

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.8.2015

CORAM :

THE HONOURABLE MR.JUSTICE V.RAMASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE T.MATHIVANAN

T.C.A.Nos.354 to 360 & 417 of 2015
and
all connected pending MPs

Commissioner of Income Tax,
Thiruchirapalli. Appellant in all the appeals

Vs

R.Sethuraman Respondent in all the appeals

Appeals under Section 260A of the Income Tax Act, 1961 against
the Common order of the Income Tax Appellate Tribunal, Bench 'D',
Chennai dated 11.07.2011 and made in I.T.A Nos.

679/Mds/2011 for Assessment year 2000-01
680/Mds/2011 for Assessment year 2001-02
682/Mds/2011 for Assessment year 2003-04
683/Mds/2011 for Assessment year 2004-05
684/Mds/2011 for Assessment year 2005-06
596/Mds/2011 for Assessment year 2003-04
597/Mds/2011 for Assessment year 2004-05 and
681/Mds/2011 for Assessment year 2002-03

respectively against the Common order of the Commissioner of Income
Tax(Appeals), Tiruchirapalli, dated 11.01.2011 and made in
I.T.A.Nos.122, 123, 125/06-07, 87, 88/07-08, 87/07-08 and 124/06-07
respectively against the (1) Order of the Deputy Commissioner of
Income Tax, Company Circle-I, Tiruchirapalli dated 29.03.2006 and
made in PAN/GIR.No.AAGPS2195C for the Assessment Years 2000-01, 2001-
02, 2002-03 and 2003-04 and (2) Order of the Assistant Commissioner
of Income Tax, Company Circle-I, Tiruchirapalli dated 31.08.2007 and
made in PAN/GIR.No.AAGPS2195C for the Assessment Years 2004-05 and
2005-06.

For Appellant : Mr.J.Narayanaswamy
Sr. Standing Counsel for I.T.Department

COMMON JUDGMENT
(Judgment was delivered by V.RAMASUBRAMANIAN,J)

The Revenue has come up with the above appeals under Section 260A of the Income Tax Act, 1961, questioning the correctness of a common order passed by the Income Tax Appellate Tribunal in I.T.A.Nos.679 to 684 and 596 and 597(Mds)/2011.

2. Heard Mr.J.Narayanaswamy, learned Standing Counsel for the Income Tax Department.

3. The respondent is the proprietor of a concern by name M/s.Win Pharma, which is engaged in the business of manufacturing and selling pharmaceutical items in a small scale. It appears that the said concern M/s.Win Pharma was originally a partnership firm comprising of the respondent herein as well as two others as its partners. Therefore, when the concern was carrying on business in partnership, it purchased land of an extent of about 1 acre on 14.12.1978. The land was depicted as the business asset of the partnership firm.

4. It appears that two out of three partners retired on 24.6.1979, making the partnership firm a sole proprietary concern, of which, the respondent became the sole proprietor. He continued to run the business as a proprietorship concern thereafter.

5. On 24.1.1981, the respondent purchased an additional land of an extent of about 1 acre, which was adjoining the land that was already owned. In this process, the respondent became the owner of a land of an extent of about 2 acres.

6. Out of the said land, the respondent sold an extent of about 25,000 sq.ft., to Life Insurance Corporation of India in the year 1991-92. The remaining portion of the land was sold by the respondent to various persons under several registered sale deeds during the period 1999-2000, by way of undivided shares. The purchasers of those undivided shares of the remaining extent of land got flats constructed for themselves on the remaining extent of the land.

7. The income derived out of this activity was returned by the respondent, as a business income, from the assessment year 2003-2004 onwards. But, pursuant to a survey held on 5.2.2004 under Section 133A and the information collected therefrom, the Department issued a

notice under Section 148 alleging that there was income that had escaped assessment.

8. Thereafter, an order was passed on 29.3.2006 under Section 143 (3), holding that the income derived by the respondent from out of the sale of the land in question, could not be treated as a business income, as he was engaged only in the business of manufacture and sale of pharmaceutical products and that therefore, the respondent ought to have paid capital gains tax.

9. A series of assessment orders was passed on 29.3.2006 for the assessment years 2000-2001 to 2003-2004. Similarly, two orders were passed on 31.8.2007 in respect of the assessment years 2004-2005 and 2005-2006. Aggrieved by these orders, the assessee filed appeals in I.T.A. Nos.122 to 125/2006-2007 and 87 and 88/2007-2008 before the Commissioner of Income Tax (Appeals). The Commissioner allowed the appeals for the assessment years 2000-2001 to 2002-2003 and 2005-2006 fully and allowed the appeals in respect of the assessment years 2003-2004 and 2004-2005 partly.

10. As against those orders, the Department filed appeals in I.T.A.Nos.679 to 684 of 2011 for the assessment years 2000-2001 to 2005-2006 before the Income Tax Appellate Tribunal. The assessee filed two independent appeals in I.T.A.Nos.596 and 597 of 2011 in respect of the assessment years 2003-2004 and 2004-2005, as against the disallowed portion of his claims. By a common order dated 11.7.2011, the Tribunal dismissed the appeals filed by the Revenue and allowed the two appeals filed by the assessee. Hence, the Revenue is on appeal before us.

11. The Revenue has raised the following substantial questions of law arising in respect of these appeals :

"(i) Assessment Year 2000-2001 to 2005-2006:

Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the income from the sale of undivided share in land and sale of flats separately in different years cannot be subjected to computation of capital gains and said income is to be treated as business income ?

(ii) Assessment year 2003-2004 :

Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the addition of difference in cost of construction based on DVO's valuation report made by the Assessing Officer under

Section 69C cannot be sustained ?

(iii) Assessment year 2003-2004 and 2004-2005 :

(a) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee is developer of housing unit and is entitled for deduction under Section 80IB(10) ?

(b) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee had developed the land to the extent of 1 acre as provided in Section 80IB(10) ? and

(c) Whether on the facts and in the circumstances of the case, the Tribunal was right in considering the fact that one of the housing unit was above 1,500 sq.ft., violating the limit prescribed under Section 80IB(10)? "

12. The answer to questions (iii)(a) to (iii)(c) in relation to assessment years 2003-2004 and 2004-2005 would depend directly upon our answer to question (i) in relation to the assessment years 2000-2001 to 2005-2006. Therefore, we shall take up for consideration the first question that relates to the issue as to whether the sale of undivided share in land by the assessee could be treated as a business income or not.

13. The facts, which we have narrated in the first part of this order would show that the respondent was originally a partnership firm, which purchased a land as part of its business asset. After the retirement of two partners and the firm became a sole proprietary concern, the respondent became the sole proprietor and he acquired the adjoining land for business purposes. Out of the said land, one portion had already been sold to the Life Insurance Corporation of India in the year 1991-1992. It appears that the said sale was treated as part of the business transaction and there was no dispute with regard to the income derived from the sale to the Life Insurance Corporation of India.

14. However, when the respondent sold the remaining extent of land by means of registered sale deeds conveying undivided shares with a view to enable the purchasers to construct flats, the Department raised an objection on the ground that the sale of properties was not part of the business of the respondent and that therefore, the income derived therefrom cannot be treated as business income.

15. The contention of the Department is primarily fallacious. The respondent is an individual. Unlike the companies incorporated under the Companies Act, 1956, whose articles of association contain the object clauses, an individual need not necessarily confine his activity to a particular line of business. It is an admitted fact that the respondent was a partnership firm, which purchased the property only as a part of its business assets. Therefore, there cannot be a presumption that the respondent cannot carry on any activity other than that of manufacture and sale of pharmaceutical products. Hence, the Commissioner of Income Tax (Appeals) and the Tribunal were right in holding that the assessee was entitled to treat it as a business income. Hence, we decide on question (i) that the Tribunal was right in holding that the income from the sale of undivided share of land and the construction of flats cannot be subjected to computation of capital gains and that the same would be treated as business income. As a consequence of this opinion, questions (iii)(a) to (iii)(c) raised in relation to the assessment years 2003-2004 and 2004-2005 should automatically go in favour of the assessee.

16. Coming to the question of law relating to the valuation report submitted by the DVO and the reliance placed by the Assessing Officer under Section 69C in relation to the assessment year 2003-2004, it is seen from paragraphs 23 and 24 of the order of the Tribunal that the sale of flats to 82 individual buyers was actually a composite transaction. For the purpose of convenience, the promoter had divided the entire consideration into two components, one representing the value of the undivided share of land and the other representing the cost of construction. Paragraphs 23 and 24 of the order of the Tribunal in this regard read as follows :

"23. The next point to be considered in the appeals filed by the Revenue is the addition of Rs.1,39,08,127/- made by the Assessing Authority for the assessment year 2003-2004 under Section 69C towards under-statement of cost of construction. The basis of making an independent valuation of the superstructure itself has been attempted by the Assessing Authority on the premise that the project of the assessee constituted two transactions, namely the sale of land and thereafter construction of apartments. Upholding the order of the Commissioner of Income Tax (Appeals), we have already held that there was no two different transactions in the sale of apartments and the assessee had sold the apartments along with the undivided share of

right in the land and the project undertaken by the assessee was a composite project and particularly a housing project. When it is found that there are no two different transactions, there is no basis for making an independent valuation of the superstructure.

24. Apart from the above basic fallacy relied on by the Assessing Authority, it is to be seen that the consideration was paid by the buyers as a whole for the purchase of apartments along with the undivided share of right in the land and as such the value of land and value of apartment cannot be worked out independently. The value adopted for the purpose of executing sale deeds to convey the undivided share of right in the land was only for the purpose of registration, which is evident from the fact that the guideline value was adopted by the assessee to register such documents. It is to be seen therefore that the consideration paid by the buyers of the apartments is wholesome consideration for a dwelling unit. The Assessing Authority has no case that the assessee had received any consideration in excess of the consideration reflected in the registered documents and in the books of accounts. No buyer has ever told the Assessing Officer that he has paid something more to the assessee than what was stated in the accounts. Therefore, there cannot be a case that the assessee had spent something more and realized something more from the buyers. When such a case is not possible, there is no basis for dissecting the superstructure from the wholesome transaction and attempt to adopt a different valuation for the said superstructure. The whole exercise of the Assessing Authority in this regard is irrational."

17. We do not see anything wrong with the opinion of the Tribunal in this regard. Therefore, the question (ii) relating to the assessment year 2003-2004 is also answered against the Department.

18. In so far as the question as to whether the Tribunal was right in holding that the assessee had developed the land to the extent of one acre and above to be eligible for the benefit of Section 80IB(10), the Tribunal has rightly pointed out that it is not

necessary for the developer to convey the entire extent of one acre and above to the purchasers. If a property is lawfully developed by a buyer, one third (1/3) of the total extent of land should necessarily be reserved for public utility such as roads, etc. It is not possible for a developer to convey the entire land in favour of the purchasers, as he is obliged by the Town and Country Planning Act, 1971 and the Development Control Rules to leave spaces earmarked for public purposes. Therefore, this question has also been rightly answered against the Department by the Tribunal.

19. Accordingly, all the above appeals are dismissed. Consequently, all connected pending MPs are also dismissed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

RS

Sub Assistant Registrar

To

- 1.The Assistant Registrar,
Income Tax Appellate Tribunal,
D Bench, Chennai.
- 2.The Commissioner of Income Tax(Appeals),
44, Williams Road, Cantonment,
Tiruchirapalli - 620 001.
- 3.The Deputy Commissioner of Income Tax,
Company Circle - I, Tiruchirapalli.
- 4.The Assistant Commissioner of Income Tax,
Company Circle - I, Range - I,
Tiruchirapalli.
- 5.The Secretary,
Central Board of Direct Taxes,
New Delhi.

+8cc's to Mr.J.Narayanasamy, S.R.No.40360

TCA.Nos.354 to 360 & 417 of 2015
all connected pending MPs

GR(CO)
CA(01/09/2015)