

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'A' Bench, Hyderabad**

**Before Shri Rama Kanta Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member**

ITA.No.833/Hyd/2017		
Assessment Year: 2006-07		
The Dy. Commissioner of Income Tax, Central Circle – 2(4), Hyderabad.	Vs.	M/s. Lakshmi Gardens, D.No.6-1-72, Lakdikapool, Hyderabad. PAN : AAAAL0457F.
(Appellant)		(Respondent)
Assessee by:		Sri A. Srinivas
Revenue by:		Sri K.E Sunil Babu
Date of hearing:		02.02.2023
Date of pronouncement:		14.03.2023

ORDER

Per Shri Laliet Kumar, J.M.

The captioned appeal is filed by the Revenue, feeling aggrieved by the order passed by the Learned Commissioner of Income Tax (Appeals)-1, Guntur dated 31.12.2016 for the A.Y 2006-07 on the following grounds :

“1. On the facts and in the circumstances of the case, and in law, the CIT (A) erred in deleting the addition of Rs.13,76,41,296/- made on account of Capital Gains.

2. On the facts and in the circumstances of the case, the CIT (A) erred in deleting the addition of Rs.13,76,41,296/- on account of LTCG, without appreciating the fact that as per section 45(4) of the Act, the LTCG arises in the hands of AOP on dissolution of AOP.

3. *Alternatively and without prejudice to ground on.1 and 2, the Ld. CIT(A) erred in not giving direction to the AO to assess the same in the hands of individual members of AOP.*

4. *Ld. CIT(A) erred in not doing Justice to the interests of Revenue.”*

2. The brief facts of the case are that Search and Seizure operation u/s 132 of the I.T.Act was conducted in the case of Sri.B. Ramdas Goud and Desagoni Raghupathi Goud Group of cases on 15/09/2008. During the course of search and seizure operations, certain incriminating material pertaining to the assessee, who is an AOP, were found and seized. Accordingly, this case was centralized with the DCIT, Central Circle-7, Hyderabad and notices u/s 153C were issued to the assessee on 27-8-2010 calling for the Returns of Income for the assessment years 2003-04 to 2008-09. In response to the notices issued, the assessee filed a letter stating that the assessee has filed returns of income under the AOP status up to assessment year 2005-06 and later on, the business operations were closed and as such no returns of Income were filed from assessment year 2006-07 onwards. Notices 142(1) were issued requiring the assessee to file details/information etc. Based on the reply furnished by the assessee, Assessing Officer had completed the assessment interalia by making an addition of Rs.13,76,41,296/- towards Capital Gains on Dissolution of AOP.

3. Feeling aggrieved by the order passed by the assessing officer, assessee filed appeal before the Ld. CIT(A), who granted relief to the assessee.

4. Feeling aggrieved by the order passed by the Ld. CIT(A), the Revenue is in appeal before us on the grounds mentioned herein above.

5. At the outset, the ld. DR had drawn our attention to page 2 and 3 of the assessment order which is to the following effect :

“Addition towards Capital Gains on Dissolution of AOP:

In this case, on verification of the information available on record and also the details filed during the course of assessment proceedings, one Sri. M. Krishna Reddy and 14 others who were the land owners after having purchased the land admeasuring 7340 Sqyds situated at 6-1-72, Lakdi-ka-pool, Hyderabad during the financial year 1994-95 have come together and decided to run a Kalyana Mandapam under the name and style of 'LAXMI GARDENS' in the status AOP by making certain modifications and additions to suit the business needs. On perusal of the assessment records, it is noticed that the business of running the Kalyana Mandapam was carried on till January,2006 and in the return of income filed for the asst year 2005-06 filed on 15-1-2006 has enclosed a note wherein it was stated that the function hall ceased to operate its commercial activities in the absence of profitable orders and has accordingly closed its business w.e.f. 15-01-2006.

From the above, it is observed that the assessee LAXMI GARDENS' in the status of AOP has closed its business and the dissolution of association of persons has taken place w.e.f 15-01-2006. Accordingly, the Capital Assets being the open land admeasuring 7340 Sqyds situated at 6-1-72, Lakdi-ka-pool, Hyderabad has been distributed among the association of persons.

In connection with the above, it relevant to mention that the provisions of subsection (4) of section 45 of the Act specifies that--

45. Capital gains. (1)

Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54C, 54D, 54E, 54EA, 54EB,54F, 54G and 54H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.

