

In the High Court of Judicature at Madras

Dated: 25.11.2014

Coram

The Honourable **Mr.JUSTICE R.SUDHAKAR**
and
The Honourable **Mr.JUSTICE R.KARUPPIAH**

Tax Case (Appeal) No.976 of 2014

Commissioner of Income Tax
Salary Circle, Chennai.

.... Appellant

Vs.

Sri.S.R.Jeyashankar
No.19/13, P.S.Sivasamy Salai,
Mylapore, Chennai - 600 004.

.... Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 27.06.2014 made in I.T.A.No.1264/Mds/2013 on the file of the Income Tax Appellate Tribunal 'C' Bench, Chennai for the assessment year 2009-10.

For Appellant : Mr.M.Swaminathan
assisted by Mr.K.Suresh Kumar
Standing Counsel for Income Tax

J U D G M E N T

(Delivered by R.SUDHAKAR,J.)

This Tax Case (Appeal) filed by the Revenue as against the order of the Income Tax Appellate Tribunal comes up for admission and the Revenue

has raised the following substantial questions of law:

"1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the date of allotment letter issued by the builder of the flat is to be considered as the date of acquisition of the property under Section 2(42A) of the Income Tax Act?

2. Whether on the facts and in the circumstances of the case for the purpose of computing holding the period of the property the date of allotment letter issued by the builder of the flat is to be considered or the date of delivery of possession of the flat is to be considered?"

2. The assessment in this case relates to the assessment year 2009-10. The assessee had purchased the undivided share of land of 2150 sq.ft. out of a large extent of 4 grounds and 400 sq.ft. situated in S.Nos.2766 and 67, RS No.1570/4 at No.1, Binny Road, Chennai. Prior to the purchase of this undivided share in land, the assessee had entered into an agreement with M/s.Vishranthi Homes Pvt. Ltd. (in short VHPL), Chennai for constructing the built-up area of 3465 sq.ft. including common area in the above-said undivided share of land. The agreement was for purchase of land as well as for construction of home by a project promoted by VHPL. The agreement was determined for a consideration at Rs.81,68,811/- to be paid by the assessee to the builder VHPL towards construction of the residential unit. Thereafter, the assessee sold the entire unit by a sale deed dated 10.4.2008 well after 36 months from the date of agreement dated

22.2.2005 and claimed the difference between the cost of acquisition and sale consideration as long term capital gains.

3. The Assessing Officer, however, took a view that the undivided share of land was registered on 4.8.2005 and since the property was purchased in the month of August, 2005 and sold in April, 2008, the capital gains arising from sale will be assessed as short terms capital gains only and accordingly, the Assessing Officer denied benefit of Section 2(29A) of the Income Tax Act and made addition. As against the said order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), who placing reliance on Circular No.471 dated 15.10.1986 allowed the appeal filed by the assessee. Aggrieved by the said order, the Revenue has filed an appeal before the Income Tax Appellate Tribunal.

4. The Tribunal after going through the detailed order of the Commissioner of Income Tax (Appeals) and taking note of the two decisions of the Punjab and Haryana High Court, namely, **363 ITR 54 (Mrs. Madhu Kaul v. CIT)** and **344 ITR 501 (Vinod Kumar Jain vs. CIT)** and also on the basis of Circular No.471 dated 15.10.1986 came to hold that the date of allotment of the flat has to be adopted as date of acquisition of the immovable property when it comes to acquiring a flat from the promoter of the flat by way of executing construction agreement and not the date of the sale deed for purchase of the relevant undivided share in land. Accordingly,

the Tribunal confirmed the order of the Commissioner of Income Tax (Appeals), dismissed the appeal filed by the Revenue. Aggrieved by the said order of the Tribunal, the Revenue has filed the present Tax Case (Appeal).

5. Heard Mr.M.Swaminathan, learned standing counsel appearing for the Revenue and perused the materials placed before this Court.

6. The short issue that arises for consideration is whether the asset which was sold by the assessee would be subject to short term capital gains in terms of Section 2(42A) or long term capital gains in terms of Section 2(29A) of the Income Tax Act. There is no dispute with regard to the purchase of the capital asset. In order to appreciate the claim of the assessee, the Tribunal has considered the following facts in paragraph 7 of the order, which reads as follows:

"7. We have heard the rival submissions and carefully perused the materials on record.....

On perusing the case, the following facts emerge vividly:-

(1) The assessee has paid to the builder M/s.Vishranthi Homes Pvt.Ltd a sum of Rs.2,30,000/- vide cheque No.580053 dated 22.2.2005 drawn on Vysya Bank Limited, Chennai.

(2) On the same day, i.e. 22.2.2005, the assessee entered into an agreement with M/s Vishranthi Homes Pvt. Ltd wherein M/s.Vishranthi Homes Pvt. Ltd had undertaken to construct a flat of 3465.34 sq.ft. The other relevant facts in the agreement are listed herein below:-

(a) The builder M/s Vishranthi Homes Pvt. Ltd has allotted a flat in the first and second floor (Duplex) on the rear side of the building to be known as "Ganeshram" along with two reserved car parking.

(b) The builder had entered into an agreement with the owner of the land for acquiring 40% of undivided share in the land on which the building "Ganeshram" was to be constructed well before 22.02.2005.

(c) The builder has nominated the 'allottee' being the assessee to purchase 2150 sq.ft., of undivided share in land described in Schedule-A.

(d) The sale consideration for the land was to be paid directly to the landlord on the purchase of the 2150 sq.ft., of undivided share in land while as construction cost of Rs.81,68,811/- has to be paid to the builder.

(e) Various rights and duties of the allottee and the builder were also mentioned in the agreement."

7. On the basis of the above admitted facts, the Tribunal placed reliance on the decision of the Punjab and Haryana High Court reported in **363 ITR 54 (Mrs.Madhu Kaul v. CIT)**, where an identical issue arose as to whether the date of capital gains should be reckoned from the date of allotment under a scheme framed by the DDA or it should be reckoned from the date of actual sale, which is subsequent to the date of allotment. The Punjab and Haryana High Court relied upon the circular, which was issued in relation to the allotment of flats to allottees under self-financing scheme of DDA, came to hold that a right has been conferred on the allottee to hold a

flat which was later identified and possession delivered on a later date. The High Court also held that the mere fact that possession was delivered later does not detract from the fact that the allottee was conferred a right to hold property on issuance of an allotment letter and the payment of balance instalments, identification of a particular flat and delivery of possession are consequential acts that relate back to and arise from the rights conferred by the allotment letter. In effect, the High Court held that the allottee gets the title to the property on issuance of allotment letter and the payment in instalments is only a consequential act upon which delivery of possession to the property flows. Similar view has been taken in the decision reported in **344 ITR 501 (Vinod Kumar Jain vs. CIT)** by the Punjab and Haryana High Court.

8. The Delhi High Court has also observed in the decision, which has been extracted in the order of the Tribunal in paragraph 7.1 of the order, holding that the date of allotment of the flat to the assessee by the promotor should be adopted as the date of acquisition of the immovable property. In the present case, the right to the property flows from the date of agreement with the builder, viz., 22.2.2005. Over a period of time payments have been made and the transaction was concluded in accordance with the terms of the agreement by registering the Undivided share in land and handing over the flat. Therefore, the assessee had a right consequent on the agreement dated 22.2.2005 in respect of the property sold by the assessee on

10.4.2008. Therefore, it exceeds the period of 36 months and the assessee has rightly claimed the benefit of long term capital gains.

9. Circular No.471 dated 15.10.1986 is also on the same lines. It speaks about the right of an allottee over a property that has been allotted. The other issues like payment of balance instalments, delivery of possession, which takes place after the allotment only, relates back to the original allotment, in the present case, agreement. Therefore, the principle on which long term capital gains should be determined has been clearly indicated in the circular. For better clarity, Circular No.471 dated 15.10.1986 reads as follows:

Circular No.471

Capital gains tax - Whether investment in a flat under the Self-Financing Scheme of the Delhi Development Authority would be construction for the purpose of ss.54 and 54F of the IT Act, 1961

15/10/1986

CAPITAL GAINS

SECTIONS 54, 54F,

Secs. 54 and 54F of the IT Act, 1961, provide that capital gains arising on transfer of a longterm capital asset shall not be charged to tax to the extent specified therein, where the amount of capital gain is invested in a residential house. In the case of purchase of a house, the benefit is available if the investment is made within a period of one year before or after the date on which the transfer took place and in case of

construction of a house, the benefit is available if the investment is made within three years from the date of the transfer.

2. The Board had occasion to examine as to whether the acquisition of a flat by an allottee under the Self-Financing Scheme of the Delhi Development Authority amounts to purchase or its construction by the Delhi Development Authority on behalf of the allottee. Under the Self-Financing Scheme of the Delhi Development Authority the allotment letter is issued on payment of the first instalment of the cost of construction. The allotment is final unless it is cancelled or the allottee withdraws from the Scheme. The allotment is cancelled only under exceptional circumstances. The allottee gets title to the property on the issuance of the allotment letter and the payment of instalments is only a follow-up action and taking the delivery of possession is only a formality. If there is a failure on the part of the Delhi Development Authority to deliver the possession of the flat after completing the construction, the remedy for the allottee is to file a suit for recovery of possession.

3. The Board have been advised that under the above circumstances, the inference that can be drawn is that the Delhi Development Authority takes up the construction work on behalf of the allottee and that the transaction involved is not a sale. Under the Scheme, the tentative cost of construction is already determined and the Delhi Development Authority facilitates the payment of the cost of construction in instalments subject to the conditions that the allottee has to bear the increase, if any, in the cost of the construction. Therefore, for the purpose of capital gains tax, the cost of the new asset is

tentative cost of construction and the fact that the amount was allowed to be paid in instalments does not affect the legal position stated above. In view of these facts, it has been decided that cases of allotment of flats under the Self-Financing Scheme of the Delhi Development Authority shall be treated as cases of construction for the purpose of capital gains."

10. In the light of the above-said decisions and the Circular, we do not find any reason why the same principle should not be applied to all transactions based on agreements in respect of capital asset. It has been correctly pointed out by the Commissioner of Income Tax (Appeals) as well as the Tribunal following the decision of the Punjab and Haryana High Court that the breach of agreement would only give right to the beneficiary for enforcing the right over the property. We find no reason to differ with the said reasoning.

11. Therefore, we find no question of law much less any substantial question of law arises for consideration in this appeal. Accordingly, this Tax Case (Appeal) stands dismissed. No costs.

Index :Yes/No
Internet:Yes/No
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(R.S.,J) (R.K.,J)
25.11.2014

To

- 1.The Income Tax Appellate Tribunal 'C' Bench, Chennai.
- 2.The Commissioner of Income Tax (Appeals)-VII, Chennai.

3.The Deputy Commissioner of Income Tax, Salary Circle IV, Chennai.

R.SUDHAKAR,J.
AND
R.KARUPPIAH,J.

sl

T.C.(A) No.976 of 2014

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