

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

"A" BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री ए. मोहन अलंकामणी, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.1396/Mds/2013

निर्धारण वर्ष / Assessment Year : 2009-10

The Income Tax Officer,
Business Ward V(1),
Chennai - 600 034.

Mrs. P.A. Sarala,
v. 83/48, Pudupet Street,
Alandur, Chennai - 600 016.

(अपीलार्थी/Appellant)

PAN : CPMP5 1262 K
(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA No.1397/Mds/2013

निर्धारण वर्ष / Assessment Year : 2009-10

The Income Tax Officer,
Business Ward V(4),
Chennai - 600 034.

Shri A.M. Vijayarangam,
v. No.48/83, Pudupet Street,
Alandur, Chennai - 600 016.

(अपीलार्थी/Appellant)

PAN : AFTPV 3060 K
(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA No.1493/Mds/2013

निर्धारण वर्ष / Assessment Year : 2009-10

The Income Tax Officer,
Business Ward V(2),
Chennai - 600 034.

Shri P. Madan Mohan,
v. No.83 (Old No.48),
Pudupet Street, Alandur,
Chennai - 600 016.

(अपीलार्थी/Appellant)

PAN : AGZPM 4775 H
(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA No.1494/Mds/2013
निर्धारण वर्ष / Assessment Year : 2009-10

The Income Tax Officer,
Salary Ward IV(3),
Chennai - 600 034.

v. Shri A.V. Gopalakrishnan,
No.83 (Old No.48),
Pudupet Street, Alandur,
Chennai - 600 016.

(अपीलार्थी/Appellant)

PAN : APXPG 8729 G
(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA No.1495/Mds/2013
निर्धारण वर्ष / Assessment Year : 2009-10

The Income Tax Officer,
Salary Ward V(4),
Chennai - 600 034.

v. Shri A.P. Rajmohan,
No.83 (Old No.48),
Pudupet Street, Alandur,
Chennai - 600 016.

(अपीलार्थी/Appellant)

PAN : AJJPR 0649 A
(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellants by : Sh. P. Radhakrishnan, JCIT
प्रत्यर्थी की ओर से/Respondents by : Sh. P. Rajasekharan, CA

सुनवाई की तारीख/Date of Hearing : 09.04.2015
घोषणा की तारीख/Date of Pronouncement : 15.05.2015

आदेश /O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

All the five appeals of the Revenue relating to independent assesses are directed against the respective orders of the Commissioner of Income Tax (Appeals)-IV, Chennai, dated 29.3.2013 and pertain to assessment year 2009-10. Since common

issue arises for consideration in all the five appeals, we heard the appeals together and disposing by common order.

2. Shri P. Radhakrishnan, the Ld. Departmental Representative, submitted that all the five assessees along with three others entered into an agreement for joint development of land on 8.12.2006 with one Shanmuga Construction Services. According to the Ld. D.R., the joint venture agreement was for construction of a multi-storied building within a period of 18 months. However, the builder M/s Shanmuga Construction Services could not complete the construction within 18 months as projected in the agreement dated 8.12.2006. Therefore, all the assessees and three others entered into another agreement to extend the period of joint venture agreement for a period of twenty four months, on 1.7.2008. In the statement filed along with return of income, the assessees claimed that the sale consideration of the property was only to the extent of ₹59,02,664/-.

3. The Ld. D.R. further submitted that as per the joint development agreement, the assessees are entitled for 40% of the constructed area and the builder is entitled for 60% of the constructed area. In lieu of the 40% constructed area, the assessees have to transfer proportionate area to the extent of 60%

of the land to the builder towards cost of construction of 40% of the constructed area. According to the Ld. D.R., since a revised agreement was entered between the assesseees and the builder extending the period of joint venture on 1.7.2008, the capital gain arose to the assesseees only during the financial year 2008-09, which is relevant to the assessment year 2009-10. Accordingly, the Assessing Officer assessed the capital gain during the year under consideration. Since the assesseees are having multiple flats as their shares from the builder, the Assessing Officer disallowed the claim under Section 54F of the Income-tax Act, 1961 (in short 'the Act').

4. Placing reliance on the judgment of Bombay High Court in *Bertha T. Almeida v. ITO* (2015) 53 taxmann.com 522, the Ld. D.R. submitted that for the purpose of capital gain in respect of development agreement, the date of agreement on which possession was taken by the builder has to be taken as the date of transfer. Since the agreement was extended on 1.7.2008, according to the Ld. D.R., the possession was deemed to be given only on 1.7.2008. Therefore, the CIT(Appeals) is not justified in holding that no capital gain arises for the year under consideration. Referring to the orders of the CIT(Appeals), the Ld. D.R. submitted

that the CIT(Appeals) found there was no transfer for the year under consideration and the CIT(Appeals) directed the Assessing Officer to consider the date of completion of the construction of flats and its handing over to the assesseees as the date of transfer for the purpose of determining the capital gain. According to the Ld. D.R., since the assesseees entered into a revised agreement dated 1.7.2008 with the builder for extending the joint venture agreement which falls in the financial year 2008-09, relevant to the assessment year 2009-10, capital gain has to be assessed only during the year under consideration. Since the assesseees are having multiple flats, they are not entitled for exemption under Section 54F of the Act.

5. On the contrary, Shri P. Rajasekharan, the Ld. representative for the assessee, submitted that all the five assesseees along with three others entered into a joint venture agreement on 8.12.2006 in respect of the land located at Survey No.150/9 & 150/16 in Adambakkam Village, Tambaram Taluk, Kancheepuram District. All the eight co-owners of the land are having equal share in the land. As per the development agreement, the builder M/s Shanmuga Construction Services has to construct the building at its cost and 60% of the constructed area would be retained by the builder, namely, Shanmuga Construction Services,

and 40% of the constructed area would be given to the assesseees in lieu of proportionate 60% of the land area that would be given to the builder, Shanmuga Construction Services. Therefore, according to the Ld. representative, the transfer took place on 8.12.2006. The subsequent agreement is only to extend the period of construction as agreed on 8.12.2006.

6. Referring to the copy of the development agreement dated 8.12.2006, the Ld. representative submitted that as per clause (6) of the agreement, the vacant possession of the property was handed over to the builder. Referring to the copy of the Power of Attorney said to be executed in favour of the builder, Shanmuga Construction Services, the Ld. representative submitted that the builder was authorized to execute sale deeds in favour of prospective purchasers in respect of the constructed area of the land which was given to it and apply for local authorities like Corporation, Chennai Metropolitan Development Authority, etc. for planning permission. This Power of Attorney was executed on 14.12.2006. Referring to the agreement executed on 1.7.2008 for extension of period of joint venture agreement, the Ld. representative submitted that this is only an extension of period of agreement for 24 months and the terms and conditions agreed on 8.12.2006 were not changed at all. This

agreement also refers to the area/portion of the flat allotted to the owners. Therefore, according to the Ld. representative, the transfer in fact took place on 8.12.2006 when the joint venture agreement was executed between the entire owners and the builder, Shanmuga Construction Services, and the vacant possession was handed over to the builder. Therefore, according to the Ld. representative, the CIT(Appeals) rightly found that there was no transfer of land for assessing the capital gain during the year under consideration, i.e. for assessment year 2009-10.

7. Coming to the claim of exemption under Section 54 of the Act, the Ld. representative submitted that the assessee transferred 60% of the total area in lieu of 40% of the constructed area. Therefore, the cost of construction of 40% area would be the sale consideration for transferring 60% of the area of the land. Since the land itself was given for joint development and the assessee was entitled to get back only 40% of the constructed area along with proportionate share in the land, according to the Ld. representative, the assessee has invested the entire funds for purchasing/constructing residential house. Placing reliance on the unreported judgment of the Madras High Court in CIT v. V.R. Karpagam in Tax Case (Appeal) No.301 of 2014, the Ld.

representative submitted that Section 54F of the Act was amended, which will come into effect only from 1.4.2015, which makes it clear that benefit of Section 54F of the Act will be applicable to construction of one residential house in India and that clarifies the situation in the present case, i.e. post amendment from 1.4.2015, the benefit of Section 54F will be applicable to one house in India. Prior to the said amendment, it is clear that a residential house would include multiple flats/residential units. Since these appeals belong to assessment year before 1.4.2015, according to the Ld. representative, multiple flats/residential units were eligible for exemption under Section 54F of the Act.

8. We have considered the rival submissions on either side and perused the relevant material on record. The first issue arises for consideration is the year in which the capital gain arises for assessment on transfer of the land by all the assesseees along with three others. We have carefully gone through the agreement dated 8.12.2006. Clause (6) of the agreement clearly says that the first party, namely, the assesseees and three others shall hand over the possession of the property to the builder, namely, Shanmuga Construction Services. The period provided in the agreement is 18 months for completion of the construction. The agreement has

provided for execution of the Power of Attorney in favour of the builder to enable him to deal with property for getting approval of concerned Government authorities and sale of the same to the prospective purchasers. Since the construction could not be completed within 18 months as provided, the parties entered into another agreement for extension of the time providing for 24 months for completion of the construction. The agreement dated 1.7.2008 clearly says that the construction has already commenced and it is in progress. Therefore, it is obvious that all the assesseees handed over the vacant physical possession of the property on 8.12.2006. The agreement dated 1.7.2008 is only for extension of the time for completing the construction. Hence, this Tribunal is of the considered opinion that the vacant possession was given to the builder on 8.12.2006 in pursuance to the joint venture agreement entered between the parties on 8.12.2006.

9. We have carefully gone through the provisions of Section 2(47) of the Act which defines "transfer". Under the common law, transfer of immovable property valuing more than ₹100 would be made only by executing a registered sale deed. However, under Income-tax Act, Section 2(47) defines "transfer" in relation to capital

asset. For the purpose of convenience, we are reproducing Section 2(47) hereunder:-

“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 zero coupon 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.—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;]”

10. Section 2(47)(i) of the Act treats the sale of the property “exchange” or “relinquishment” of the asset as “transfer” within the meaning of Section 2(47) of the Act. Section 2(47)(vi) shows that any transaction by way of an agreement or arrangement in any manner which has the effect of transferring or enabling the

enjoyment of immovable property also treats as transfer. In this case, the assesseees in exchange of 40% of the constructed area, transferred 60% of the land to the builder and handed over the physical possession. Therefore, it is an exchange of property between the parties. In other words, the assesseees exchanged 60% of the landed area for 40% of the constructed area. Therefore, there is a transfer within the meaning of Section 2(47) (i) of the Act on the date on which the agreement dated 8.12.2006 was executed. Even otherwise, the joint venture agreement has the effect of transferring 60% of the landed area to the builder. The assessee cannot take back 60% landed area on which the builder has commenced construction. At the best, the assesseees would get only 40% of the constructed area and 40% landed area proportionate to the constructed area. Therefore, the transaction between the assesseees and the builder is by way of arrangement or agreement which has the effect of transferring the landed property for enjoyment of the builder. In other words, the assesseees transferred 60% of the land area to the builder for its enjoyment. Therefore, this Tribunal is of the considered opinion that there was a transfer on 8.12.2006 within the meaning of Section 2(47)(i) and 2(47)(vi) of the Act. Therefore, the relevant transaction took place in the financial year 2006-07 which falls in the assessment year

2007-08. Hence capital gain, if any, is assessable only in the assessment year 2007-08 and certainly not in the year 2009-10.

11. The CIT(Appeals) proceeded to observe that the capital gain arises only on the date of completion of the construction of flats and its handing over to the assesseees. This observation is totally contrary to the provisions of Section 2(47) of the Act. In fact, the assesseees entered into an agreement and handing over the physical possession of the property to builder allowing it to enjoy 60% of the land in lieu of 40% of the constructed area. This Tribunal is of the considered opinion that the transfer took place on 8.12.2006 and the assesseees are liable for payment of capital gain tax in the assessment year 2007-08. Therefore, no capital gain arises in the year in which the construction was completed and the constructed area was handed over to the assesseees. Accordingly, we hold that no capital gain arises for assessment in the year under consideration.

12. Now coming to the issue of exemption under Section 54F of the Act, the assesseees entrusted the construction of the building to the builder in lieu of 60% of the landed area transferred to the builder. Therefore, the assesseees, from the date on which the transfer was made by entering into agreement for joint

development, are in the process of constructing the residential house. Therefore, this Tribunal is of the considered opinion that the assesseees are entitled for exemption under Section 54F of the Act. Now the objection of the Department is that the assesseees got multiple flats, almost eight flats each, in lieu of the land transferred to the builder. The question arises for consideration is when the assesseees received eight flats/residential units from the builder in lieu of cost of the land transferred to the builder, whether the assesseees are entitled for exemption under Section 54F of the Act? We have gone through the judgment of Madras High Court in V.R. Karpagam (supra). In this case, the assessee obtained five independent flats in a multi-storied construction and claimed exemption as independent unit under Section 54F of the Act. The Madras High Court, after referring to the amendment made with effect from 1.4.2015, found that the assessee is eligible for exemption under Section 54F of the Act. In view of the judgment of the Madras High Court, this Tribunal is of the considered opinion that the assesseees are eligible for exemption even though multiple flats were allotted to them in lieu of cost of 60% of the land allotted to the builder.

13. In view of the above discussion, we do not find any infirmity in the orders of the CIT(Appeals). Accordingly, the same are confirmed.

14. In the result, all the five appeals of the Revenue are dismissed.

Order pronounced on 15th May, 2015 at Chennai.

sd/-
(A.Mohan Alankamony)
(ए. मोहन अलंकामणी)
लेखा सदस्य/Accountant Member

sd/-
(N.R.S. Ganesan)
(एन.आर.एस. गणेशन)
न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,
दिनांक/Dated, the 15th May, 2015.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)-IV, Chennai-34
4. आयकर आयुक्त/CIT-VII, Chennai-34
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.