

आयकर अपीलिय अधिकरण, 'ए' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI

श्री वी. दुर्गा राव, माननीय न्यायिक सदस्य एवं
श्री जी. मंजूनाथा, माननीय लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.314/Chny/2019
निर्धारण वर्ष /Assessment Year: 2015-16

The Asst. Commissioner-
of Income Tax,
Cuddalore Circle,
Cuddalore.

(अपीलार्थी/Appellant)

v. Smt. Sarojini B. Nair,
No.1, Salem Road,
Vridhachalam.

[PAN: AAVPS 9240 B]

(प्रत्यर्थी/Respondent)

Department by

: Mr. AR.V.Sreenivasan,
Addl.CIT

Assessee by

: Mr.V.Meenakshi Sundar, CA &
Mr.R.Selvam, CA

सुनवाई की तारीख/Date of Hearing

: 08.12.2022

घोषणा की तारीख /Date of Pronouncement

: 23.12.2022

आदेश / ORDER

PER G. MANJUNATHA, AM:

This appeal filed by the Revenue is directed against the order of the Commissioner of Income Tax (Appeals), Puducherry, dated 19.11.2018 and pertains to assessment year 2015-16.

2. The Revenue has raised the following grounds of appeal:

1. *The learned CIT(A) has erred in deleting the addition made towards capital gains based on the Circular No.791 dated 2.6.2000 of CBDT.*

2. *The CIT(A) has failed to appreciate that provisions of section 47(iii) of the Income Tax Act,1961 is applicable only to capital assets and not to 'stock-in-trade' as the assessee had already converted the capital asset into stock-in-trade.*

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3. The learned CIT(A) has failed to appreciate the fact that the road portion was already converted into stock in trade and was used for the purpose of business. Since the nature of road area changed from assessee's own land into common public road, there is an extinguishment of assessee's right over the land as per section 2(47) of the I.T.Act giving rise to capital gain.

4. The learned CIT(A) has not taken into consideration that section 43CA is not overridden by section 47 and hence the transfer under the nomenclature " under an irrecoverable trust" does not hold back the adoption of the stamp duty value of the transferred non capital asset as full consideration of the assessee.

5. Alternatively, CIT(A) at-least ought to have reduced the road component from the stock-in-trade as it was never intended for sale but only intended to be gifted through an "irrevocable gift deed".

6. For these and such other grounds that may be adduced at the time of hearing, it is prayed that the order of the CIT(A) is cancelled and the order of the Assessing Officer restored.

3. The brief facts of the case are that the assessee is engaged in the business of real estate, bus transport, marriage hall and also received rental income from properties. The assessee had filed her return of income for the AY 2015-16 on 22.03.2016 declaring 'NIL' total income. During the course of assessment proceedings, the AO noticed that the assessee has converted investment into stock-in-trade as per s.45(2) of the Act. The AO further noted that the assessee had earmarked 40,386.81 sq.ft. land for common amenities like road, parks, etc., in terms of municipal regulations. The assessee claimed that land earmarked for road and other common facilities is required to be handed over to local municipal authorities by executing a Settlement Deed or Lease Deed as and when the authorities demand for execution of such deed. The AO, however, was not convinced with the explanation of the assessee and according to the AO, the assessee has relinquished her right in land earmarked for road and other common facilities to the extent of 40,386.81 sq.ft. which comes under the definition of transfer as defined u/s.47(iii) of the Act, and thus, computed capital

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gains on transfer of land earmarked for public utility purpose and made addition of Rs.1,80,83,081/- under the head 'income from capital gains'. The AO had also invoked provisions of Sec.45(2) of the Act, and computed business profits in respect of land earmarked for road and other common facilities on the ground that when the land has been converted into stock-in-trade, the assessee is liable to pay tax on business profits in the year in which such land has been transferred. The AO, while doing so has invoked provisions of Sec.43CA of the Act, to adopt Fair Market Value of the land in place of actual consideration and computed income from business and profession on total land earmarked for road and other common utility purpose and made addition of Rs.1,81,74,065/-.

4. Being aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee submitted as per regulatory requirements of local authorities, the assessee needs to allow certain percentage of land for common utility purpose including roads, parks, etc. Further, said land needs to be transferred in favour of local authorities. Therefore, the same cannot be considered as transfer in terms of Sec.47(iii) of the Act, and also the question of invoking provisions of Sec.45(2) of the Act, does not arise. The Ld.CIT(A) after considering relevant submissions of the assessee and also taken note of certain judicial precedents, including the decision of the Hon'ble Madras High Court in the case of Mr.M.Krishnasamy v. The Member Secretary of Chennai Metropolitan Development Authority in WP No.14670/2010, held that when

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the assessee has earmarked the land for common utilities without any exclusive right to anybody, including the assessee as per prevailing laws and guidelines related to layout approval, the AO cannot tax said land earmarked for common amenities purpose within the meaning of Sec.47(iii) of the Act, and also Sec.45(2) of the Act. Therefore, deleted the additions made by the AO towards computation of long term capital gains on deemed transfer of land earmarked for roads and other common facilities and also application of Sec.45(2) of the Act, to compute income from business and profession. The relevant findings of the Ld.CIT(A) are as under:

5.5.1 I have examined the facts of the case and submissions filed regarding the additions made. It is not in dispute that when a land is converted into stock-in-trade, section 45(2) of the IT Act is applicable and accordingly assessee is liable for capital gains. In section 45(2), it is clearly stated that liability for capital gains tax arises in the year in which the stock-in-trade is sold or otherwise transferred. However, section 47(iii) deals with certain transactions which are not regarded as transfer. As per this, any transfer of a capital asset under a gift or a will or an irrevocable trust is not regarded as transfer. Therefore, the above specific provision (47(iii)) will prevail over Section 45 since it starts with the words "nothing contained in section 45 shall apply....".

