

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
' B' BENCH : CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री चंद्र पूजारी, लेखा सदस्य के समक्ष।

[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER]

आयकर अपील सं./I.T.A.Nos.1600 /Mds/2015

निर्धारण वर्ष /Assessment year : 2007-2008

Income Tax Officer,
Non-Corporate Ward 2(2)
Coimbatore

Vs. Smt. T.R.K. Saraswathy,
No.67, Avarampalayam Road,
K.R. Puram,
Coimbatore
[PAN ALTPS 9452J]

आयकर अपील सं./I.T.A.Nos.1601 /Mds/2015

निर्धारण वर्ष /Assessment year : 2007-2008

Income Tax Officer,
Non-Corporate Ward 2(2)
Coimbatore

Vs. Smt. K. Priya,
No.67, Avarampalayam Road,
K.R. Puram,
Coimbatore
[PAN AJXPP 4653Q]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Shri. P. Radhakrishnan, IRS, JCIT
प्रत्यर्थी की ओर से /Respondent by : None

सुनवाई की तारीख/Date of Hearing : 30-09-2015

घोषणा की तारीख /Date of Pronouncement : 16-10-2015

आदेश / ORDER**PER CHANDRA POOJARI, ACCOUNTANT MEMBER**

These two appeals filed by the Revenue are directed against different orders of the Commissioner of Income-tax (Appeals)-1, Coimbatore, dated 10.04.2015 for the above assessment year. Since the issues in these two appeals are common in nature, these appeals are clubbed, heard together, and disposed of by this common order for the sake of convenience.

2. There was a delay of 07 days in filing these two appeals before the Tribunal. The department has filed affidavits praying for condonation of delay. After going through the reason given in condonation petitions, we are satisfied that there is a reasonable cause for this short delay of 07 days in filing these two appeals and the same are condoned and the appeals are admitted for adjudication.

3. First we take up ITA No.1600/Mds/2015 for adjudication. None appeared on behalf of the assessee. Therefore, we proceed to decide the case on merits after hearing the Id. Departmental Representative.

4. The grievance of the Revenue in this appeal is regarding treating the sale of shares as long term capital gains instead of short term capital gains.

5. The facts of the case are that the assessee filed her return of income had offered Long Term Capital Gains of ₹2,27,52,531/- earned by her from the sale of shares of M/s. Ganesar Ginning Company (Pvt) Ltd. The assessee, her husband Shri T.S.R.Khannaiyan and their daughter Smt K. Priya, are the directors of the above company. They entered into a Memorandum of Understanding dated 28-11-2006 with M/s. DLF Retail Developers Ltd., as per which the entire share capital of the company M/s. Ganesar Ginning Company Pvt. Ltd was transferred to M/s. DLF Retail Developers Ltd. On this transaction, the assessee has offered her share of Long Term Capital Gains in the return of income filed. M/s. Ganesar Ginning Mills Pvt. Ltd., was having only the land of 2 acres and 23 cents and a building on it, in Coimbatore, as its assets. The entire share of the above company was acquired, through resolution of transfer of shares, by the assessee, her father and mother during September 2005. The Company was sold during November 2006 as the entire share capital of the company was sold by the assessee and her family. As per the Balance Sheet filed by The Ganesar Ginning Company Private Limited for the year ending 31.3.2006, the authorized share capital was ₹1,50,000/- consisting of 1,500 shares (each having a face value of Rs.100/-). The total of the balance sheet is only ₹20,29,147/-, which consists of accumulated losses of ₹30,14,192/-. As per the Profit and Loss account filed by the

above Company for the said period, there was a net loss of ₹3,19,905/-. Further, no income was reflected in this account, which showed that no business was conducted for 31.3.2005 and 31.3.2006. In such a situation, no prudent business man would acquire 1500 shares of a company, which was incurring continuous losses, with a face value of ₹1,50,000/- for ₹5,31,97,500/-. Hence it was apparent that when the assessee and her parents acquired the shares of The Ganesar Ginning Company Private Limited, their only objective / interest was in the prime land owned by the company and not in the business of the company. Hence the amount of ₹5,31,97,500/- that they paid was for the land and not for the business of the company. Further the MOU entered into between the directors of The Ganesar Ginning Company Private Limited (ie assessee and her parents) and M/s. DLF Retail Developers Limited talked mainly about the transfer of the said land (2.23 acres at Ganapathy East Village, Coimbatore) i.e , about its mode of acquisition by the company, ceiling limits under the ULCR Act, approval obtained by the directors on 5.7.2006 from Coimbatore Local Planning Authority stated that it was industrial land and could be used for general commercial purposes. etc. Hence, a perusal of the above events revealed that the said land was acquired by assessee and her husband and daughter on 23.9.2005 and subsequently sold on 28.11.2006. It was apparent that since the

holding period of the asset (land) was less than 3 years, the resultant Capital Gain in the hands of the assessee needed to be assessed as Short Term Capital Gains. Hence, in this case, there was tangible material and there was reason to believe that Income chargeable has escaped assessment Hence notice u/s.148 was issued to the assessee. While computing assessment, the Assessing Officer treated capital gain on transfer of shares as short term capital gains. Aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals).

6. The Commissioner of Income Tax (Appeals) placed reliance on the judgment of Karnataka High Court in the case of *Bhoruka Engineering Industries Ltd vs. DCIT 36 taxmann.com 82* decided the issue in favour of the assessee. Against this, the Revenue is in appeal before us.

7. The Id. Departmental Representative submitted that the Commissioner of Income Tax (Appeals) erred in relying on the decision of the Karnataka High Court in the case of *Bhoruka Engineering Industries Ltd. (cited supra)*. The balance sheet of the acquired company showed only a loss of ₹3,19,905/- the assessee's purpose of purchase of shares of the loss making company was to acquire the land which was later sold to m/s. DLF Retail Developers Ltd. for a high price of ₹14,58,40,140/- which shows this is

definitely a colourable device. Hence the assessing officer's action of assessing the capital gain as a short term capital gain has to be upheld and the order of the CIT(A) be quashed. Moreover, the modus operandi adopted by this assessee in transferring the above mentioned shares was entirely different from that of the case relied upon by the Commissioner of Income Tax (Appeals). In this case, the entire share capital of Ganesar Ginning Company Pvt. Ltd. was acquired through resolution of transfer of shares by the assessee and her family whereas in the case of *Bhoruka Engineering Industries Ltd*, the transfer of shares was done through a registered stock exchange and the applicable securities transaction tax was paid by them. The objective of the transfer as per the MOU ibid, was to construct a shopping mall and complex on the land. Hence, assessing officer's action of assessing the capital gain as a short term capital gain, in this case, has to be upheld since this case is entirely different in nature from the one cited by the Commissioner of Income Tax (Appeals).

8. We have heard the Id. Departmental Representative and perused the material available on record. It is evident that the assessee has sold the shares of M/s. Ganesar Ginning Company (Pvt) Ltd. to M/s. DLF Retail Developers Ltd. The Authorized Representative submitted before the Commissioner of Income Tax (Appeals) that the assessee has purchased only the shares of the company earlier and

not the lands or other assets of the company. The said land has been held by the company M/s. Ganesar Ginning Company (Pvt) Ltd. from the beginning. The assessee has offered to tax the gains from the sale of shares as Long Term Capital Asset and paid the tax at applicable rates. The company being a artificial person / different taxable entity, the assessee cannot be taxed for the assets held by the company. It was plea of the assessee before the Commissioner of Income Tax (Appeals) that the sale of shares is not done through any Sub Registrars Office or Registration Authorities. As seen from the facts of this case, M/s. BSFL, one of the Group companies of M/s. Bhoruka Engineering Industries Ltd, purchased 15 acres of land from M/s BSL. The assessee company M/s. B S L and other Promoter shareholders held 98.73 per cent shares in M/s. B S F L. Assessee along with other promoters sold their shareholdings in BSFL to DLF-CDL through Magadh Stock Exchange and claimed exemption from LTCG arising from sale of shares. Before sale of shares, BSFL systematically reduced all its assets except land. The Revenue contended that transaction of sale of shares was a colourable device and virtually immovable property had been transferred. The High Court held that *"where arrangement of assessee to avoid payment of tax did not contravene any statutory provision and was achieved within four corner of law, it cannot be found fault with"*. The High Court

also held that" *whether merely because if registered sale deed had been executed by BSFL selling land in favour of DLF-CDL, capital gain tax should be paid on sale consideration, was of no reason to held that when a shareholder of BSFL transferred their shares for a consideration after complying with legal requirement, he was not entitled to benefit of tax exemption'.*

The High Court held that it was a valid legal transaction in law and merely because they were able to avoid payment of tax, it cannot be said to be a colourable device or sham transaction or a unreal transaction. In the case of the appellant the transaction is real, all legal formalities have been complied with and what is transferred is the shares and not immovable property. The findings of the Assessing Authority that it is a transaction of immovable property is contrary to law and contrary to the material on record. The Karnataka High Court held that if the veil of the company is lifted, what appeared to them is transaction of immovable property. Such a finding is impermissible in law. In the case of M/s. Bhoruka Engineering Industries Ltd (cited supra), the assessee traded the shares in Magadh Stock Exchange and paid the transaction fee and claimed the Long Term Capital Gains as exempt. In the case of the assessee, she paid the Long Term Capital Gain on the sale of shares as per the requirement of law. In view of the above, the issue in appeal

is squarely covered by the above judgment. Hence, the appeal of the Revenue is dismissed.

9. ITA No.1601/Mds/2015, assessment year 2007-08; K. Priya.

The first ground raised by the Revenue is with regard to reopening of assessment.

10. The facts of the issue are that in the return of income filed, the assessee had offered Long Term Capital Gains of ₹ 2,23,91,380/- earned by her from the sale of shares of M/s. Ganesar Ginning Company (Pvt) Ltd. The assessee and her parents Shri T.S.R.Khannaiyan and Smt. T.R.K.Saraswathy, are the directors of M/s. Ganesar Ginning Company (Pvt) Ltd. They entered into a Memorandum of Understanding dated 28-11-2006 with M/s. DLF Retail Developers Ltd., as per which the entire share capital of the company M/s. Ganesar Ginning Company Pvt Ltd, was transferred to M/s. DLF Retail Developers Ltd. On this transaction, the assessee has offered her share of Long Term Capital Gains in the Return of income filed. M/s. Ganesar Ginning Mills Pvt. Ltd., was having only the land of 2 acres and 23 cents and a building on it, in Coimbatore, as its assets. The entire share of the above company was acquired, through resolution of transfer of shares, by the assessee, her father and

mother during September 2005. The Company was sold during November 2006 as the entire share capital of the company was sold by the assessee and her family. As per the Balance Sheet filed by the Ganesar Ginning Company Private Limited for the year ending 31.3.2006, the authorized share capital was ₹1,50,000/- consisting of 1,500 shares (each having a face value of Rs.100/-). The total of the balance sheet is only ₹20,29,147/-, which consists of accumulated losses of ₹20,14,192/-. As per the Profit and Loss account filed by the Company for the said period, there was a net loss of ₹3,19,905/-. Further, no income was reflected in this account, which showed that no business was conducted for 31.3.2005 and 31.3.2006. In such a situation, no prudent business man would acquire 1500 shares of a company, which was incurring continuous losses, with a face value of ₹1,50,000/- for ₹5,31,97,500/-. Hence it was apparent that when the assessee and her parents acquired the shares of The Ganesar Ginning Company Private Limited, their only objective / interest was in the prime land owned by the company and not in the business of the company. Hence the amount of ₹5,31,97,500/- that they paid was for the land and not for the business of the company. Further the MOU entered into between the directors of the Ganesar Ginning Company Private Limited (ie assessee and her parents) and M/s. DLF Retail Developers Limited talked mainly about the transfer of the said

land (2.23 acres at Ganapathy East Village, Coimbatore) i.e. about its mode of acquisition by the company, ceiling limits under the ULCR Act, approval obtained by the directors on 5.7.2006 from Coimbatore Local Planning Authority stated that it was industrial land and could be used for general commercial purposes, etc. Hence, a perusal of the above events revealed that the said land was acquired by assessee and her parents on 23.9.2005 and subsequently sold on 28.11.2006. It was apparent that since the holding period of the asset (land) was less than 3 years, the resultant Capital Gain in the hands of the assessee needed to be assessed as Short Term Capital Gains. Hence, in this case, there was tangible material and there was reason to believe that Income chargeable has escaped assessment Hence notice u/s.148 was issued to the assessee. Aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals).

11. On appeal, the Commissioner of Income Tax (Appeals) gave a finding in favour of the assessee holding that reopening is bad in law. Against this, the Revenue is in appeal before us.

12. We have heard both the sides and perused the material on record. In this case the original assessment for the assessment year

2007-2008 was completed u/s.143(3) of the Act after examining the books of accounts. It was noted that the calculation of capital gains on sale of equity shares of Ganesar Ginning Mills Ltd has been verified by the then Assessing Officer based on the relevant facts and materials submitted by the assessee and the Assessing Officer has accepted the stand of the assessee in respect of calculation of capital gains on sale of shares. In such an eventuality in an assessment u/s.143(3) where there has been no failure on the part of the assessee in disclosing truly and materially all facts relating to the case, the assessment cannot be reopened after 4 years time limit which was completed on 31.03.2012 as per the proviso to section 147 of the Act. Further, there was no allegation by the Assessing Officer that there was failure on the part of the assessee to disclose the materials, facts truly and correctly for the period of assessment. Being so, since the assessment was reopened after four years from the end of the relevant assessment year when the original assessment was completed u/s.143(3), this issue is squarely covered by the judgment of Supreme Court in the case of *CIT vs. Kelvinator of India Ltd 320 ITR 561*. The Assessing Officer precluded from reopening the assessment. Accordingly, reopening of assessment is invalid, the order of the Commissioner of Income Tax (Appeals) is confirmed.

13. Coming to the second issue in this appeal, which is identical to the one considered in ITA No.1600/Mds/2015. Applying the above ratio, this appeal of the Revenue is also dismissed.

14. In the result, the appeals of the Revenue in ITA Nos.1600 & 1601/Mds/2015 are dismissed.

Order pronounced on Friday, the 16th day of October, 2015, at Chennai.

Sd/-

(एन.आर.एस. गणेशन))

(N.R.S. GANESAN)

न्यायिक सदस्य/JUDICIAL MEMBER

चेन्नई/Chennai

दिनांक/Dated: 16.10.2015

KV

Sd/-

(चंद्र पूजारी)

(CHANDRA POOJARI)

लेखा सदस्य /ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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