

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.06.2019

CORAM :

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

Tax Case Appeal No.1986 of 2008

Shri.P.Madhusudhan,
"Ramya" F 1-02 III Street,
Anna Nagar East,
Chenna-600 102.

... Appellant

-vs-

The Assistant Commissioner of Income Tax,
Circle - XIII, Chennai-600 006.

... Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order dated 24.08.2007 made in I.T.A.No.114/Mds/2005 and 120/mds/2005 on the file of the Income Tax Appellate Tribunal Chennai 'B' Bench, Chennai for the assessment year 2001-2002, as against the order dated 29/10/2004 made in ITA Nos.39/04-05 on the file of Commissioner of Income Tax (Appeals)-XII, 121, Mahatma Gandhi Road, Chennai-600 034 as against the order dated 30/03/2004 on the file of Assistant Commissioner of Income Tax Circle-XIII, Chennai-6 in PAN/GIR/No. 61889-M for the Assessment Year 2001-2002.

For Appellant : Mr.M.P.Senthil Kumar

For Respondent: Mrs.S.Premalatha,
Standing Counsel

JUDGMENT

(Judgement of the Court was delivered by T.S.Sivagnanam, J.)

This appeal, by the assessee filed under Section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), is directed against the order dated 24.08.2007, passed by the Income Tax Appellate Tribunal "B" Bench, Chennai (for brevity, "the Tribunal"), in I.T.A.No.114/Mds/2005 for the assessment year 2001-2002.

2.At the time when the appeal was entertained by order dated 08.12.2008, four substantial questions of law were admitted.

3.Mr.M.P.Senthil Kumar, learned counsel appearing for the appellant/assessee submitted that there are certain typographical errors and this Court may consider in re-framing the substantial questions of law.

4.We have heard Mrs.S.Premalatha, learned Standing Counsel for respondent/Revenue on the above submission.

5.Accordingly, the re-framed substantial questions of law are as hereunder:-

"(i) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in interpreting the terms of development agreement and rejecting the contention that the entire transfer took place in an earlier year and no portion of capital gains is taxable this year.

(ii) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the cost of construction incurred by the developer should be adopted for the purpose of computing capital gains by ignoring the value agreed to between the assessee and the developer as accepted by the appropriate Authority of the Income Tax Department while granting No Objection Certificates for the transfer as per the Development Agreement?

(iii) 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 damages, entire deposit and the entire value of rent free accommodation provided by the developer is to be assessed as capital gains of this year?

(iv) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the appellant is not entitled to exemption U/s.54 of Income Tax Act, 1961?"

6.The assessee, Mr.P.Madhusudhan, is one of the 5 co-owners of the immovable property in Chennai. The assessee and the other co-owners entered into a development agreement with the builder on 27.03.1994. Under the said agreement, the assessee

and others agreed to transfer 47.5% undivided share in the land, in return, the developer agreed to build and handover 52.5% built-up area to the owners and deposit of Rs.15 lakhs to be returned within three months from the completion of the work.

7.The development agreement dated 27.03.1994 was filed before the Appropriate Authority of Income Tax Department requesting for No Objection Certificate in terms of Section 269-UL of the Act. The Appropriate Authority by order dated 22.06.1994 granted No Objection Certificate to transfer of the property indicated as per the agreement dated 27.03.1994 and as per the statement filed in Form No.37-I. Subsequently, another agreement was entered into with the developer on 24.05.1995 which pertains to a small piece of land adjoining to the property subject matter of development in the agreement dated 27.03.1994 and in the said second development agreement, the assessee and the other co-owners agreed to transfer 45% undivided share in the land, in return, the developer agreed to build and hand over 55% built-up area to the owners. This document was once again submitted before the Appropriate Authority, who by order dated 24.08.1995, granted No Objection Certificate for transfer of the property. In both the approvals granted by the Appropriate Authority, the apparent sale consideration which was agreed to was accepted, namely Rs.98,99,100/- and Rs.67,17,150/- respectively.

8.During the assessment year 2000-2001, the developer handed over the built-up area to the assessee and other co-owners and on account of a delay in handing over, the assessee and co-owners were paid damages, as agreed to in the development agreements.

9.In the assessment year 2001-2002, the developer nominated buyers for purchase of undivided share in the land in respect of nine flats which fall to the share of the developer which was executed by the assessee and other co-owners. The assessee filed return of income on 06.11.2011 admitting long term capital gains of Rs.88,12,774/- for the assessment year 2001-2002. The capital gains which was offered by the assessee was only in respect of the land proportionate to the nine flats which fell to the share of the developer under the development agreement. The return filed by the assessee was subject matter of scrutiny and the Assessing Officer proceeded on the basis that the entire undivided share of land was to be deemed as transfer having taken place this year and computed capital gains, accordingly. Further, the Assessing Officer adopted the cost of construction as Rs.817/- per sq.ft., incurred by the developer as sale consideration for transfer of undivided share. The assessee made a claim of exemption under Section 54 of the Act because, the assessee had transferred only land and not building and

thereby computed long term capital gain and short term capital gain.

10. Aggrieved by such assessment order, the assessee filed appeal before the Commissioner of Income Tax (Appeals)-XII, Chennai (for brevity, "the CIT(A)"), in I.T.A.No.39/2004-05. The CIT(A) passed an order partly allowing by holding that the long term capital gains are chargeable to tax in respect of sale of nine flats only at the rate of Rs.717/- per sq.ft., (reduced the rate by Rs.100/- than what was fixed by the Assessing Officer) and treated the whole of liquidated damages, deposits and rent free accommodation provided by the developer as capital gains. This was also adopted by the CIT(A) for the flats sold by the assessee. The CIT(A) confirmed the denial of exemption under Section 54 of the Act and also rejected the alternate submission by the assessee with regard to entitlement under Section 54F of the Act.

11. Aggrieved by the same, the assessee preferred appeal before the Tribunal, which was dismissed by order dated 24.08.2007, which is impugned before us.

12. The first question to be considered is whether the Tribunal was right in interpreting the terms of development agreement and rejecting the contentions that the entire transfer took place in an earlier year and no portion of capital gains is taxable in the year under consideration, viz., 2001-2002. The Assessing Officer as well as the CIT(A) and the Tribunal while interpreting the terms and conditions of the development agreement, referred to clause no. 21 of the agreement and proceeded to hold that the developer was allowed to enter into the property as the licensee of the owner only for the purpose of carrying out the development of the said property by providing alternate accommodation to the assessee and the assessee has not given absolute possession to the developer and the developer had no absolute and complete control over the property. Further, it held that the developer is only a licensee of the assessee to carry out the construction activities and to get permission from various authorities for construction and the transfer of possession took place only when the assessee got registered the undivided share of land to the extent of 6175 sq.ft., to the nominee of the developer and this falls in the assessment year 2001-02, the year in which the assessee has given possession of the property to the nominee of the developer. Thus, the Tribunal held that the development agreement is not relevant to decide the transfer of property.

13. To test the correctness of the finding, we may straightaway refer to the definition of "transfer" as defined under Section 2(47) of the Act, which reads as follows:-

"Section 2(47):-

.....
.....

Section 2(47)(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)."

14. We need to see as to whether the nature of transaction between the assessee and the developer would fall within the definition of "transfer" as defined under sub-Clause (v) of Section 2(47) of the Act. In terms of the above provision, 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 (hereinafter referred to as "the TP Act"), would qualify for a transfer. Section 53A of the TP Act deals with "part performance" and it reads as follows:-

"Section 53A. Part Performance.- Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed thereof by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

15. In terms of the above provision, if a person contracts to transfer for consideration any immovable property in writing, from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, then it would qualify for part performance of a contract.

16. The Tribunal was of the view that the assessee was only a licensee. We do not agree with the said finding on account of a crucial fact which cannot be disputed by the Revenue, viz., the No Objection Certificate issued by the Appropriate Authority under Section 269-UL of the Act. The approval clearly states the extent of land which has been agreed to be transferred.

17. So far as the development agreement dated 27.03.1994 is concerned, the extent of land agreed to be transferred is 47.5% of undivided share in 18675 sq.ft., the extent of built-up area which was agreed to be transferred measure 6500 sq.ft. The apparent sale consideration for the land and building was Rs.98,99,100/- which was approved by the Appropriate Authority.

18. So far as the second development agreement dated 24.05.1995 is concerned, the extent of land agreed to be transferred was 3997 sq.ft, i.e., 45% of undivided share in 8882 sq.ft. However, in the said agreement, there was no building. These agreements were considered by the Appropriate Authority and noting there is an agreement to transfer property with reasonable certainty and on being satisfied about the apparent sale consideration, no objection was granted. Therefore, it would be incorrect to state that the development agreement do not contemplate transfer of immovable property, but we may say that there is a clear certainty in the extent to be transferred. Therefore, in our considered view, the transaction would continue to qualify under the definition of 'transfer' as defined under Section 2(47) (v) of Act.

19. In the light of the above discussion, the order passed by the Tribunal requires to be set aside and the first substantial question of law is answered in favour of the assessee.

20. With regard to the second substantial question of law regarding the value of cost of construction, the appellate authority reckoned the delay in completing the project, obtained information from the developer and uniformly fixed the cost at Rs.717/- per sq.ft., for both the agreements as against Rs.450 per sq.ft., and Rs.550/- per sq.ft., respectively, as mentioned by the assessee.

21. In our considered view, in terms of clause no. 10 of the development agreement dated 27.03.1994, the cost of construction has already been crystallized at Rs.450/- per sq. ft., and in respect of the development agreement dated 24.05.1995, the cost has been fixed at Rs.550/- per sq.ft. The Assessing Officer uniformly fixed Rs.817/- per sq.ft., for both the agreements. However, the CIT(A) reduced it and fixed Rs.717/-. In our considered view, in the absence of any material to doubt the cost of construction, which was consciously agreed to between the parties, question of adding the damages paid by the developer on account of non fulfilment of the condition in the agreement with regard to the time limit of handing over the possession of the constructed area can in no way increase the cost of construction at the hands of the appellant/assessee. Therefore, the finding in this regard requires to be set aside and accordingly, it is held that the cost of construction as mentioned in the agreement, namely, Rs.480/- and Rs.550/- respectively, are confirmed and the second substantial question of law is answered accordingly.

22. The next question is whether the Tribunal was right in holding that the entire damages, deposit and rent free accommodation should be assessed as capital gain. The development agreement makes it abundantly clear and the first of the covenants states that the developer shall provide free of rent for the owners alternate residential accommodation. Admittedly, rents were paid by the developer, rental deposit was paid by the developer and the agreement does not provide for any adjustment of these payments as against the consideration payable under the development agreement. Therefore, the Tribunal committed an error in including the same to be assessed as capital gains. Accordingly, this finding is set aside and the substantial question of law is answered in favour of the assessee.

23. This leaves us with the last substantial question of law as to whether the assessee is entitled to exemption under Section 54 of the Act.

24. The Tribunal rejected the claim of the assessee on the ground that the transfer as per the development agreement dated 27.03.1994 was only land and not building and therefore, the claim under Section 54 of the Act is not sustainable. To be entitled to the relief under Section 54 of the Act, the assessee needs to establish that he transferred land and building.

25. So far as the development agreement dated 27.03.1994 is concerned, the schedule to the agreement clearly contemplates transfer of not only the land, but also building thereon. This

is evidently clear from the order of the Appropriate Authority dated 22.06.1994, which shows that the extent of building is 6,500 sq.ft. This document of transfer was accepted and No Objection Certificate was issued by the Appropriate Authority. Therefore, there could be no better document to establish that what was transferred was not only the land, but also that the building standing thereon.

26. So far as the development agreement dated 24.05.1995 is concerned, we find there is no building thereon and in fact, a readjustment of schedule A of the property has been mentioned in the agreement which in fact, is the schedule property in the development agreement dated 27.03.1994.

27. Thus, for the above reasons, we are of the considered view that the assessee is entitled to exemption under Section 54 of the Act. Accordingly, the substantial question of law is answered in favour of the assessee.

28. In the result, this tax case appeal is allowed and the substantial questions of law are answered in favour of the assessee. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1. The Assistant Commissioner of Income-tax,
Circle-XIII, Chennai-6.
2. The Commissioner of Income-tax (Appeals)-XII,
121, Mahatma Gandhi Road, Chennai-600 034.
3. The Income Tax Appellate Tribunal 'B' Bench, Chennai.

+1cc to Mr.M.P.Senthilkumar, Advocate Sr.47181
+1cc to Mrs.S.Premalatha, Advocate Sr.47390

T.C.A.No.1986 of 2008

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srg 13/08/2019