5.5.2 In this case, the road portion was earmarked for the common use without any exclusive right to anybody including the assessee as per the extant law and guidelines related to layout approvals. In this case, though the formal registration settling or gifting the road portion to municipality is not completed, as per the decision of Madras High Court in the case of Mr. M Krishnasamy Vs Member Secretary of the Chennai Metropolitan Development Authority, the road portion was held to be common for the benefit of the society or public in general pending formal registration. Thus it is clear that, the assessee or the buyers have no ownership or exclusive right over the road portion. The right vests with only the municipality for common use. Therefore, the above relinquishment of road is nothing but transfer under an irrevocable trust. In this regard, the moment the road portions are laid out and shown in the layouts, which are in turn duly shown in the documents submitted for registration, in terms of the above referred decision of the Madras High Court, the assessee holds the land only as a Trustee for the general public. The relinquishment will have to be construed as a 'transfer under Irrecoverable Trust', although not registered. The registration process only 'formalizes' the position, as and when registration is affected. Therefore, non-registration / subsequent registration of the road portion of the land in favour of the Municipality / Panchayat does not alter the legal position with regard to the taxability. The Assessing Officer has taken a view that once the assessee has converted the stock-in-trade into Capital Asset, the provisions relating to Capital Gains, particularly Sec. 47(iii) will cease to apply. This argument of the Assessing Officer is not correct as, if the provisions relating to head Capital Gains are not to be made applicable after conversion of the capital asset into stock-in-trade, section 45(2) itself will become inapplicable. One cannot choose to invoke one section for taxation i.e., 45(2) and exclude another section grating exemption i.e., 47(iii), when both sections

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are falling under the same chapter / head arbitrarily. As mentioned by appellant, the Circular No.791 dated 02.06.2000 of CBDT, has clarified the position that for the purposes of giving benefit of Sections 54EA, 54EB and 54EC (sections giving exemptions to Capital Gains otherwise chargeable under Sec. 45), the date in which the stock (which was converted from Capital Asset) is sold or transferred is to be taken into account and not the date of conversion. Thus, the position that emerges is that the liability to capital gains under Sec. 45(2) arising in one year, can later become exempted subsequently after its conversion into stock in trade (may be even in the succeeding years) by reason of operation of Sec. 54EA, 54EB and 54EC, etc. Hence, the position can be no different if such gains get exempted under Sec.47(iii), as against Sec.54EA, 54EB and 54EC etc., as envisaged in the said circular.

5.5.3 On the above facts, the assessment of capital gains by adding Rs.1,80,83,081/- is incorrect and deleted.

5.5.4 Now, the next main issue is including the road portion (as discussed above) in the addition of Rs.1,81,74,264/- under business income by the Assessing officer. As discussed earlier, the road portion has not been transferred to the buyers. Hence Section 43CA cannot apply to the sale transaction with individual buyers. The applicability of provisions of Sec. 43CA to the transaction of settlement by an 'irrecoverable trust' or 'gift' to the Municipality / Village Panchayat is examined below.

Sec. 43CA reads as under:

"43CA. (1) Where the consideration received or accruing as a result of the transfer by an assessee of an asset (other than a capital asset), being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration received or accruing as a result of such transfer."

5.6 At the time of registration to the municipality, the value 'assessable' has to be seen. As per the G.O No. 117 dated 27/1/1982 (as mentioned in the submissions by AR) and the instance of gift deed executed in a similar case (which was produced before the AO and mentioned in the order), such transactions will be chargeable to stamp duty on a nominal valuation of Rs.100/-. In cases of transfer by way of gift deeds to be executed by the owners of layouts handing over layout roads to the Panchayat Villages, etc., the Govt. of Tamil Nadu, has vide Notification No. G.O.Ms.No.117 dt. 27.01.1982, has laid down that such transactions will be chargeable to Stamp Duty on a nominal valuation of Rs.100/- vide a G.O.Ms.No. 117 dt. 27.01.1982 issued by the Government of Tamil Nadu. Though a copy of the same has not been produced, reference to the same has been given in decision of the Madras High Court (W.P.No.24136/2016 & WMP.No.20664/2016) mentioned earlier. Thus, going by Sec. 43CA, the value assessable in respect of the settlement / gift transaction will only be a sum of Rs.100/-. In any case, it is the value that can be assessed by the Registrar, as and when the document is presented for registration. As pointed by the AR in submissions, the Stamp Duty Authorities, have in a similar case, have accepted the Settlement Deed for the road portion, valued at Rs.100/- for the purposes of payment of Stamp Duty. Since Sec.43CA uses the words 'assessed' or 'assessable' even if 43CA is to be invoked, the value assessable would only be Rs.100/- and nothing more. In the above facts and circumstances, the addition of Rs.1,81,74,065/- to the business income as value of road portion is deleted.

