

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL, 'B' BENCH, CHENNAI
श्री वी.दुर्गा राव, न्यायिक सदस्य एवं श्री जी.मंजुनाथ, लेखा सदस्य के समक्ष
BEFORE SHRI V.DURGA RAO, JUDICIAL MEMBER
AND SHRI G.MANJUNATHA, ACCOUNTANT MEMBER

आयकरअपीलसं./I.T.A.No.2200 & 2201/Chny/2019

(निर्धारणवर्ष / Assessment Years: 2011-12 & 2012-13)

Mrs. Mageswari, 1, M.T.H.Road, Padi, Chennai-600 050.	Vs	Income Tax Officer, Non-Corporate Ward-10(3), Chennai.
PAN: ANFPM 5901L		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Mr.R.T.Vijayaraghavan, C.A
प्रत्यर्थीकीओरसे/Respondent by	:	Mr. Suresh Peria amy,JCIT

सुनवाईकीतारीख/Date of hearing	:	02.03.2021
घोषणाकीतारीख /Date of Pronouncement	:	19 03.2021

आदेश / ORDER

PER G.MANJUNATHA, AM:

These two appeals filed by the assessee are directed against common order of the learned CIT(A)-12, Chennai dated 26.04.2019 and pertain to assessment years 2011-12 & 2012-13. Since, the facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed off by this consolidated order.

2. The assessee has more or less raised common grounds of appeal for both the assessment years, therefore, for the sake of brevity, grounds of appeal filed for assessment year 2011-12 in ITA No.2200/Chny/2019 are reproduced as under:-

"1. Your appellant submits that the order of the Commissioner of Income Tax (Appeals) is against the facts of the case and bad in law.

2. Your appellant submits that the authorities below had not fully considered the facts of the facts.

3. Your appellant submits that the learned Assessing Officer had erred in adopting the assessment procedure followed in the hands of Mr. P.S. Man (father of the appellant) in computing the income for the present year in the hands of your appellant

4. your appellant submits that the learned Assessing Officer had not properly considered the ,replies submitted at the time of assessment proceedings about the nature of the transactions happened in the hands of your appellant, the variance in the relationship at your appellant with her fathers business.

5. Your appellant submits that the Learned Assessing Officer is not correct in wholly depending upon the statement made by the father of your appellant at the time of survey in his office which is generalized statement.

6. Your appellant submits that the income earned by your appellant is to be considered as Income from long term capital gains and further the sales of the plots were made as Power of Attorney holder of other sellers and not the property of your appellant.

7. Your appellant submits that even admitting for the sake of argument that the income is to be computed as Income from Business instead of Income from Long Term Capital Gains the reasonable expenses incurred for buying lands and developing and other incidental expenses are to be allowed in arriving at the income.

8. Your appellant submits that the authorities below are not correct in adopting the funds transferred to the trust as the

Income of your appellant without considering the expenses involved.

9. *Your appellant submits that funds transferred are the amounts received from transactions and while considering the income from business the necessary expenses like cost of purchase, developmental charges, plan permission expenses, and incidental expenses are to be deducted to arrive at the correct income from the business. The principle of commercial expediency has not been followed in arriving at the income for the year.*

10. *Your appellant submits that the authorities below had not considered this point and made the assessment on the premises that the whole amount received was the income of the year which your appellant submits that not correct and the income of Rs. 34,07,600/- determined for the year is to be re-determined*

11. *In view of the above facts and circumstances, your appellant prays that the Honourable Tribunal may be pleased to direct the Assessing Officer to allow the expenses connected with the business transactions and determine the income."*

3. At the outset, we find that appeal filed by assessee is barred by limitation of 2 days for which necessary petition for condonation of delay along with affidavit explaining the reasons for delay has been filed. The learned counsel submitted that assessee could not file appeal within the time allowed under the Act, therefore delay may be condoned. Having heard both sides and considered the petition filed by the

assessee for condonation of delay, we are of the considered view that reasons given by assessee for not filing the appeal within the time allowed under the Act comes under reasonable cause as provided under the Act for condonation of delay and hence, 2 days delay in filing of above appeal is condoned and appeal filed by the assessee is admitted for adjudication.