(4) The profits or gains arising from the transfer of a capital asset by way of distribution of capital assets on the dissolution of a firm or other association of persons or body of individuals (not being a company or a co-operative society) or otherwise, shall be chargeable to tax as the income of the firm, association of persons or body of individuals, of the previous year in which the said transfer takes place and, for the purposes of section 48, the fair market value of the asset on the date of such transfer shall be deemed to be the full value of the consideration received or accruing as a result of the transfer.

From the reading of the provisions of section 45(4) of the Act, it is clearly mentioned that the profits arising from the transfer of a capital asset by way of distribution of capital assets on the dissolution of association of persons shall be chargeable to tax as the income of the association of persons of the previous year in which the said transfer takes place and, for the purposes of computation of Capital Gains the fair market value of the asset on the date of such transfer shall be deemed to be the full value of the consideration received or accruing as a result of the transfer.

Therefore, the assessee has to furnish the return of income for the asst year 2006-07 admitting the Capital Gains by taking into consideration the fair market value of the Capital asset computed as per the provisions of section 45(4) of the Act and would have paid taxes accordingly. However, it is observed from the records and the information available that it has been mentioned that 'LAXMI GARDENS' AOP ceased to exist w.e.f. 15-01-2006 and as such the returns of income was not filed from asst year 2006-07 onwards. Whereas, as per the provisions of section 45(4) of the Act the assessee AOP was under obligation to file the return of income for the previous year 2005-06 relevant to the asst year 2006-07 admitting the Capital Gains which the assessee AOP failed to do so. In view of the assessee's failure to furnish the return of income by admitting the income from Capital Gains arisen on account of dissolution of AOP during the asst year 2006-07, the Capital Gains are computed by applying the provisions of section 45(4) of the Act and the resultant Income from Capital gains are brought to tax accordingly.

In the above case, as per the enquiries made and information gathered from one of the constituent members Sri M.Krishna Reddy, it is learnt that the property used for business activities earlier to financial year 2005-06 of M/s Laxmi Gardens was given for a development of residential complex. He has admitted that the property was handed over to the developer as per the development agreement and they need to file the return of income and pay the taxes. Accordingly, before the Investigation Wing he has furnished an affidavit with a computation of Capital Gains in the hands of M/s Laxmi Gardens on transfer of property. Along with affidavit he has furnished the copy of the development agreement cum G.P.A. for the property situated at Lakdi-kapul wherein it is observed that the property was given on development for construction of residential plots to M/s.Choice Infrastructure Projects (P) Limited ® 50%:50% sharing basis. On

verification of the copy of the Development agreement, it is noticed that the same was executed on 07-07-2006 and the rate of market value of S.R.O, S.R.Nagar (backside of Page No.4) as per the Development Agreement dated: 07/07/2006 was shown as Rs.14,72,10,000/- for 7340 Sqyds of land.

Since, the provisions of section 45(4) specifies that for the purposes of computation of Capital Gains the fair market value of the asset on the date of such transfer shall be deemed to be the full value of the consideration, the market value of the land as mentioned in the Development Agreement is taken as Full value of consideration as the fair market value as per SRO as on 07-07-2006 (Development Agreement date)is the nearest date to the dissolution date of the AOP M/s Laxmi Gardens i.e. 15-01-2006.”

6. On the basis of the above, it was submitted by the Id. DR that once the APO ceases to operate and carries out business and thereafter, entered into the land Development Agreement, then the income arisen from the land Development Agreement / transfer of land is required to be shown as income / long term capital gain in the return of income for the assessment year 2006-07.

7. In the present case, it is the case of the assessee that the AOP was dissolved as mentioned in the assessment order and therefore, the AOP has not disclosed the gain in its hands. However, the Id. DR has submitted that the Id.CIT(A) had wrongly granted the relief to the assessee without considering the case of the Assessing Officer at page 6 of his order by holding as under :

“.....

I have gone through the facts of the case, contents of the assessment order and written submissions of the assessee and remand report furnished by the DCIT, Circle-2(2), Hyderabad in the case of Mr. M. Krishna Reddy, Member of AOP. It is seen that the 13 members of the AOP are the owners of the property, purchased between the years 1990 to 1992 and have formed the AOP for the purpose of running and maintaining Kalyana Mandapam and have filed the ROI of AOP for the A.Y. 1995-96 to 2005-06. The business of the AOP was discontinued from 15.01.2006 and the property was given on development by the members of the AOP. The property was own by the individual members and have shown the same in their books of accounts

and was never brought it to the AOP. This fact is evidenced by the balance sheet filed by the members of the AOP as well as AOP. As a property does not belong to the AOP, the question of leaving capital gains in the hands of AOP does not arise. The addition made by the AO is deleted and assessee's grounds of appeal is allowed."

8. Per contra, the ld. AR relied upon the orders of lower authorities. He had drawn our attention to pages 42 and 43 of the paper book wherein the details of persons, extent of holding and date of registration of title document were provided. It was submitted that each person was the owner of 1/14th share admeasuring 524.29 sq.yards in the entire 7340 sq.yards of the property. It was submitted that the order passed by the ld.CIT(A) is in accordance with the law.

9. We have heard the rival submissions and perused the material on record. Admittedly, the case of the assessee is that the subject matter of the disputed property is owned by 14 individuals in whose names the individual sale deeds stand and the said 14 individuals are respectively income tax payers and have shown the share in the property in their respective return of income. The above said fact of owning of the land by 14 persons has not been disputed by the Assessing Officer as the same is clear from the order of the Assessing Officer. The details of individual holding were duly captured in the order passed by the ld.CIT(A). However, for the purpose of completeness, we are reproducing hereinbelow the ownership, which is placed at page 42 of the paper book to the following effect :

Name of Person	Extent of Share	Document Date
M. Krishna Reddy	1/14 524.29 sq.yds	19/12/1990
M. Swapna	1/14 524.29 sq.yds	01/02/1992
Progressive Hotels Pvt Ltd	1/14 524.29 sq.yds	24/12/1990
M. Vani	1/14 524.29 sq.yds	10/02/1992
M. Padmaja	1/14 524.29 sq.yds	19/12/1990
M. Dayakar Reddy	1/14 524.29 sq.yds	10/2/1992
Dr. M. Sudhakar Reddy	1/14 524.29 sq.yds	19/12/1990
Progressive Hotels P Ltd	1/14 524.29 sq.yds	07/02/1992
M. Yadagiri Reddy	1/14 524.29 sq.yds	19/12/1990
Smt. Laxmamma	1/14 524.29 sq.yds	21/05/1992
M. Narasa Reddy	1/14 524.29 sq.yds	19/12/1990
Dr. L. Vijaya Laxmi	1/14 524.29 sq.yds	21/05/1992
Dr. L. Vijay Kumar Reddy	1/14 524.29 sq.yds	18/03/1991
L. Yadi Reddy	1/14 524.29 sq.yds	11/02/1992

10. From the perusal of the above said chart and the title documents, it is abundantly clear that 14 individuals were the owners of 524.29 sq. yards each in the total land admeasuring 7340 sq.yards.

11. Now the moot question before us is whether the capital gain u/s 45 of the Income Tax Act 1961 is required to be charged in the hands of the AOP or in the hands of individuals. In the present case, the Assessing Officer had concluded that the capital gain is required to be charged in the hands of AOP and not in the hands of the individuals. In our view, the said finding of the Assessing Officer is contrary to the concept of the capital asset and the capital gain as mentioned in the Income Tax Act, 1961. Section 45 of the Act deals with the capital gain.

12. The capital gains are of two types, namely, short term capital gain and long term capital gain. We are reproducing hereinbelow the relevant definition of long term capital asset, long term capital gain, short term capital asset and short term capital gain for the purpose of completeness defined under Sections 2(29A), (29B), 42(A) and 42(B) of Income Tax Act 1961.

[(29A) "long-term capital asset" means a capital asset which is not a short-term capital asset ;

(29B) "long-term capital gain" means capital gain arising from the transfer of a long-term capital asset ;]

42(A) 88["short-term capital asset" means a capital asset held by an assessee for not more than 89[thirty-six] months immediately preceding the date of its transfer :]

90[Provided that in the case of a share held in a company 91[or any other security listed in a recognised stock exchange in India or a unit of the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963) or a unit of a Mutual Fund specified under clause (23D) of section 10] 92[or a zero coupon bond], the provisions of this clause shall have effect as if for the words "thirty-six months", the words "twelve months" had been substituted.]

