

आयकरअपीलीयअधिकरण, विशाखापटणमपीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISA KHAPATNAM BENCH, VISA KHAPATNAM

श्रीदुव्वूरुआरएलरेड्डी, न्यायिकसदस्यएवंश्रीएसबालाकृष्णन, लेखासदस्यकेसमक्ष

BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER

आयकरअपीलसं./ I.T.A. No.292/Viz/2023

(निर्धारणवर्ष/ Assessment Year :2013-14)

Sivakama Sundar Manthravadi,
United Kingdom.

PAN: AVSPM 1372 N

(अपीलार्थी/ Appellant)

Vs.

Commissioner of Income Tax
(IT & TP),
Hyderabad.

(प्रत्यर्थी/ Respondent)

आयकरअपीलसं./ I.T.A. No.295/Viz/2023

(निर्धारणवर्ष/ Assessment Year : 2013-14)

Vidyavathi Manthravadi,
United Kingdom.

PAN: AVSPM 1370 Q

(अपीलार्थी/ Appellant)

Vs.

Commissioner of Income Tax
(IT & TP),
Hyderabad.

(प्रत्यर्थी/ Respondent)

अपीलार्थीकीओरसे/ Assessee by

:

Ms. P. Chandini, AR

प्रत्यर्थीकीओरसे/ Revenue by

:

Dr. Satyasai Rath, CIT-DR

सुनवाईकीतारीख/ Date of Hearing

:

27/03/2024

घोषणाकीतारीख/Date of

:

28/05/2024

Pronouncement

ORDER

PER S. BALAKRISHNAN, Accountant Member :

Both the captioned appeals are filed by the assessee's
against the orders of the Ld. Commissioner of Income Tax (IT

&TP), Hyderabad vide DIN & Order No : ITBA/REV/F/REV5/2023-24/1056577239(1) in the case of Sivakama Sundar Manthravadi and DIN & Order No : ITBA/REV/F/REV5/2023- 24/1056577624(1) in the case of Vidyavathi Manthravadi arising out of the orders passed U/s. 143(3) r.w.s 147 of the Income Tax Act, 1961 [the Act] for the AY 2013-14. Since the issues raised in both these appeals are identical, for the sake of convenience, these appeals are clubbed, heard together and disposed off in this consolidated order. Firstly, we shall take up ITA No. 292/Viz/2023 in the case of Sivakama Sundar Manthavadi as a lead appeal.

2. Briefly stated the facts of the case are that the assessee, a Non-Resident Indian, has sold his Flat No. 202, Old D.No.7-5-137, Pandurangapuram, Visakhapatnam on 12/12/2012 for a consideration of Rs. 44,15,000/-. The Ld. AO noticed that the assessee has not filed his return of income for the impugned assessment year admitting the capital gains arising out of the sale of the capital asset. The Ld. AO after making necessary enquiries with the SRO, Visakhapatnam noted that the assessee and his wife Smt. Mantravadi Vidyavathi had entered into a Development Agreement on 21/07/2008 with respect to the property admeasuring 450.11 sq yds for development on 60 : 40 basis to M/s. MSR Life Care Services Pvt Ltd, Visakhapatnam. It was noticed that as

per the Development Agreement, the assessee is entitled to receive 6 residential flats for extinguishing 40% the land to M/s. MSR Life Care Services Pvt Ltd. Accordingly, while filing the return of income in response to the notice u/s 148, the assessee computed the capital gains and claimed deduction U/s. 54 for the Act for the AY 2009-10. The assessee has also not filed any original return of income for the AY 2009-10 but has filed the return of income in response to the notice U/s. 148 of the Act and claimed NIL capital gains after claiming the deduction U/s. 54 of the Act. In the first round of proceedings, the Ld. AO disallowed the claim of the assessee U/s. 54 of the Act stating that the completion certificate was obtained on 01/11/2011 which is beyond three years of the date of Development Agreement, which is considered as the date of accrual of capital gains. The matter was carried before the Tribunal, wherein the Tribunal vide order dated 02/08/2019 directed the Ld. AO to allow deduction U/s. 54 of the Act, which was denied due to delay in construction of the property, the Tribunal observed that the delay is not on account of the assessee but of the builder. Subsequently, it was noticed that the assessee sold the same flat on 12/12/2012 for a consideration of Rs. 44,15,000/-. However, the assessee has not once again filed the return of income for the AY 2013-14 disclosing the sale of immovable property. The case was therefore reopened by the Ld. AO U/s. 147 of the Act and a notice U/s. 148 was issued on 08/01/2021.

In response, the assessee filed the return of income declaring the total income of Rs. 7,74,600/ and disclosing the capital gains of NIL on the sale of flat after claiming the cost of indexation and cost of improvement. The Ld. AO partly disallowing the cost of indexation and cost of improvement and after considering the investment U/s. 54EC of the Act, computed the taxable income under capital gains at Rs. 5,435/-. The Ld. AO thus completed the assessment U/s. 143(3) r.w.s 147 of the Act on 19/03/2022 assessing the total income at Rs. 7,80,035/-.

3. Thereafter, by virtue of the powers vested U/s. 263 of the Act, the Ld. CIT (IT & TP), Hyderabad considered the order of the Ld. AO passed U/s. 143(3) r.w.s 147 of the Act as erroneous and prejudicial to the interests of the revenue for the following reasons. The Ld. CIT observed that the possession for the Flat No. 202 was during February, 2011 whereas the assessee sold the property in 12/12/2012 which is before the completion of three years from February, 2011 and thereby concluded that the assessee has violated the provisions of section 54(1) of the Act. The Ld. CIT considered the sale as short term capital gains and consequently concluded that deduction claimed U/s. 54EC of the Act is not allowable. The Ld. CIT did not consider the explanation provided by the assessee that the date of Development Agreement should be construed as date of acquisition of the capital asset for the purpose of

computation of capital gains. The Ld CIT observed on perusal of the JDA, that the clauses-12 & 13 of the Development Agreement wherein it was mentioned that the delivery of possession of the built up area shall entitle the assessee as an absolute owner of the property. He therefore set-aside the assessment order and directed the Ld. AO to verify the claim of deduction of the assessee and reduce the cost of acquisition accordingly while computing the income from short term capital gains for the AY 2013-14. Further, the Ld. CIT also directed the Ld.AO to not allow deduction U/s. 54EC of the Act. The Ld. CIT directed the Ld. AO to examine the above issues and re-do the assessment after verification of the issues in accordance with law and after providing a reasonable opportunity of being heard to the assessee. Aggrieved by the order of the Ld. CIT, the assessee is in appeal before us.

4. Before the Tribunal, the assessee has raised the grounds of appeal which are mostly argumentative in nature. However, from the grounds raised by the assessee, we find that the grievance of the assessee is with respect to the treatment of sale of residential property (Flat No 202) as short term capital asset by the Ld. CIT. We therefore proceed to adjudicate this issue as the other grounds raised by the assessee in his grounds of appeal are argumentative in nature and therefore does not deserve any adjudication.

5. At the outset, the Ld. Authorized Representative [AR] argued that the assessee has entered into a Joint Development agreement on 21/7/2008 and has claimed deduction U/s. 54 of the Act for extinguishing rights on the 40% share of the land given to the developer M/s. MSR Life Care Services Pvt. Ltd. The Ld. AR also argued that based on the investment in the residential property, the assessee has also claimed deduction U/s. 54 of the Act in the AY 2009-10. Since the assessee has subsequently sold the same property on 12/12/2012, the Ld. AR argued that the date of purchase of the capital asset should be considered as the date of development agreement and not the date of delivery / possession of the flat which is on 01/11/2011. The Ld. AR further submitted that the Tribunal in the first round of appeal has allowed deduction U/s. 54 of the Act based on the date of Joint Development Agreement. The Ld AR further submitted an alternative plea that the UDS of land should be considered as Long Term, and shall be bifurcated from the lumpsum consideration. The Ld. AR therefore pleaded that the sale of asset on 12/12/2012 should be considered as long term capital asset and accordingly deduction U/s. 54EC claimed by the assessee should be allowed.

6. Per contra, the Ld. Departmental Representative [DR] fully supported the order of the Ld. CIT and argued that the date of

possession of the Flat No. 202 was deemed to be considered as February, 2011 and hence the assessee is supposed to retain the flat for a period of three years since the assessee has claimed deduction U/s. 54 of the Act for the same flat with respect to long term capital gains for the conveyance of land to the builder by way of Joint Development Agreement. The Ld. DR also argued that the Flat came into existence only during the year 2011 and the possession was handed over during February, 2011 as claimed by the assessee and hence sale of the same flat on 12/12/2012 shall be deemed to be short term capital gains and pleaded that no deduction can be allowed U/s. 54EC of the Act.