5. The Ld.DR, submitted that the Ld.CIT(A) erred in not appreciating the fact that provisions of Sec.47(iii) of the Act, is applicable only to capital

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asset and not to stock-in-trade as the assessee has already converted capital asset into stock-in-trade. The Ld.DR further referring to provisions of Sec.2(47) of the Act, submitted that when the assessee has converted own land into common utility purpose, there is an extinguishment of right in the land as per provisions of Sec.2(47) of the Act, which give rise to capital gains. The Ld.CIT(A) without appreciating the fact simply deleted the additions made by the AO.

6. The Ld.Counsel for the assessee, on the other hand, referring to Gift Deed executed by the assessee in favour of Virudhachalam Municipality dated 22.03.2019 submitted that as per regulatory requirement, the assessee has executed a Gift Deed and relinquished her right in land admeasuring 40,386.81 sq.ft. in favour of the Municipality. The only basis for AO to compute capital gains on land earmarked for common utility purpose, including road was that the assessee did not execute Settlement Deed in favour of the Municipality. But, fact remains that the assessee has subsequently, as per the demand of the concerned authorities, has executed Gift Deed on 22.03.2019 in favour of the Commissioner, Virudhachalam Municipality and relinquished her right in the land. Therefore, the question of computing capital gains and also business profits in respect of land earmarked for public amenities purpose does not arise. The Ld.CIT(A) after considering relevant facts has rightly deleted the additions made by the AO and their order should be upheld.

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7. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The factual matrix of the impugned dispute is that the assessee is in the business of real estate development had converted her land into stock-in-trade in terms of provisions of Sec.45(2) of the Act. Further, the assessee has formed a layout as per approved plan from the local municipal authorities. As per approved plan, the assessee has earmarked 40,386.81 sq.ft. of land for road and other common amenities purpose. The AO has computed long term capital gains in terms of Sec.47(iii) of the Act, on land earmarked for road, on the ground that when the assessee has converted her own land into public roads, there is an extinguishment of right in the land which amounts to transfer within the meaning of Sec.47(iii) of the Act. Therefore, he has computed capital gains in respect of land earmarked for public amenities purpose. The AO had also computed business profit u/s.45(2) of the Act, in respect of 40,386.81 sq.ft. land earmarked for road on the ground that when investment has been converted into stock-in-trade in terms of Sec.45(2) of the Act, then the assessee is liable to pay tax on business profits in the year in which such land has been transferred. Since, the assessee has transferred land for the impugned assessment year, he has computed book profit by applying provisions of Sec.45(2) of the Act r.w.s.43CA of the Act.

8. We have given our thoughtful consideration to the reasons given by the AO in light of arguments advanced by the Ld.Counsel for the assessee

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and we ourselves do not subscribe to the reasons given by the AO for the simple reason that the land earmarked for public utility purpose in terms of municipal regulations while forming residential lay out, cannot be brought to tax either u/s.47(iii) of the Act or u/s.45(2) of the Act, because, relinquishment of right in land earmarked for common utility purpose, cannot be considered as extinguishment of any right in property which can be considered as transfer within the definition of Sec.47(iii) of the Act. Further, the provisions of Sec.45(2) of the Act, also cannot be invoked to compute business profits when the land has been converted into stock-in-trade, because, the assessee has not transferred the land for a consideration. Therefore, we are of the considered view that when the assessee has relinquished her right in the land earmarked for common utility purpose in terms of regulatory requirements and also executed Gift Deed in favour of the Commissioner, Virudhachalam, without any consideration, then, the question of computing long term capital gains on such land and also business profit in terms of Sec.45(2) of the Act, does not arise. In this case, the assessee has executed a Gift Deed dated 22.03.2019 and handed over the land in favour of the Commissioner, Virudhachalam Municipality. In our considered view, said transaction neither attracts capital gains as per Sec.47(iii) of the Act, nor business profit as per Sec.45(2) of the Act. Therefore, we are of the considered view that the AO is completely erred in taxing deemed long term capital gains and deemed book profit in respect of 40,386.81 sq.ft. land earmarked for

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public utility purpose and handed over to local municipal authorities. The Ld.CIT(A) after considering relevant facts has rightly deleted the additions made by the AO and thus, we are inclined to uphold the order of the Ld.CIT(A) and dismiss the appeal filed by the Revenue.

9. In the result, appeal filed by the Revenue is dismissed.

Order pronounced on the 23rd day of December, 2022, in Chennai.

Sd/-

(वी. दुर्गा राव)

(V. DURGA RAO)

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 23rd December, 2022.

TLN

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)

Sd/-

(जी. मंजूनाथा)

(G. MANJUNATHA)

लेखा सदस्य/**ACCOUNTANT MEMBER**

4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF