial land. The Ld.AO concluded that the income earned to the tune of Rs.1,97,12,500/- (to be assessed in the hands of 3 co-owners) has to be business income. The Ld.AO computed the asset to be short-term capital asset from the date of conversion of the land and disallowed the deduction claimed by assessee under section 54F.

2.5 Aggrieved by the order of Ld. AO, assessee preferred appeal before the Ld.CIT(A).

2.6 Before the Ld.CIT(A) assessee submitted that assessee was a salaried person and did not intend to carry out any business.

2.7 The Ld.CIT(A) observed and held as under:

“After carefully understanding the facts of the case, it is inferred that the activity of the assessee does fall under the purview of Sec.45 but falls under the provisions of Sec.28 of the IT Act, as there is element of business activity. The intention of the Co-owners in purchase of land is very much clear towards making profit. The insertion is further strengthened when the agricultural land was converted into non agricultural (industrial) purpose. Part of the land was sold to three different persons as industrial land. Even as per the judgments of Hon'ble Supreme Court in the cases of Bombay steam Navigation co.(p).Ltd. CIT (1965) 56 ITR 52(SC) CIT v. BANGLAORE TRANSPORT Co.Ltd. (1967) (66 ITR 373 (SC) and also CIT v. Kalikutty (K.B.)(1969)(731TR 533(SC), the assessee's activity clearly fall under the business activity. The Hon'ble Supreme Court in the above cases has held that the business or profession must have been carried on any time during the previous year. Therefore, it is not necessary that the business or profession must have been carried on throughout the previous year. The Hon'ble Apex Court further held that it is not essential that business or profession should be carried on throughout the previous year or upto the end of the previous year. Accordingly, as per the provisions of Sec 28 of the I.T. Act and also judgment cited supra, it was proposed to assess the income under the head Business after considering the expenditure debited by the assessee such as proportionate cost of acquisition and proportionate cost of conversion charges as claimed. It is abundantly clear that the income earned to the tune of Rs. 1,97,12,500/- to be assessed in the hand of three co-owners as business income & However, considering the submissions of the appellant that the asset - should be treated as capital asset, it has to be mentioned here that the asset become a capital asset only after conversion from agricultural! to

industrial land as per the provisions of Sec. 2(47)(iv), the relevant portion of the I.T. Act is reproduced as under:

In a case where the asset is converted by the owner thereof into or is treated by him as, stock—in trade or business carried on by him, such conversion or treatment. Thus, it is clear that the asset has become capital asset as per the conversion order of the Deputy Commissioner dated 11.08.2010 and the period of holding of the asset from date of conversion to the date of sales made on 25/07/2012, 17.08.2012 is less than 3 years and accordingly the asset sold is a short term capital asset and the gain is to be treated as short term capital gain and thereby the appellant is not entitled for claiming deduction u/s. 54F. Thus the appellant's contention that the appellant did not follow the condition laid down in the notification in formation of layout, approval for the layout, or provide facilities of water, electricity drainage and thus the asset sold was a capital asset and eligible for deduction u/s 54F does not have any merit. In view of the above discussion and position of the law the action of the Assessing Officer in assessing under Business head is hereby upheld. The grounds of appeal is therefore dismissed.”

3. Aggrieved by the order passed by the Ld. CIT (A) assessee is in appeal before us.

3.1 The Ld.AR submitted that, the subject transaction falls under the definition of section 2(47) of the Act, and not under section 28 of the Act as held by the authorities below. It was submitted that, the land sold was purchased by assessee along with the 2 co-owners in the financial year 2005-06 at a cost of Rs.7,84,401/- and made improvement expenditure during the relevant financial year amounting to Rs.9,05,000/-. It was submitted that the assessee's share in the land was 38.46%, and the capital gains that came in the hands of assessee on sale of original asset was Rs.61,09,590/-.

3.2 He submitted that assessee purchased a residential property from Purvankara Developers for a value of Rs.42,13,788/- and incurred Rs.20,85,224/- as improvement expenditure towards the flat. He submitted that assessee also satisfies all the necessary conditions to claim exemption under

section 54F in respect of capital gains earned on the sale of original asset.

3.3 Assessee submitted that there was no irregularity of transactions of purchase and sale by assessee and that this was the only solitary transaction entered into by assessee. Further, it was submitted that the co-owners were relatives of assessee, all of them were salaried people. He thus submitted that the sale of land cannot be treated as business activity. The Ld.AR submitted that the tax authorities have placed reliance on co-ownership Agreement in order to hold it as business transaction. He submitted that co-ownership Agreement has been entered only to ascertain the share of each co-owner. Further, it is an incomplete agreement, since all the co-owners have not signed it. Hence the tax authorities were not justified in placing reliance.

3.4 The Ld.AR in support placed reliance on following decisions:

- *Decision of Hon'ble Supreme Court in case of Naveen Jindal vs ACIT reported in (2010) 320 ITR 708;*
- *Decision of Hon'ble Allahabad High Court in CIT vs Ramarani Kalia reported in (2013) 358 ITR 499;*
- *Decision of Hon'ble Punjab and Haryana High Court in CIT vs Ved Prakash & Sons (HUF) 207 ITR 148*
- *Decision of Hon'ble Madhya Pradesh High Court in case of CIT vs Suresh Chand Goyal reported in (2008) 298 ITR 277*
- *Decision of Hon'ble Rajasthan High Court in case of CIT vs Manna Lal Nirmal Kumar Surana reported in (2003) 264 ITR 116*

3.5 On the contrary, the Ld.Sr.DR submitted that the transaction was in the nature of business activity carried on by the 3 co-owners. Reliance was placed on page 15 of small paper book, wherein the co-ownership agreement dated 15/06/2002 is

placed. It was submitted that Clause 4 of the said agreement mentions the nature of business under the agreement to be joint purchase of land. It was submitted by the Ld.Sr.DR that, authorities below are right in considering the income earned on sale of land by assessee to be business income. It was submitted that assessee along with the co-owners has incurred expenses towards conversion. It was submitted by the Ld.Sr.DR that the contention of assessee that requirement as per the conversion order dated 11/08/2010 were not fulfilled is not acceptable as the land was sold to three different purchasers as industrial plots.

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

4.1 The issue that arises in the present case is

1. Whether the sale of land by assessee along with co-owners could be treated as business activity?
2. Whether the income earned from sale of land is to be treated as capital gains or business income?
3. Whether assessee is eligible for claim u/s. 54F.

4.2 The authorities below treated the income earned on sale of land to be business income.

4.3 On perusal of orders passed by authorities below we note that the sale of land is treated to be business income in the hands of the assessee on the basis of co-ownership agreement and on the basis of fact that the said land was converted into industrial nature 2 years prior to sale.

4.4 The foremost factor that needs to be considered is, how the land was treated since its purchase i.e. whether it was held as

capital asset or stock in trade. If it had been held as capital asset and valued "at cost" from its purchase subject to nominal addition like boundary-wall, it should be treated as "Capital Asset" only. *Hon'ble Karnataka High Court* in the case of *Principal Commissioner of Income-Tax and Another v. Telesar Investments (P.) Ltd.* reported in 387 ITR 248 held that:

"The cost was reflected throughout in the balance-sheet and it was never treated as stock-in-trade showing cost or market price whichever is lower. The profit derived on its sale was assessable as capital gain"

4.5 Another important factor that needs to be considered is the holding period of the original asset by assessee along with its co-owners. The period of holding plays vital role.

In the present facts of the case the land was purchased in 2005. The order of conversion of original asset from agricultural to nonagricultural (Industrial) land was passed by the Deputy Collector on 11/08/2010 two years prior to assessment year under consideration. Thus the asset has been held by the assessee for more than six years.

4.6 The 3rd important criteria is the intention of the parties. Merely because the land was converted to non agricultural/industrial profits are earned on sale of original asset, cannot ipsofacto determine that the intention was to treat the same as business income. As rightly pointed out by Ld.AR, the co-ownership agreement is defective, since it has not been signed by all co-owners. Hence, no cognizance should be taken thereof. In any case, as the title indicate, it appears to have been prepared to record the share of each co-owner.

In the present facts, revenue has nothing on record to establish that assessee had entered into series of sale and purchase of land. Further sale of impugned land to multiple purchasers does not imply the intention of assessee was to carry on business.

4.7 We therefore hold the asset to be capital asset. Assessee is therefore eligible for deduction u/s. 54F. Ld. AO is directed to grant the exemption u/s. 54F in accordance with law.

Accordingly the grounds raised by assessee stands allowed for statistical purposes.

In the result appeal filed by assessee stands allowed for statistical purposes.

Order pronounced in the open court on 04th October, 2021.

Sd/-
(B.R BASKARAN)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 04th October, 2021.
/Vms/

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore