IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case Appeal Nos.1940 and 1941 of 2008

M/s.C.Venkatachalam [HUF],
Chennai – 600 010. ... Appellant in T.C.A.No.1940/2008

M/s.C.Sudarsana Srinivasan [HUF]
Chennai – 600 010. ... Appellant in T.C.A.No.1941/2008

Vs

The Assistant Commissioner of Income Tax,
Business Circle – XIV,
Chennai. ... Respondent in both appeals

Tax Case Appeals filed under Section 260-A of the Income Tax Act, 1961, against the common order of the Income Tax Appellate Tribunal Madras 'A' Bench, dated 13.06.2008 in ITA Nos.95 and 96/Mds/2006 for the assessment year 2000-01.

For Appellants [in both appeals]	:	Mr.M.P.Senthil Kumar
For Respondent [in both appeals]	:	Ms.V.Pushpa Junior Standing Counsel

COMMON JUDGMENT

[Judgment of the Court was made by **T.S.SIVAGNANAM, *J***]

These appeals filed by the assessees under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') are directed against the common order dated 13.06.2008 passed by the Income Tax Appellate Tribunal Madras 'A' Bench (hereinafter referred to as 'the Tribunal') in ITA Nos.95 and 96/Mds/2006 for the assessment year 2000-01.

2. The Tax Case Appeals were admitted on 15.12.2008 on the following substantial questions of law:

> *"1. Whether on the facts an in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in not holding that in view of the assessment order for A.Y.1996-97 treating the entire capital gains to be liable for tax in that year, the assessing officer cannot travel beyond the reasons for which assessment was reopened, since it would amount to contradicting views of the assessing officer for two assessment years, viz. 1996-97 and 2000-01, where it was held that entire capital gains was chargeable to tax in both the years ?*
>
> *2) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in*

holding that there was no transfer within the meaning of 2(47)(v) during the A.Y.1996-97?

3) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in not holding that capital gains would arise only in the relevant assessment years in which sale deeds were executed in respect of transfer of undivided share of land in favour of nominees of the Developer?

4) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the entire capital gains was taxable in A.Y.2000-01, when there was no transfer in respect of the entire land either u/s.2(47)(v) or section 45 of the Income Tax Act, 1961?

5) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the CIT(A) had given direction to modify the assessment order for all the assessment years by deleting the sum assessed by way of Long Term Capital Gains and accordingly to re-compute the taxes payable and there was no double taxable of the capital gains?

6) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in not holding that the Assessing Officer having held that the capital gains was taxable in the A.Y.1996-97 in terms of Section 2(47)(v), was precluded from assessing the same in A.Y.2001-02 on the basis of receipt of the consideration?"

3. The facts, which would be necessary for the disposal of these appeals, are culled out as hereunder: -

The appellant/assessees are Hindu Undivided Families, which owned properties at Chennai. Both the assessees entered into a Development Agreement with a builder, in terms of which, the assessees were entitled to 60% of the total built up area to be constructed by the developer at its cost and in consideration, the developer was entitled to 40% of undivided share in the land and entitled to retain proportionate 40% of the built up area. The land owners received a non-refundable security deposit of Rs.10,00,000/- each, during the previous year relevant to the assessment year 1996-97. According to the assessees, from the assessment year 1999-2000, the developer commenced selling the built up area and directed the land owners to execute sale deeds in respect of undivided share of the land to the nominees/purchasers of flats from the builder. The land owners offered capital gains in each of their hands in respect of the land transferred by them during each of the assessment years starting from 1999-2000, 2000-01, 2001-02, 2002-03 and 2003-04.

4. The assessees would admit that the developer handed over possession of 60% of built up area to the land owners during the assessment year 2000-01.

The assessment for the year 1996-97 was completed and the same was re-opened and the re-assessment proceedings were completed vide order dated 23.03.2004 including the entire capital gains in that year on the ground that the possession of the land was handed over by the owners to the developer in that year. For the assessment year 2001-02, the Assessing Officer had completed the assessment protectively on the capital gains offered by the assessees in respect of the undivided share of land sold during that year.

5. The appellants/assessees preferred appeals against both the orders, namely, re-assessment orders dated 23.03.2004 and protective assessment dated 23.03.2004. These appeals were taken on file by the Commissioner of Income Tax (Appeals)-XII [hereinafter referred to as 'the CIT(A)'] in I.T.A.Nos. 35 & 36/04-05 and the appeals were disposed of by a common order dated 27.08.2004 setting aside re-assessment for the year 1996-97 on a technical ground of non-compliance of Section 151 of the Act. In the very same order, the CIT(A) directed the Assessing Officer to treat the protective assessment order dated 23.03.2004 for the assessment year 2001-02 as a substantive one and assess capital gains accordingly.

6. For the assessment year under consideration, namely, 2000-01, the assessees filed their returns of income on 29.12.2000 admitting an income of Rs.13,83,085/-, which included capital gains in respect of the undivided share of the land that was sold during the previous year relevant to the assessment year 2000-01. An intimation under Section 143(1) of the Act was issued on 13.03.2002 and subsequently, by notice dated 25.03.2004, the assessment was re-opened under Section 147 of the Act. The reason assigned was that the entire capital gains in respect of 40% of the undivided share in the land was to be brought to tax. The objection filed by the assessees were not accepted and an order was passed on 11.03.2005 by treating Rs.95,44,610/- as long term capital gains. Aggrieved by the same, the assesses preferred appeals before the CIT(A) in ITA Nos.3 and 6/2005-06. By a common order dated 30.11.2005, the CIT(A) upheld the decision of the Assessing Officer in respect of bringing to tax the entire capital gains during the year 2000-01.

7. Aggrieved by the same, the assessees preferred appeals before the Income Tax Appellate Tribunal, Chennai, which were dismissed by common order dated 13.06.2008, which is impugned before us in both these appeals.

8. In the preceding paragraphs, we have referred to the six substantial questions of law, on which, the appeals were entertained. It is agreed by the learned counsel for the parties and more particularly, the learned counsel appearing for appellants/assessees that an answer to substantial question Nos.1 and 6 would cover the entire case as the other substantial questions of law viz., questions 2 to 5 are interlinked. In view of the said submission, we take up for consideration substantial question Nos.1 and 6.

9. The sheet anchor of the argument of Mr.M.P.Senthil Kumar, learned counsel appearing for appellants/assessees is by contending that the Assessing Officer cannot travel beyond the reasons, for which, assessment was re-opened since it would amount to contradicting view of the Assessing Officer himself for two assessment years namely 1996-97 and 2000-01. Further, it is submitted that the Assessing Officer himself had taken a view that the entire capital gains were taxable in the assessment year 1996-97 rejecting the objections raised by the assessees that it should be taxable for the assessment year 1999-2000 and now he had taken a contrary view to that of the earlier one on the same transaction and same set of facts. Therefore, it is submitted that the Assessing Officer was bound by the rules of consistency and having accepted that the act

of transfer falls in the assessment year 2000-01, he cannot now take a different stand and in doing so, it is a clear case of change of opinion.

10. Further, it is contended that the Tribunal was wrong in holding that the re-assessment for the year 1996-97 was cancelled only on a technical ground, that therefore, there was no error in the order passed by the Assessing Officer and the CIT(A) and that the finding of the Tribunal is erroneous because the order of the CIT(A) while setting aside the re-assessment proceedings, though on a technical ground, directed the protective assessment for the year 2001-02 to be a substantive assessment and therefore, the Tribunal committed an error in rejecting the assessee's appeal.

11. In order to substantiate the stand taken by the assessee as accepted by the CIT(A) while treating the assessment for the year 2001-02 as substantive, learned counsel for the assessees referred to various clauses in the General Development Agreement between the assessees and the developer and submitted that the effect of a substantive assessment cannot be changed or altered and that this came to be done based on a mere change of opinion which is unsustainable in law.

12. In this regard, learned counsel for the assessees placed reliance on the decisions of the Honourable Supreme Court in the case of ***CIT Vs. Kelvinator India Ltd. [reported in (2010) 320 ITR 561] and ITO v. Techspan India P. Ltd. [reported in (2018) 404 ITR 10]***, which were referred to in W.P.No.7416 of 2017 dated 04.10.2018 [MBI Kits International Vs. ITO] as confirmed ***by us*** in W.A.No.200 of 2019 vide judgment dated 24.06.2019. With regard to the aspect i.e. what is the effective date of transfer, reliance was placed on the decision in ***Shrip. P.Madhusudhan Vs. ACIT in TCA.No.1986 of 2008 dated 11.06.2019***. Thus, in the light of the above submission, the learned counsel prays for setting aside of the common order passed by the Tribunal.

13. Ms.V.Pushpa, learned Junior Standing counsel for the respondent - Revenue pointed out that the Tribunal elaborately considered the factual position and confirmed the detailed order passed by the CIT(A) and that the Tribunal recorded a clear finding that the assessees had been taking an inconsistent stand before the Assessing Officer and the CIT(A) at different points of time. It is submitted by the learned counsel that the assessees had admitted the cost of land at Rs.80/- per sq.ft., whereas it was ascertained that

the actual cost was only Rs.41/- per sq.ft and in this regard, learned Junior Standing counsel for the respondent/Revenue invited our attention to relevant documents wherein reasons have been recorded. Further, it is submitted that the assessees have not questioned the reopening in the appeals filed before the CIT(A), which is evident from the order passed by the CIT(A) dated 30.11.2005 in Paragraphs 6.3 and 6.4.

14. Further, it is contended by the learned Junior Standing Counsel appearing for the Revenue that once the assessments have been reopened, it becomes open on all issues and even items, which are not mentioned in the reasons can also be considered during the said re-assessment proceedings as held by the Supreme Court in ***CIT Vs. Sun Engineering Works Ltd. [reported in (1992) 198 ITR 297]***.

15. The learned Junior Standing Counsel has drawn our attention to the orders passed by the CIT(A) and submitted that it has been specifically noted that the re-assessment for the assessment year 1996-97 was annulled for not obtaining statutory permission of the higher authorities before issuance of the notice under Section 148 of the Act and that the Assessing Officer had made

the assessment for the year 1996-97 as substantive and the assessment for the year 2001-02 as protective. It is submitted that there was no decision on merits and that the issues, which were considered by the CIT(A), were not at all discussed in the earlier round of appeal proceedings and the stand taken in the present proceedings as confirmed by the Tribunal is perfectly legal and valid and prayed for confirmation of the common order passed by the Tribunal.

16. We have heard learned counsel for the parties and carefully perused the materials placed on record.

17. As held earlier, the sheet anchor of the argument of Mr.M.P.Senthil Kumar is by attaching finality to the protective assessment order dated 23.03.2004 for the assessment year 2001-02. It is submitted that in the said order, the Assessing Officer held that notwithstanding the stand taken on the issue of liability to capital gains, which were brought to tax in the assessment year 1996-97, the capital gains admitted by the assessee in the assessment year 2001-02 were assessed on protective basis. It is submitted that when the assessees challenged the re-assessment order for the year 1996-97 dated 23.03.2004 and the protective assessment for the year 2001-02 dated

23.03.2004 by way of appeal, the CIT(A), by a common order dated 27.08.2004 allowed the appeals and set aside the re-assessment proceedings dated 23.03.2004. The CIT(A), while concluding that the re-assessment proceedings dated 23.03.2004 for the assessment year 1996-97, were bad in law on account of technical non-compliance, confirmed the protective assessment for the year 2001-02 as a regular assessment and therefore, the re-opening cannot be done.

18. Though the submission of learned counsel for the assessees appears to be convincing at the first instance, on a closer scrutiny, the result to be arrived at is otherwise. In fact, the CIT(A), in the orders dated 30.11.2005, has elaborately considered these aspects while dealing with ground No.8 raised, in paragraph No.5 of the orders dated 30.11.2005. At this juncture, it will be worthwhile to take note of the following decision rendered by the CIT(A):

> *"8.1........In this connection, it has to be mentioned that during the course of the appeal proceedings in ITA Nos. 37 & 38/04-05 for the assessment years 1996-1997 and 2001-2009, vide orders dated 27.08.2004, the assessment for the assessment year 1996-1997 was annulled while holding that the assessment made for the assessment year 2001-2002 was a substantive one. In these orders, the year of taxability of the capital gains was not dealt with in detail because,*

the main contention raised by the appellant for the assessment year 1996-1997 was that the Assessing Officer had no jurisdiction to initiate proceedings u/s. 147 by issue of notice u/s. 148. On this ground of jurisdiction itself, the assessment made for the assessment year 1996-1997 was annulled and in that context, the assessment made by the Assessing Officer based on the return of income filed by the appellant HUF itself was held to be substantive because, the Assessing Officer considered the assessment made for the assessment year 2001-2002 as a protective one. The issue regarding chargeability fo the capital gains was not discussed in that appellate proceedings. The relevant portion of the appellate order dated 27.08.2004 is reproduced as under:

'In view of the foregoing discussions, it has to be held that the issue of notice u/s. 148 is not according to law and the further assessment proceedings based on that notice is ab initio void and the appellant's stand has to be upheld. Therefore, the impugned re-assessment order for the assessment year 1996-97 is liable to be quashed.'

'Since the assessment order itself is quashed for the assessment year 1996-97, the other issues raised by the appellant in the grounds of appeal for that year are not dealt with'.

"Now coming to the assessment year 2001-2002, it is the main plea of the appellant that the assessment

> *for the year should be made as substantive one and not on protective basis. By virtue of the fact that the re-assessment which according to the Assessing Officer was substantive for the assessment year 1996-97 had been annulled, the assessment for the assessment year 2001-2002 has to be held as substantive one'."*

19. After taking note of the common order passed by the CIT(A) dated 27.08.2004, it was held by the CIT(A) in the orders dated 30.11.2005 that the assessment for the year 2001-02, which was directed to be treated as substantive, was not on merits and it was only in the present appeals before the CIT(A), what was sought to be decided was as to the effective date of transfer. We have also gone through the order dated 23.03.2004 for the assessment year 2001-02 and we find absolutely no discussion on the merits of the matter. Therefore, there was no effective adjudication as to what would be the effective date of transfer while deciding the correctness of the re-assessment for the year 1996-97 while making protective assessment for the year 2001-02. Therefore, we fully agree with the view taken by the CIT(A) that there was no discussion on merits on the effective date of transfer. Further, the CIT(A), after elaborately considering the terms of agreement, was right in concluding that the transfer came to be actually completed during the

financial year 1999-2000 and consequently, the CIT(A) was right in holding that the entire capital gains relating to 40% of the undivided share of land were subjected to tax for the assessment year 2000-01. The Tribunal re-examined the factual position and pointed out that the assessees had never admitted the capital gains on sale of 40% of undivided portion of the land, against which, consideration was held to be 60% of the constructed area. After noting that the assessees had shown the capital gains on the basis of individual sale deeds executed in favour of the nominees of the developer, it was held that it cannot be stated that the assessment order stood merged with the appellate order because the said issue was never raised by the assessees in order to be decided by the appellate authority. We are not required to adjudicate this issue as no substantial question of law has been entertained with regard to Doctrine of Merger of orders.

20. Further, as rightly pointed out by Ms.V.Pushpa, learned Junior Standing Counsel, on facts, the assessees had been taking inconsistent stand and this has been clearly noted and highlighted by the Tribunal in paragraph No.22 of its order. The Tribunal, after referring to a decision of this Court in the case of ***R.Vijayalakshmi Vs. Appu Hotels Ltd [reported in (2002) 257***

ITR 4] and a decision of the Division Bench of the Bombay High Court in the case of ***Chaturbhuj Dwarkadas Kapadia Vs. CIT [reported in (2003) 260 ITR 491]***, held that the assessees had also taken a similar stand and resisted the effort by the department to levy capital gains on the said transaction in the assessment year 1996-97. Thereafter, now the assessees have taken a U turn. Further, the Tribunal noted that the assessees avoided a query from the Tribunal when they were asked to specifically explain as to when the transaction took place, i.e., whether in the assessment year 1996-97 or in the later years. Further, the Tribunal noticed the inconsistent stand that there is a submission that capital gains should have been assessed for the assessment year 1996-97 because transfer took place on 04.10.1995 itself, i.e. the date of the execution of the Development Agreement. Subsequently, the assessees took a stand that the transfer took place when the assessees actually executed sale deeds in various years in favour of the nominees of the developer. Thus, we fully agree with the finding of the Tribunal that the assessees did not come out clearly as to when the actual transaction took place.

21. Further, the learned counsel for the Revenue pointed out that the assessees, in their letter dated 01.02.2006 to the Assistant Commissioner of

Income Tax, Circle -XIV, Chennai, has taken yet another contrary stand by filing an application under Section 154 of the Act for the assessment year 2001-02 stating that such assessment should be rectified in line with the decision taken for the assessment year 2000-01.

22. As already held by us, the assessees cannot plead a case that there has been a change of opinion and that the rules of consistency had been violated. The CIT (A) has elaborately dealt with this aspect and we concur with the view taken by the CIT(A), which was confirmed by the Tribunal. Thus, for all the above reasons, we find that the Assessing Officer has not traveled beyond the reasons, for which, the assessment was re-opened and there is no contra view of the Assessing Officer for two assessment years i.e., 1996-97 and 2000-01 as it is reiterated that at no point of time, there was discussion on the merits of the matter as to what is the actual date of transfer. Furthermore, we have also brought out the factual position to show that the assessees were inconsistent in their stand at different point of time. Thus, for the above reasons, we are of the view that the decisions relied on learned counsel for the appelant can be of no assistance to the case of the assessees.

23. In the result, both the appeals filed by the assessees are dismissed and the substantial questions of law No.1 and 6 are answered against the assessees. Consequently, substantial questions of law Nos.2 to 5 are also answered against the assessees. No costs.

24. After we dictated the judgment, Mr.M.P.Senthil Kumar, learned counsel appearing for the appellants/assessees pointed out that in paragraph 30 of the common order passed by the Tribunal, the issue regarding double taxation was taken note of by the Tribunal by referring to paragraph 8.4 of the orders passed by the CIT(A) dated 30.11.2005 wherein a direction was issued to the Assessing Officer to modify the assessment orders for the years 1999-2000 and 2002-03 by deleting the sums added by way of long term capital gains and recompute the taxes payable for those years. After noting the said finding, the Tribunal held that the CIT(A) has already given directions to modify the orders for the assessment years 1999-2000 and 2002-03.

25. The learned counsel for the appellant/assessee would further submit that the Assessing Officer has not given effect to the order by interpreting the order of the CIT(A) which says 1999-2000 and 2002-03 instead of 1999-2000 to 2002-03 as held by the Tribunal.

26. It cannot be disputed by the Revenue that for all the years, the assessee has offered capital gains for taxation, which is from the assessment year 1999-2000 upto 2003-04 and in fact, these particulars are noted in the orders passed by the CIT(A) dated 30.11.2005. From paragraph 7.1 of the orders passed by the CIT(A), we find that the assessees offered the capital gains for taxation upto 2003-04. Therefore, the Tribunal, while granting the relief, should have granted relief to the assessee for the assessment years 1999-2000 upto 2003-04. Accordingly, the Assessing Officer is directed to give effect to the orders passed by the Tribunal by modifying the orders for the assessment years 1999-2000 upto 2003-04.

[T.S.S., J] [V.B.S., J]
30.07.2019

Index: Yes/No
Internet: Yes

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T.S.SIVAGNANAM, J.
and
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