93[Explanation 1].—(i) In determining the period for which any capital asset is held by the assessee—

(a) in the case of a share held in a company in liquidation, there shall be excluded the period subsequent to the date on which the company goes into liquidation ;

(b) in the case of a capital asset which becomes the property of the assessee in the circumstances mentioned in 94[sub-section (1)] of section 49, there shall be included the period for which the asset was held by the previous owner referred to in the said section ;

95[(c) in the case of a capital asset being a share or shares in an Indian company, which becomes the property of the assessee in consideration of a transfer referred to in clause (vii) of section 47, there shall be included the period for which the share or shares in the amalgamating company were held by the assessee ;]

96[(d) in the case of a capital asset, being a share or any other security (hereafter in this clause referred to as the financial asset) subscribed to by the assessee on the basis of his right to subscribe to such financial asset or subscribed to by the person in whose favour the assessee has renounced his right to subscribe to such financial asset, the period shall be reckoned from the date of allotment of such financial asset ;

(e) in the case of a capital asset, being the right to subscribe to any financial asset, which is renounced in favour of any other person, the period shall be reckoned from the date of the offer of such right by the company or institution, as the case may be, making such offer ;]

97[(f) in the case of a capital asset, being a financial asset, allotted without any payment and on the basis of holding of any other financial asset, the period shall be reckoned from the date of the allotment of such financial asset ;]

98[(g) in the case of a capital asset, being a share or shares in an Indian company, which becomes the property of the assessee in consideration of a demerger, there shall be included the period for which the share or shares held in the demerged company were held by the assessee ;]

99[(h) in the case of a capital asset, being trading or clearing rights of a recognised stock exchange in India acquired by a person pursuant to demutualisation or corporatisation of the recognised stock exchange in India as referred to in clause (xiii) of section 47, there shall be included the period for which the person was a member of the recognised stock exchange in India immediately prior to such demutualisation or corporatisation;

(ha) in the case of a capital asset, being equity share or shares in a company allotted pursuant to demutualisation or corporatisation of a recognised stock exchange in India as re-ferred to in clause(xiii) of section 47, there shall be included the period for which the person was a member of the recognised stock exchange in India immediately prior to such demutualisation or corporatisation;]

The following sub-clause (hb) shall be inserted after sub-clause (ha) of clause (i) of Explanation 1 to clause (42A) of section 2 by the Finance Act, 2007, w.e.f. 1-4-2008 :

(hb) in the case of a capital asset, being any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer free of cost or at concessional rate to his employees (including former employee or employees), the period shall be reckoned from the date of allotment or transfer of such specified security or sweat equity shares.

(ii) In respect of capital assets other than those mentioned in clause (i), the period for which any capital asset is held by the assessee shall be determined subject to any rules which the Board may make in this behalf.]

1[Explanation 2.—For the purposes of this clause, the expression "security"² shall have the meaning assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) ;]

The following Explanation 3 shall be inserted after Explanation 2 to clause (42A) of section 2 by the Finance Act, 2007, w.e.f. 1-4-2008 :

Explanation 3.—For the purposes of this clause, the expressions "specified security" and "sweat equity shares" shall have the meanings respectively assigned to them in the Explanation to clause (d)of sub-section (1) of section 115WB;

[(42B) "short-term capital gain" means capital gain arising from the transfer of a short-term capital asset ;]

13. From the conjoint reading of the short term capital asset, long term capital asset, short term capital gain and long term capital gain, it is clear that the long term capital gain will arise to a person who is the owner of the long term capital asset. Admittedly, 14 individuals / persons were the owners of long term capital asset and therefore, the long term capital gain shall only be chargeable, if any, in their respective hands. In the present case, as admitted by the Assessing Officer as well as discernable from the record, 14 individuals were the owners of 524.29 sq.yards each admeasuring 7340 sq.yards, and thus were assessee owning the long term capital asset. Once the long term capital asset is owned and belonged to 14 individuals then the Assessing Officer had erred in making the addition of capital gain in the hands of the AOP. The law is fairly settled that the tax is to be imposed in the hands of the right person and it cannot be imposed on a person who is not liable to pay the tax. In view of the above, we do not find any mistake in the order passed by the Id.CIT(A). In view of the said reasoning, we dismiss the appeal of Revenue.

14. In the result, the appeal of Revenue is dismissed.

Order pronounced in the Open Court on 14th March, 2023.

Sd/-

Sd/-

(RAMA KANTA PANDA) ACCOUNTANT MEMBER	(LALIET KUMAR) JUDICIAL MEMBER
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Hyderabad, dated 14th March, 2023

TYNN /sps

Copy to:

S.No	Addresses
1	M/s. Lakshmi Gardens, D.No.6-1-72, Lakdikapool, Hyderabad.
2	DCIT, Central Circle-2(4) Hyderabad
3	Pr.CIT (Central) (I/C), Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order