7. We have heard both the sides and perused the material available on record as well as the orders of the Ld. Revenue Authorities and also the written submissions made by the assessee. It is an admitted fact that the assessee is a regular non-filer as both for the AY 2009-10 and 2013-14, the returns were filed in response to the notice U/s. 148 in both the AYs. During the reassessment proceedings, the Ld.AO has considered the date of Joint Development agreement as date of purchase and has computed the capital gains accordingly. The Ld. CIT invoking the powers vested U/s. 263 of the Act considered the order as erroneous and prejudicial to the interest of the Revenue since the Ld. AO has erred in treating the asset as long term capital asset. It was contention of the Ld.

CIT that the assessee got possession of the flat only during February, 2011 and hence the sale of flat on 12/12/2012 shall be considered as short term capital gains. In this context, we hereby extract below the provisions of section 2(47) of the Act which defines “transfer”.

“Sec: 2(47) “transfer”, in relation to a capital asset, includes,—

- (i) the sale, exchange or relinquishment of the asset; or
- (ii) the extinguishment of any rights therein; or
- (iii) the compulsory acquisition thereof under any law; or
- (iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; or
- (iva) the maturity or redemption of a zerocoupon bond; or
- (v) **any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or**
- (vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation 1.—For the purposes of sub-clauses (v) and (vi), “immovable property” shall have the same meaning as in clause (d) of section 269UA.

Explanation 2.—For the removal of doubts, it is hereby clarified that “transfer” includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;”

8. Section 2(47)(v) of the Act, as above, states that **transaction involving the allowing of the possession of any immovable property shall be considered as a “transfer”** in relation to capital asset. Further, it is undisputed that the built up area of the flat comes into existence only during the year 2011 and possession taken by the assessee during

Feb 2011. We do not agree with the written submissions made by the Ld. AR wherein the Ld. AR has argued that “exchange” should be considered as “transfer” in relation to capital asset as the assessee has exchanged only the land for the purpose of construction of a residential flat which obviously came into existence only during February, 2011. The Ld. AR in the written submissions contested that the assessee has acquired a right on the apartment by transferring of his land to the builder. This contention could not be accepted because of the fact that the built up area was not in existence at that point of time. Merely because the deduction U/s. 54 was allowed based on the investment made in the residential flat does not entitle the assessee to consider the date of acquisition as date of Joint Development Agreement. Therefore it is the contention of the Ld.AR in the written submissions that since the deduction u/s 54 is claimed in AY 2009-10, the residential flat should be deemed to be in existence at that time. We do not agree that the residential flat was in existence at that time, since the completion and possession was granted during Feb 2011. In flats/multi-storied apartments/commercial complexes, the ownership consists of owning undivided share of land and built-up area and these together is the property. It has two components and ownership of both components of undivided

share of land and ownership of building is necessary to complete title to a flat. Generally, when a JDA is entered into the owner of the land offers it to a developer with an understanding that he will retain undivided share of land proportionate to his share of built-up area and the undivided share of land proportionate to the built-up area which falls to the share of the developer is agreed to be sold. Therefore, the owner of the property retains undivided share of land proportionate to his share of built-up area. When the built-up area is delivered to the owner of the land and when he sells his share, he again transfers not only the built-up area but also proportionate undivided share of land. In such transaction, there will be no bifurcation of cost of land and building. The AO has to call for details and arrive at the cost of undivided share of land and built-up area. When the owner sells his share of built-up area, the built-up area is acquired when the developer delivers possession of the built-up area to the owner but the undivided share of land is already owned by the owner. When an owner sells his share of property under a JDA he sells two components one is undivided share of land which he held for a longer period than the building and the building which he gets from the developer on completion of the building and the period of holding of the building is much shorter than the period of

holding of the land. The concept of bifurcation of undivided share of land and built-up area is a well recognized concept. In practice, a building and the land appurtenant thereto held by an assessee, could be transferred together to a transferee through a single conveyance deed against a lumpsum monetary consideration. In such cases, the question on the method of computing the long term capital gains arises (i.e.) whether the long term capital gain/short term capital gain could be computed for land and building separately? This question assumes paramount importance since the period of holding will decide whether the capital gain is long term or shorter and the indexed cost of acquisition and improvement thereto in respect of these assets will vary depending upon the period of holding. The long term capital gains could be computed separately for land and building as held by the Hon'ble Madras High Court in CIT vs Dr. D. L. Ramachandra Rao [1999]236 ITR 51 wherein it was held that the land is an independent, identifiable asset and continues to remain as an identifiable capital asset even after construction of a building thereon. Identical views were taken by the Hon'ble Rajasthan High Court in the case of CIT vs Vimal Chand Golecha reported in [1993]201 ITR 442 and by the ITAT, Calcutta in the case of CIT vs Sri Sekhar Gupta [2001]114 Taxmann 122. However

in order to claim the above capital gains separately for land and building, the assessee is required to give basic details like the original cost of acquisition of land and building, the year acquisition etc separately duly supported by necessary documentary evidences as they may be required at the time of assessment. Based on the holding period of these assets, the capital gain is long term or short term and the indexed cost of acquisition could be computed. Likewise in order to claim the indexed cost of improvement necessary documents in support of the improvements done and the expenditure incurred thereon have to be also maintained by the assessee. The next question is how to appropriate the sale consideration for the transfer of land and building if a lump-sum monetary consideration is received by the transferor from the transferee when the transfer is effected through a single conveyance deed. As per section 50C as amended by the Finance Act 2009, where the consideration received or accruing as a result of transfer of land and/ or building is less than the value adopted or assessed or assessable by an authority of the State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall be deemed to be the full value of consideration received or accruing as a result of such

transfer for computing capital gains. The market value of the immovable property transferred as indicated in the sale deed will be equivalent to the actual sale consideration received by the transferor from the transferee. If this value exceeds the value adopted or assessable by the Registration Authority for stamp duty purposes, the said sale consideration as appropriated to land and building as per Annexure or other documents attached with the registered sale deed could be adopted for the purpose of computing the capital gains. If the sale consideration is lesser than the value adopted or assessable by the Registration Authority for stamp duty purposes, then such value so adopted by the Registration Authority as appropriated between the land and building could be adopted as deemed sale consideration for the respective assets for the purpose of computing the capital gains.

In view of the above discussion, we are of the view that the Ld. CIT has erred while invoking the powers U/s. 263 of the Act without considering the appropriation between land and building, and hence the order U/s. 263 deserves to be quashed. It would be just and appropriate to direct the Ld AO to examine the issue afresh in the light of the directions as given above. We therefore allow the ground raised by the assessee for statistical purposes.

10. In the result, **appeal of the assessee is allowed for statistical purposes.**

11. With respect to **ITA No. 295/Viz/2023** (AY 2013-14) in the case of **Smt. Vidyavathi Manthravadi**, since the assessee has raised identical issues with that of the issues raised by the assessee in the case of Sivakama Sundar Manthravadi (ITA No. 292/Viz/2023), which is adjudicated in the above paragraphs of this order, our decision given while adjudicating the appeal in ITA No. 292/Viz/2023 *mutatis mutandis* applies to the ITA No.295/Viz/2023 also. Accordingly, grounds raised by the assessee in ITA No.295/Viz/2023 are **allowed for statistical purposes.**

12. Ex-consequenti, both the appeals filed by the assesseees are **allowed for statistical purposes.**

Pronounced in the open Court on 28th May, 2024.

Sd/-

(दुव्वूरु आर. एल रेड्डी)
(DUVVURU RL REDDY)

न्यायिकसदस्य/JUDICIAL MEMBER

Sd/-

(एसबालाकृष्णन)
(S.BALAKRISHNAN)

लेखासदस्य/ACCOUNTANT MEMBER

Dated : 28.05.2024

OKK - SPS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee–Sivakama Sundar Manthravadi, 5, Broadhalgh, BMFord, Rochdale, OLI15LX, United Kingdom – 999999. **(ii)**VidyavathiManthravadi5, Broadhalgh, BMFord, Rochdale, OLI15LX, United Kingdom – 999999.
2. राजस्व/The Revenue –Commissioner of Income Tax (IT & TP), Income Tax Department, Hyderabad at VPN, Telangana.
3. The Principal Commissioner of Income Tax,
4. आयकरआयुक्त (अपील)/ The Commissioner of Income Tax
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम/ DR,ITAT, Visakhapatnam
6. गार्डफाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam