

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.09.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE KRISHNAN RAMASAMY

T.C.A.No.788 of 2016

Commissioner of Income Tax
Media Circle, Chennai ...Appellant/Respondent

vs.

M/s.Emgeeyar Pictures P.Ltd.,
Flat No.3B, 'Doshi Residency' Complex,
Old No.9, New No.17,
Dhandapani Street,
T.Nagar, Chennai 17 ...Respondent/Appellant

Appeal filed against the order of the Income Tax Appellate
Tribunal Madras "C" Bench dated 18.03.2016 in ITA
No.992/Mds/2015.

Appeal against the order dated 10.03.2015 made in I.T.A.No.
00CIT(A)-14/2013-2014, I.T.A. No. 96/2006-2007 on the file of
the Commissioner of Income Tax (Appeals)-14, VI Chennai, PAN
No. AABCE1440J Assessment Year 2000-2001, 2001-2002 order dated
10.03.2015& 30.03.2006.

Appeal against the order dated 25.03.2013 on the file of the
Deputy Commissioner of Income Tax Media Circle-I Chennai-17 PAN
No. AABCE1440J Assessment year 2001-2002.

Appeal against the order dated 31.05.2010 made in I.T.A.
Nos. 327 & 328/mds/2010 on the file of the Income Tax Appellate
Tribunal Chennai Bench 'D' Chennai PAN No. AABCE1440J Assessment
year 2003-2004 and 2004-2005 order dated 18.02.2011.

Appeal against the order dated 31.05.2010 made in I.T.A. No.
327 & 328/mds/2010 Assessment year 2003-2004 & 2004-2005 on the
file of the Income Tax Appellate Tribunal, Chennai Bench'D'
Chennai PAN No. AABCE1440J

Appeal against the order dated 22.07.2008 made in I.T.A.No.
226/2006-2007 on the file of the Commissioner of Income Tax

(Appeals)VI Chennai PAN No. AABCE1440J Assessment year 2004-2005

Appeal against the order dated 22.07.2008 made in I.T.A. No. 98/2006-2007 on the file of the Commissioner of Income Tax (Appeals)VI, Chennai order dated 30.03.2006.

Appeals against the order dated 28.12.2006 on the file of the Assistant Commissioner of Income Tax Media Circle I, Chennai PAN No. 10001-E/AABCE1440J Assessment year 2004-2005.

Appeal against the order dated 30.03.2006 on the file of the Assistant Commissioner of Income Tax, Media Circle I, Media Range, Chennai 34.

Appeal against the order dated 30.03.2006 on the file of the Deputy Commissioner of Income Tax, Media Circle I, Chennai 34 order dated 30.04.2006.

For Appellant : M/s.V.Pushpa
Junior Standing Counsel
For respondent : Mr.Ashok Pathy
For Pass Associates

JUDGMENT

(Delivered by DR.VINEET KOTHARI, J.)

The present appeal filed by the Revenue for AY 2001-02 presents a piquant and not a very happy dealing of appeals at the level of Income Tax Appellate Tribunal, arising out of the order of Tribunal dated 18.03.2016 by a majority of 2:1, upon a difference of opinion in the Judicial Member and the Accountant Member of the Tribunal.

2. The case has a little chequered history and it is briefly stated as under.

3. The Assessee M/s.Emgeeyar Pictures Private Limited entered into a Joint Development Agreement with another firm M/s.Doshi Builders in December 2000, for development of a property situated at No.9, Dhandapani Street, T.Nagar, Chennai, under which agreement, the Assessee got 60% of the constructed property viz., 9 flats amounting to 17442 sq.ft., each flat measuring 2010 sq.ft. inclusive of proportionate share in common area and the sale of such flats was effected by Assessee in the month of March 2003, wherein two flats were transferred in favour of the company's Director viz., Mrs.Nirmala Ravindran and the other flats were sold to other persons in the relevant financial years 2003-04 and relevant for AY 2003-04 and AY 2004-05.

4. Since apparently no taxable event for imposing capital gains tax under the head 'Capital Gains' arose in the month of

December 2000, when Joint Development Agreement was executed, the question of taxability on the 'Capital Gains' arose in the AY 2003-04 and AY 2004-05, when sale of flats took place.

5. Against the order of the learned Commissioner of Income Tax (Appeals), upholding the imposition of capital gains tax, the matter was taken up by the Assessee before the learned Income Tax Appellate Tribunal for these two Assessment Years, viz., AY 2003-04 and AY 2004-05, which came to be disposed of by the "D" Bench of the learned Income Tax Appellate Tribunal on 31 May 2010. It appears that before the said Bench of learned Tribunal, the Assessee took a somersault and changed its stand and urged before the Tribunal that since J.D. Agreement was entered only on 25 December 2000 and possession of the property was also handed over to M/s.Doshi Builders, the 'Capital Gains' tax, if any, could be assessed only for the previous AY 2001-02 and not in the Assessment Years involved before the Tribunal viz., AY 2003-04 and AY 2004-05, even though no sale of flats had taken place in the year relevant to AY 2001-02. The challenge to levy of interest under section 234A, 234B and 234C of the Act was also raised but the learned Tribunal (per Sri Hari Om Maratha and Sri Abraham P. George) in its impugned order accepted the said change of stand of the Assessee and held that no 'Capital Gains Tax' was liable to be taxed at the hands of the Assessee in the Assessment Years AY 2003-04 and AY 2004-05 on the sale of flats by the Assessee company and thus, the appeal of the Assessee came to be allowed.

6. The relevant portion of the order dated 31.05.2010 is quoted below for ready reference:-

2. Briefly stated, the facts of the case are that the assessee, for Assessment Year 2003-04 did not file any return of income. A search u/s 132 of the Income tax Act, 1961 (hereinafter referred to as the Act' for short) was conducted in the case of Dr. Rajdurai wherein it was found that he was a tenant of Flat No.3A, Doshi Apartments, No.9 Dhandapani Street, T. Nagar, Chennai-17, owned by the assessee. consequently, after recording reasons u/s 148, notice was issued and the re-assessment was completed on 30.3.2006 at a total income of Rs. 27,00,190/-. Against this, the assessee preferred appeal. The assessee is a limited company and was owner of 72 grounds (18,000 sq ft) of land. It had entered into a Development agreement on 25 December 2000 with a builder. The assessee has sold part of the 3 built-up area together with

proportionate undivided share of land during the relevant previous year. The assessee has declared the consideration as declared under the Deed of Sale and Construction Agreements. While computing capital gains, the assessee has adopted a value of Rs. 217.80 per sq ft as the fair market value as on 1 April 1981 as against which the Assessing Officer has finalized the assessment fixing the consideration for sale of land u/s 50C by adopting the guideline value and fixing the fair market value as on 1.4.1981 based on guideline value at Rs. 25 per sq ft. He has also disallowed the business expenditure claimed by the assessee during the year with the observation that no business was carried on by the assessee during the relevant year. Thus, two issues were raised before the Id. CIT(A) - (1) challenged the computation of capital gains; (Not the levy of Capital Gains Tax itself) and (i) Disallowance of business expenditure. The Id. CIT(A) has directed to adopt a value of Rs. 143/- per sq ft as on 1.4.1981 as against Rs. 217.80 adopted by the assessee and Rs. 25/- per sq ft adopted by the Assessing Officer. The Id. CIT(A) has also disallowed the claim of business loss by not accepting that there was a temporary lull in the business of the assessee and now the assessee has filed appeal by taking the following grounds in Assessment Year 2003-04.

"1. The order of the Id. CIT(A) is contrary to law facts and circumstances of the case and opposed to principle of legitimate expectation.

2. Capital Gains:

(a) The Id. CIT(A) fundamentally failed to appreciate that no capital gains is taxable in the year of account since the appellant had entered into a development agreement on 25th day of December 2000 and right accrues on that date without prejudice. (This ground was never raised before CIT (Appeals)).

(b) The Id. CIT(A) fixing the fair market value as at 1.4.1981 at Rs. 143/- per sq ft as against Rs. 217.80 per sq ft claimed by the appellant on scientific basis. (c) The Id. CIT(A) erred in confirming guideline value for the land and a building sold on the basis of guideline value in terms of section 50C of the Act.

3. Disallowance of business loss

The Id. CIT(A) ought to have allowed the business loss claimed by the appellant since the business loss could be claimed interest even in a situation there exists "lull" in a business.

4. The Id. CIT(A) ought to have appreciated that the Assessing Officer erred in charging interest u/s 234A, 234B and 234C of the Act."

4. It was argued by the Id.AR that no capital gains is taxable in the year of account (sic) since the assessee had entered into a development agreement only on 25.12.2000 and rights accrued on that date only. It was further argued that possession had already been handed over on that date. So, after relying on various decisions, it was claimed that no capital gains was taxable in Assessment Year 2003-04. The Id.AR has also disputed the adoption of fair market Value at Rs. 143/- per sq ft as against Rs. 217.80 per sq ft adopted by the assessee. With regard to disallowance of business loss, it was argued that there was not a permanent stoppage of business but it was only a temporary lull whereby the business could not be done during the year under consideration. With regard to the last ground i.e charging of interest u/s 234A, B & C, consequential relief was claimed.

5. On the other hand, the Id.DR has heavily relied on the order of the Id. CIT (A) and has reiterated all the reasons given by him in arriving at his conclusion.

6. After hearing both sides, it was found for a fact with reference to copy of

the agreement which was placed before us and the same was also available before the Assessing Officer and from which it is established that the assessee had entered into a development agreement on 25.12.2000 and had handed over the possession of the property to the builder on that very date. Reference was made to page 62 to 66 of the paper book filed by the ld.AR to demonstrate that no such capital gains actually accrued to the assessee during the year. Reliance was placed on various decisions including that of Chennai Bench and the Hon'ble Madras High Court wherein it has been held that at the time of delivery of possession to the vendor and having received full consideration as per the terms of the agreement transfer was complete on delivery of possession and capital gains arose in that relevant year. We have gone through the decision of Hon'ble Madras High Court in the case of D Kasturi vs CIT, 251 ITR 532, and other decisions whose ratio are on the line and the copies of the orders/judgments are annexed in the assessee's paper book. Having established the fact that transfer of the asset has already taken place in the year 2000, capital gains cannot be taxed in Assessment Year 2003-04 and 2004-05.

(sic ! Tribunal wholly missed the point here that the Capital Gains Tax Liability on transfer/sale of flats was being considered by Tribunal and not transfer of land under J.D.Agreement).

Therefore, we have to allow Ground No.2 first part and thereafter the adoption of fair market value as on 1.4.1981 either at Rs. 143/- per sq ft or Rs. 127.80 per sq ft remains only of academic interest.

7. A Miscellaneous Petition was immediately filed by the Revenue, before the learned Tribunal, inter alia contending that the learned Commissioner of Income Tax (Appeals), for AY 2003-04 did not deal with the said change of stand of the Assessee as only the question on ascertaining the Fair Market Value for computing Capital Gains Tax Liability was raised by the Assessee. Therefore, the matter ought to have been remanded back by the learned Tribunal instead of allowing the appeal of the Assessee vide order dated 31 May 2010 and since the Assessee had

itself admitted 'Capital Gains Tax' liability for AY 2003-04 and AY 2004-05, in the Return of Income filed by it and was agitating only the question of its computation on the basis of Fair Market Value, the learned Tribunal could not have held that no capital gains tax was attracted in these Assessment Years AY 2003-04 and 2004-05. The said Miscellaneous Petition, however, came to be rejected by the learned Tribunal vide order dated 18 February 2011 by a cursory order.

8. While the assessment for AY 2001-02 was taken up under Section 147 r/w 148, 150 and 254 of the Income Tax Act by notice under Section 148, dated 10.06.2011, an reassessment order was passed by the Assessing Authority on 25 March 2013 for AY 2001-02, imposing the capital gains tax liability on the Assessee, on such sale of flats. However, the First Appeal was dismissed by the Commissioner of Income Tax (Appeals) and the matter was taken up by the Assessee before the learned Tribunal and it was contended by the Assessee that reassessment for AY 2001-02 had already become time barred as per Section 149 of the Act and Section 150 of the Act did not save the limitation for the Assessing Authority for AY 2001-02.

9. Vide order dated 21 July 2015, both the learned Members of the Tribunal differed in their respective opinion on the issue of limitation for reassessment for AY 2001-02 to bring to tax the said sale of flats by the Assessee and thus, on account of such difference of opinion, the matter was referred to the Third Member viz., Vice President of the learned Income Tax Appellate Tribunal, on the issue of limitation in issuance of reassessment notice. The Third Member came to dispose of the matter vide order dated 26.02.2010 and agreed with Judicial Member. While Vice President (Mr.D.Manmohan) and Judicial Member (Mr.N.R.S.Ganesan) held the reassessment for AY 2001-02 to be time barred, the Accountant Member (Mr.Chandra Poojari) held it to be within limitation.

10. We find from these orders that even in the questions referred to the learned Third Member, the two members (Mr.N.R.S.Ganesan, Judicial Member and Mr.Chandra Poojari, Accountant Member), differed and framed different questions.

11. The questions as referred by them and as noted by the Third Member, the Vice President (Sri.D.Manmohan), are quoted below for ready reference :-

"On account of difference of opinion between the learned Accountant Member and the learned Judicial Member, the matter was referred to the Hon'ble President for nominating a Third Member under section 255

(4) of the Income Tax Act, 1961, to resolve the points of difference. It may be noted that even while framing the points of difference, there was a difference of opinion. According to the learned Judicial Member, (Sri. N.R.S.Ganesan) the following questions need to be resolved:

(1) In the facts and circumstances of the case, in the absence of any specific finding/direction to assess the income for the Assessment Year 2001-02 in the order of this Tribunal dated 31 May 2010, can there be an inference/ presumption, especially, when no proceeding for the Assessment Year 2001-02 was before the Tribunal, as held by Apex Court in CIT v. Green World Corporation (2009) 314 ITR 81?

(2) In the facts and circumstances of the case, when admittedly, the assessment for the Assessment Year 2001-02 was not subject matter of appeal before this Tribunal can the observation, if any, made by the Tribunal, be considered as finding/ direction to assess the income for the Assessment Year 2001-02 in view of the decision of this Tribunal in Sun Metal Factor (I) (P.) Ltd. v. ACIT (2010) 124 ITD 14, especially when this Bench of the Tribunal in 'Sriram Capital Ltd. V. DCIT in I.T.A.Nos.512 & 513/Mds/2015 dated 26.06.2015 (the very same Ld. Accountant Member is a party/author) found that the Appellate authority cannot travel beyond the Assessment Year in appeal and expunge the directions (to refer p.63 & 64 at para 19.3 of the Tribunal order in I.T.A. Nos.512 & 513/Mds/2015 dated 26.06.2015)?

(3) In the facts and circumstances of the case, whether the reopening made under Section 147 of the Act and consequent

order of assessment are barred by limitation?

2. On the other hand, the learned Accountant Member (Sri.Chandra Poojari), formulated the following three questions while referring the matter to the Hon'ble President u/s 255(4) of the Act:

(1) Whether, on the facts and circumstances of the case, the notice issued is barred by limitation as provided under sections 149(1)(b), 150(1) and 150(2) of the I.T. Act, 1961, as the same has been issued in consequence to the order passed by the Tribunal for the Assessment Years 2003-04 & 2004-05?

(2) Whether, on the facts and circumstances of the case, the ratio laid down by the Supreme Court in the case of CIT vs. Green World Corporation (2009) 314 ITR 81 is applicable to the present case which is delivered on different context?

(3) Whether, on the facts and circumstances of the case, the ratio laid down by the Chennai Bench of the Tribunal in the cases of Sun Metal Factor (I) (P.) Ltd. vs. ACIT (2010) 124 ITD 14 and Sriram Capital Ltd. vs. DCIT in ITA Nos.512 & 513/Mds/2015 dated 26.6.2015 is applicable to the facts of the present case, as the above orders are delivered on different context?

12. On account of such difference in the referred questions themselves, the learned Third Member reframed the following two fresh questions only after hearing the learned counsel for both the parties, for the same.

1. Whether the notice issued under Section 148 r.w.s.150(1) of the Act dated 10.06.2011 for the Assessment Year 2001-02 is based on any finding or direction issued by the ITAT In I T. A. Nos. 327 & 328/Mds/2010? (decided on 31.05.2010)

2. In the event of holding that there is a finding or direction, whether the

notice issued u/s 148 of the Act dated 10.6.2011 is barred by limitation or not?

13. The Third Member, however, agreed with the Judicial Member and held that the reassessment for AY 2001-02 to bring to tax the Capital Gains was barred by limitation.

14. Para 17 of the order passed by the Third Member (Vice President Shri D.Manmohan) is quoted below for ready reference :-

17. I have carefully considered the rival submissions and perused the record. As could be noticed from the observations made by the Tribunal, while disposing of the appeals for Assessment Years 2003-04 and 2004-05, a casual observation was made to deal with the issue before them as to whether the capital gains is attracted in assessment year 2003-04 and 2004-05; but there is no specific finding or direction that it is assessable to tax in assessment year 2001-02. Even if it is assumed that there is a finding or direction, in my humble opinion, the Hon'ble Madras High Court, in the case of M/s Goldmine Investments (supra), has considered an identical issue wherein it was held that in respect of any assessment year wherein further proceedings are barred by limitation, the same cannot be reopened merely by virtue of an opinion expressed by any higher forum at a later date i.e. subsequent to the date of limitation period. In fact, the judgments of the Apex Court are also on the same lines. Having regard to the circumstances of the case, I am of the view that the reopening assessment is bad in law since the proceedings u/s 148 of the Act are sought to be initiated by issuing a notice after the period of limitation. In the light of the above findings, the reframed questions are answered as follows:

(1) The notice issued u/s 148 r.w.s 150 of the Act cannot be said to be based on any finding or direction issued by the ITAT in & by the ITAT in I.T.A. Nos 327 & 328/Mds/2010.

(2) Even otherwise the notice issued u/s 148 of the Act is barred by limitation.

18. Now, the case will be placed before the Regular Bench for passing a concluding order in accordance with the majority view.

15. Accordingly, on the ground of limitation for AY 2001-02, the Tribunal held in favour of the Assessee by a majority of 2:1 that the reassessment could not be made for this year to bring to tax, the said transaction of sale of flats by the Assessee.

16. It is also brought to our notice that the Tax Appeals filed by the Revenue for the Assessment Years AY 2003-04 and AY 2004-05 viz., T.C.A.Nos.1230 and 1231 of 2010, however, were withdrawn by the Revenue on 28.01.2016 on account of low tax quantum below Rs.20 lakhs as per Central Board of Direct Taxes Circular No.21/2015 dated 10.12.2015, laying down litigation policy that if the Revenue stake is than the prescribed limit of Rs.20,00,000/-, vide order dated 28.01.2016, the appeals filed in High Court may be withdrawn, leaving the questions involved open for consideration.

17. Thus these appeals for AY 2003-04 and AY 2004-05 as decided by the learned Tribunal holding that no capital gain tax was leviable in these years became final with the withdrawal of the appeals by the Revenue in High Court under Section 260A, which were dismissed as withdrawn vide order dated 28.01.2016 passed by this Court before the filing of the present appeal, TC.A.No.788 of 2016 for AY 2001-02, which was filed on 26.08.2016. However, those orders of Tribunal could not be said to have merged with the order of High Court dated 28.01.2016, permitting such withdrawal of appeal as per CBDT Circular and leaving the questions open for consideration.

18. The present appeal was thereafter filed before this Court on 26 August 2016, for AY 2001-02, raising the following substantial questions of law, for our consideration.

1. Whether the notice issued u/s 148 r.w.s. 150(1) the Act dated 10.6.2011 for the assessment year 2001-02 is based on any finding or direction issued by the Income Tax Appellate Tribunal in ITA Nos.327 & 328/Mds/2010?

2. Whether on the facts and circumstances the case the Tribunal was right and justified in holding that the notice u/s 148 was barred by limitation without noting that the time limit was available to issue such notice in view of the provisions contained in section 150(2) of the Income Tax Act.

3. Whether on the facts and circumstances of the case the Tribunal erred in holding that notice issued u/s 148 is

beyond the time limit specified in section 149 overlooking the provisions contained in section 150 which begins with non obstante clause?

4. Whether on the facts and in the circumstance of the case the Tribunal failed to note that the order which is the subject matter of appeal order dated 31.5.2010 was made on 30.3.2006 (AY 2003-04) and on 28.12.2006 (AY 2004-05) and at that point of time, time limit for re-opening of AY 2001-02 was very much available that is up to 31.3.2008.

5. Whether on the facts and circumstances of the case the Tribunal failed to see the applicability of section 150(2) whereas the said sub-section speaks about the order which is subject matter of appeal that is the assessment orders dated 30.3.2006 (AY 2003-04) and 28.12.2006 (AY 2004-05) which were subject matter of Tribunal order and the Assessing Officer had time to issue notice u/s 148 of A.Y. 2001-02 on such date?

19. When the present appeal was taken up today by us for admission, the learned counsel for the Assessee, Mr.Ashok Pathy, submitted that even the present appeal is liable to be withdrawn by the Revenue, as the tax effect in the present case is also less than the prescribed limit which is now Rs.One Crore as per the Central Board of Direct Taxes vide Circular No.17/2019 dated 8 August 2019. However, Mr.Swaminathan, learned counsel for the Revenue submitted that he has instructions to argue the matter on merits and he is not instructed to withdraw the present appeal and therefore, he may be permitted to make submissions on merits.

20. Since withdrawal of the appeal is a matter to be decided by the party itself, the Court cannot naturally insist upon the withdrawal of the appeal and therefore, we have allowed the learned counsel for the Revenue and the learned counsel for the Assessee to address the Court on the merits of the case also.

21. Mr.M.Swaminathan, learned Senior Standing Counsel for the Revenue assailing the impugned orders of Tribunal both for AY 2001-02 and AY 2003-04 and AY 2004-05, urged that by the two sets of orders passed by the Tribunal for these years, the Assessee will go away Scot Free without any tax imposition under the head 'Capital Gain' despite its own admission of such

Capital Gains Tax Liability, in the return of income filed for AY 2003-04 and 2004-05. He submitted that by a change of stand before the learned Income Tax Appellate Tribunal in the appeals for AY 2003-04 and AY 2004-05, which was decided on 31 May 2010, though this issue raised was only of Fair Market Value and not of the Capital Gains Tax Liability itself, the Assessee got the relief on a wholly wrong premise before the learned Tribunal who held that no capital gain tax liability was attracted in AY 2003-04 and AY 2004-05, whereas the sale of flats had taken place only in March 2003 and thereafter, while on the other hand, for AY 2001-02, by raising the ground of limitation for invoking the reassessment proceedings, to bring to tax the said transactions in that year also, the Assessee succeeded before the learned Tribunal and despite the difference of opinion in the Members of Tribunal and therefore, the Revenue is constrained to argue the present appeal for AY 2001-02 on merits and submit before the Court that the Assessee, by this devious method can go Scot free or tax free on the taxable event which had admittedly had taken place in the present case and on the own admission of the Assessee itself in the Returns filed by it, the 'Capital Gains Liability' was admitted by the Assessee and the only issue was raised about Fair Market Value to be adopted for computing the capital gains tax liability for AY 2003-04 and AY 2004-05.

22. Per contra, the learned counsel for the Assessee Mr. Ashok Pathy submitted that the learned Tribunal was justified in holding that the reassessment could not be made for AY 2001-02, as there was no specific direction of the learned Tribunal in the order dated 31 May 2010, to levy Capital Gains Tax in AY 2001-02, while they dealt with the appeal for the AY 2003-04 and AY 2004-05 and therefore, subsequently, the learned Tribunal, including the Third Member opinion, had rightly held that the assessment was time barred for AY 2001-02, under the impugned reassessment notice under Section 148 of the Act issued on 10.06.2011.

23. This is how a Catch 22 situation has arisen in the present case and despite the admission of the capital gain tax liability by the Assessee before the Revenue authorities, where it was raising the question only on the Fair Market Value to be taken as the sale value on the sale of flats by the Assessee, which the Assessee secured under the Joint Venture Agreement with M/s. Doshi Builders, only on the technical ground of limitation, the Assessee in the present AY 2001-02 seeks withdrawal of the present appeal by the Revenue on the ground of Revenue stakes involved and put an end to the matter for Assessment Year, AY 2001-02 also.

24. Having heard the learned counsel for the parties and

upon perusal of records, we are not inclined to accept the submissions made by the learned counsel for the Assessee, Mr.Ashok Pathy. On the contrary, we deprecate the change of stand by a complete 'U' Turn taken by the Assessee before the learned Tribunal while arguing the appeals for AY 2003-04 and AY 2004-05, which resulted in a completely favourable order to them on 31 May 2010. In our considered opinion, the learned Tribunal completely fell into error in passing the order dated 31.05.2010 and holding that no Capital Gains Tax was leviable in AY 2003-04 and AY 2004-05 and missed the basic facts altogether that they were dealing with Capital Gains Tax Liability in respect of sale of flats by Assessee Company and not on the transfer of land for Joint Development in December 2000.

25. We are rather pained by the manner in which the learned Tribunal dismissed even the Miscellaneous Petition also filed by the Revenue, despite bringing the said mistake to the notice of the learned Tribunal, about the said illegal and mischievous change of stand by the Assessee that sale of flats did not attract 'Capital Gains Tax Liability' for AY 2003-04 or AY 2004-05 but for AY 2001-02 only. Having not raised this issue before the learned CIT (Appeals) who passed the order dated 22.07.2008, for AY 2003-04 and AY 2004-05, the Assessee could not have taken this stand before the Tribunal and the learned Tribunal instead of remitting the matter back to learned CIT (Appeals), chose to grant the complete relief to the Assessee on this ground alone, and even dismissed the Miscellaneous Petition Nos.173 and 174/Mds/2010 filed by the Revenue on 27.10.2010 in a quick response, on 18.02.2011. The said order dated 18.02.2011 rejecting the Miscellaneous Petition filed by Revenue is quoted below :-

PER HARI OM MARATHA, JUDICIAL MEMBER:

These miscellaneous petitions have been filed by the Revenue in respect of the Tribunal order dated 31.5.2010 in S.P No 20/Mds/2010 & ITANO 327 & 328/Mds/2010. for assessment years 2003-04 and 2004-05.

2. The Revenue seeks the recall of the entire order for fresh consideration. The reasons for filing these petitions u/s 254 (2) have been mentioned by the Revenue as under:

"1. From the order of the CIT (A) in Income-tax Act, 1961 No.226/06-07 dated 22.07.2008 it is seen that the issue of taxability of capital gain in the year of account was not adjudicated by the CIT(A). Hence,

the Hon'ble Tribunal erred in admitting this issue instead of remanding it back to the CIT(A).

2. The assessee on its own admitted capital gains during the AY 2003-04 and 2004-05 in the return of income filed by it. The assessee has only challenged the adoption of guideline value as Fair Market Value of the property @ Rs.85 per sq ft. decided by the Hon'ble ITAT 'D' Bench vide order in Income tax Act, 1961 No 2196/Mds/08 dated 26.06.2009 and not the taxability of capital gains. Hence, the assessee cannot claim any grievance against its own admission.

3. From the perusal of the assessment order it is seen that though the agreement for development of the property was entered into with builders during the F.Y 2000-01 the undivided share of land (USL) was transferred to the purchaser during the month of March 2003 and capital gains arising out of its transfer was assessed during the AY 2003-04."

3. We have heard the rival submissions. The Id DR has repeated the reasons taken in the petition, but the Id AR has objected to the recall of the order on the ground that these miscellaneous petitions, if allowed, would amount to review of the Tribunal order which is not permissible in law. After considering the rival submissions in the light of the record, we are also of the considered opinion that these petitions cannot be allowed because the sheer perusal of the grounds mentioned in these petitions evince that the petitioner wants us to re write the order by way of review which is not permissible u/s 254(2) of the Act. Consequently, there being no merit in these miscellaneous petitions, the same stand dismissed.

26. What was obviously an error in fact, was refused to be corrected by Tribunal, by holding it to be an impermissible review thus. We cannot find a better case in rectification of mistake by Tribunal absolutely permissible under Section 254(2) of the Act.

Section 254(1) and (2) of the Act is quoted below for ready reference :-

Orders of Appellate Tribunal.

254. (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(1A) ...

(2) The Appellate Tribunal may, at any time within [six months from the end of the month in which the order was passed], with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section(1), and shall make such amendment, if the mistake is brought to its notice by the Assessee or the (Assessing Officer) :

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard:

[Provided further that any application filed by the Assessee in this sub-section on or after the 1st day of October 1998, shall be accompanied by a fee of fifty rupees].

27. The power under Section 254(2) also gives power to amend the order for rectification of mistake. The Proviso further provides for amendment to be made after giving opportunity of hearing to Assessee, in case the amendment of order will increase the tax liability of Assessee. Therefore, the scope of Section 254(2) is much wider and the learned Tribunal obviously fell in error in holding that it had no power to review or recall. If there is a mistake apparent, the Tribunal has the power to even recall and modify its previous order. To err is Human, and to forgive is Divine but in between these two, to correct the error is not only lawful and permissible but also the judicious approach, which all public authorities, Tribunal and Courts should have.

28. Obviously, when the Assessing Authority undertook the reassessment proceeding under Section 147/148 of the Act read with the other relevant provisions of limitations Sections 149/150 of the Income Tax Act, for giving effect to the observation of Tribunal in its order dated 31.05.2010, that tax if any could be levied on the basis of transfer of flats in December 2000, regarding limitation for issuance of such reassessment notices for AY 2001-02, these reassessments were found to be time barred by the learned Tribunal. The learned Tribunal, with great respect, has erred, in our opinion, in not going to the root of the matter and taking the help of the relevant provisions, including Section 150 of the Act, the learned Tribunal ought to have directed the Assessing Authority to take the reassessment proceedings to bring to tax the admitted tax liability, as the admitted taxable events had taken place to fix the taxability in the hands of the Assessee in the correct Assessment Year. All this happened, because the learned Tribunal, in our opinion, superficially dealt with the matter while passing a wholly erroneous order dated 31.5.2010, resulting in a serious miscarriage of justice against the Revenue and allowing the taxability of an admittedly taxable transaction to be buried by wrongly allowing Assessee to take a changed and wrong stand before it in the first instance, that no capital gains tax was leviable for AY 2003-04 and AY 2004-05 but for AY 2001-02 and then later on holding that reassessment for AY 2001-02 was time barred.

29. We may observe here that the limitation for taking particular action for assessment/reassessment in law is prescribed even in the Taxation Laws to ensure timely action on the part of the Assessing Authorities, so that beyond a reasonable period, the Revenue Authorities do not rake up the dead issues or old issues and cause any prejudice to the Assessee. But there is a saving provision in the limitation provisions prescribed in the Act as well, when such reassessment are undertaken by the Authorities concerned under the directions of superior Tribunals or Court. The Assessing Authority, naturally gets a fresh limitation and in compliance with the direction of the higher Tribunal or Court, it is always open to the Assessing Authority to pass fresh assessment / re-assessment orders. Section 150(1) of the Act is that provision under the Income Tax Act, 1961.

30. Section 147 of the Act is the enabling provision for reassessment, which provides for reassessment where the income escapes assessment and Section 148 prescribes for a Notice to be issued to the Assessee for such reassessment. Section 149 of the Act provides for time limit for giving such notice. Section 150 carves out an exception to Section 149 of the Act which provides for a limitation in issuing the notice under Section 148 of the

Act, which gives power to reassess on the escapement of income given to the Assessing Authority. Section 150 also provides for aforesaid exception where such assessment is in pursuance of an order passed in appeal or by the court. The words "or by a court in any proceeding under any other law" were also added in the said provisions of Section 150 of the Act by Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989.

31. All the aforesaid relevant provisions from Sections 147 to 150, to the relevant extent are quoted below for ready reference:-

147. Income escaping assessment.

If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under subsection (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

[Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.]

148. Issue of notice where Income has escaped

assessment :-

[(1)] Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, [* * *] as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 :]

[Provided that in a case- (a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005 in response to a notice served under this section, and

(b) subsequently a notice has been served under sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to sub-section (2) of section 143, as it stood immediately before the amendment of said sub-section by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice:

Provided further that in a case-

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and

(b) subsequently a notice has been served under clause (ii) of sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to clause (ii) of sub-section (2) of section 143, but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in sub-section

(2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice.]

149. Time limit for notice:-

(1) No notice under section 148 shall be issued for the relevant assessment year,-

[(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.]

Explanation.-In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section.]

(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.

(3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non-resident under section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year.

150. Provision for cases where assessment is in pursuance of an order on appeal, etc.

(1) Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision [or by a Court in any proceeding under any other law].

(2) The provisions of sub-section (1)

shall not apply in any case where any such assessment, reassessment or recomputation as is referred to in that sub-section relates to an assessment year in respect of which an assessment, reassessment or recomputation could not have been made at the time the order which was the subject-matter of the appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time within which any action for assessment, reassessment or recomputation may be taken.

32. The scheme of Act about reassessment, coupled with the provisions of limitation is thus clear. It is not intended to defeat the taxability but it is intended to provide a safeguard to the Assessee so that beyond the prescribed period of limitation, action of reassessment on the part of the Assessing Authority is not permitted unless the conditions for initiating such action beyond the prescribed limitations are satisfied. Like in Section 147 first Proviso, a limitation of four years is prescribed for reassessment, while the assessment is done upon scrutiny under Section 143(3) of the Act but beyond four years, after the end of the Assessment Year, such reassessment can be undertaken, if there is a failure on the part of the Assessee to make a return under Section 139 or failure to disclose fully and truly all material facts necessary for his assessment, for that Assessment Year.

33. Likewise, Section 149 provides for the limitation of four years for issuing notice under Section 148 of the Act. But Clause (b) provides for an extended limit of six years if the alleged escaped income is more than Rs.One lakh. Section 150 of the Act provides a non obstante clause to provide for reassessment, where such reassessment is undertaken in pursuance of the directions of the Tribunal or Court of law. Sub section (2) of Section 150, which was relied by the learned counsel for the Assessee before us, only provides that if at the time of passing of impugned order under appeal, reference or revision, the said impugned assessment or reassessment had already become time barred, then such extended limitation for 'giving effect order' will not be available. This position of law as laid down by Hon'ble Supreme Court in K.M.Sharma vs. I.T.O. (254 ITR 772) is clear enough.

34. We clearly find that the taxability of capital gains tax in the hands of the Assessee, though admitted by the Assessee himself for AY 2003-04 and 2004-05 is likely to completely escape taxation, if the contentions raised before us was to be accepted. What could be and ought to have been done by

the learned Tribunal while dealing with the appeal filed for AY 2003-04 was three fold :-

(i) Either examine the question of computation only for AY 2003-04 and AY 2004-05 itself and decide the question of Fair Market Value, which only had been agitated by the Assessee before the lower Commissioner of Income Tax (Appeals) and the Assessing Authority and not to allow change of stand to the Assessee as was done by allowing a new and fresh ground of appeal taken before it for the first time albeit thoroughly wrong even on facts as the sale of flats had never taken place in December 2000; or

(ii) to remand the case back to Commissioner of Income Tax (Appeals), as the fresh ground, even taken on a change of stand by Assessee, to allow the Revenue to have its say on facts in that regard; or

(iii) to direct the Assessing Authority to, specifically pass reassessment order for AY 2001-02 in pursuance of its own directions as it held that transfer of Asset had taken place in December 2000, so that the Assessing Authority could have invoked section 150(1) of the Act and pass fresh reassessment orders in pursuance of such order of Tribunal and question of limitation could not have arisen.

35. The reassessment for AY 2001-02 had once been made on 30.03.2000 and again on 25.03.2013 in pursuance of Tribunal order dated 31.05.2010, whereas reassessment for AY 2003-04 and 2004-05 had been initially made on 30.03.2006 and 28.12.2006 respectively, which was very much within limitation prescribed under Section 149 of the Act. The order of Commissioner of Income Tax (Appeals) for these three years was passed on 22.07.2008, which was 'subject matter' of appeal before Income Tax Appellate Authority which held reassessment to be time barred by an obvious misreading of Section 150(2) of the Act.

36. By deciding the question of limitation of AY 2000-01 against Revenue, and by holding that there was no tax liability for AY 2003-04 and AY 2004-05, these two sets of orders passed by learned Income Tax Appellate Authority have resulted in a serious miscarriage of justice, which we cannot permit. The manner in which the various appeals and Miscellaneous Petition have been dealt with by the learned Tribunal for all the three

Assessment years in question leaves much to be desired and the change of stand allowed by the Tribunal and later withdrawal of the appeals for AY 2003-04 and AY 2004-05 under the litigation policy of the CBDT Circular dated 28.01.2016, has resulted in all this goof up. Therefore, we are constrained to set aside all the orders passed by the learned Tribunal for all the three Assessment Years as also all the orders passed by Lower Authorities also for all these three Assessment Years viz., AY 2001-02, 2003-04 and 2004-05. We are conscious of the fact that we are dealing with the appeal for AY 2001-02 only but since the Tribunal's order dated 31.05.2010 for AY 2003-04 and AY 2004-05 is at the root of the order of Tribunal dated 18.03.2016, by majority of 2:1 for AY 2001-02 and Appeal under Section 260A against that order dated 31.05.2010 already stands withdrawn by Revenue, we deem it appropriate to set aside even the order dated 31.05.2010 in the present appeal in these peculiar circumstances.

37. We restore the matter back to the Assessing Authority to re-examine the whole issue of taxability of the Capital Gains de novo, including the question of levy of capital gains Tax on sale of flats, the year of taxability and computation of Fair Market Value for computing such tax liability. We are not deliberately fixing any particular Assessment Year of taxability or the question of Fair Market Value, but we direct that the Assessing Authority will be free to impose the appropriate 'Capital Gain Tax Liability' by undertaking the fresh reassessment proceedings under Section 150(1) of the Act in pursuance of our directions, in terms of Section 150(1) of the Act, for all the three Assessment Years AY 2001-02, AY 2003-04 and AY 2004-05, de novo. We keep all other questions open to be decided by the Assessing Authority again, however, it will not be open to the Assessee challenge such reassessment on the ground of limitation.

38. With these observations and directions, the present appeal filed by the Revenue is disposed of and the questions raised in this appeal are answered in favour of the Revenue and against the Assessee, in the aforesaid manner. There is no order as to costs in the appeal.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. The Income Tax Appellate Tribunal Madras "C" Bench
Chennai

2. The Commissioner of Income Tax,
Media Circle , Chennai

3. The Commissioner of Income Tax (Appeals-VI)
Chennai-34.

4. The Assistant Commissioner of Income Tax,
Media Circle I. Chennai -34.

5. Deputy Commissioner of Income Tax,
Media Circle -I, Chennai -17.

6. The Assistant Registrar,
Income Tax Appellate Tribunal, 'D' Bench Rajaji Bhavan,
Bezant Nagar, Chennai-90.

Copy To:

1. The President,
Income Tax Appellate Tribunal,
Mumbai. (For information)

2. The Secretary
Ministry of Law and Justice
New Delhi. (For Information)

T.C.A.No.788 of 2016

PP (CO)
RMP (23/11/2020)

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