4. Brief facts of the case are that the assessee had not filed her return of income for assessment year 2011-12 & 2012-13. A survey u/s. 133A of the Act was conducted on 02.09.2013 in the office premises of M/s .Kumaran Real Estate & Builders, Vellore assessed as APO. Based on the survey, assessment of the AOP and members have been reopened and concluded u/s.143(3) r.w.s. 147 of the Act and assessed income derived from purchase and sale of properties under the head income from business or profession, as against income admitted by AOP as well as Members under the head income from long term capital gain on the ground that AOP as well as Members were involved in a systematic business activity of purchase and sale of lands and thus, profit derived from such activity is

assessable under the head income from business or profession. Further, the case of the assessee was reopened u/s. 147 of the Act for both assessment years on the basis of survey report received from Office of the Income Tax Officer, Vellore, as per which the assessee was also engaged in the business activity of purchase and sale of lands and further, offered capital gain from sale of land for assessment years 2011-12 & 2012-13. Based on the survey report, assessment has been reopened u/s. 147 of the Act, and accordingly, notice u/s. 148 dated 31.03.2017 was issued and served on the assessee. In response to notice, the assessee has filed return of income on 16.08.2018 admitting total income of ₹ 82,600/- for assessment year 2011-12 and ₹ 99,400/- for assessment year 2012-13. The case was taken up for scrutiny and during the course of assessment proceedings, the Assessing Officer based on survey report received from Office of the Income Tax Officer, Vellore and upon further enquiry came to the conclusion that assessee was engaged in the business activity of purchase and sale of land in line with other members of AOP, M/s.Kumaran Real Estate & Builders and hence, profit

derived from purchase and sale of lands is assessable under the head income from business or profession. The Assessing Officer to arrive at such conclusion has taken support from findings recorded during the course of survey, admission of Mr. P.S.Mani, one of the Members of AOP. Therefore, he opined that there is no merit in the contention of the assessee that she is not engaged in the activity of buying and selling of lands and whatever lands sold by her is investment activity and profit derived from such activity is assessable under the head capital gains. The relevant findings of the Assessing Officer are as under:-

“15. The submissions, survey folder and orders passed on other members of the trust are carefully perused. That the assessee had been involved in the affairs of M/s. Kumaran Real estate has been clearly put out as in all the submissions made by Shri P S Mani. The Family members were carrying on the business as a whole was well brought out. This clearly establishes the next's of the assessee in all the and transactions undertaken over the years by Shri PS Mani and family members. It had been clearly stated that purchase of property are being done in individual names only. Most of the real estate transactions are being done executed in the individual named and admit partly in the name of the AOP for convenience. This is brought out also in the orders of other trustees.”

and Forwarded also the assessing officer had categorically recorded as under.

Considering the details submitted by the assessee and the representative, it is appeared that the assessee's claim of LTCG appears to reasonable. But on further investigation, it is came 10 light the assesses is doing the real estate activity in and around gudiyattam town for more than 15-20 years and whatever investment he has made over the years only with the intention to do real estate business and this has been confirmed by the local period and the vicinity of the assessee's business premises at Gudiyattam. Hence on the above lines, further Investigation was carried out at kollati, n ar minjur and at Santhosh Nagar Plots, When all the above details are brought to the knowledge of the assessee, they have agreed to declare the income under the head real estate business income. Since the case was taken for deep scrutiny with the permission of JCIT, Vellore range, a breakthrough was happened at the end. Considering the discrepancies pointed out to the assesses and the rep esentative, they came forward and submitted a letter dated 31.03.2016 with a request to sought installments to pay tax due arisen on the basis of revised declaration.

18. Thus, Shri P S Mani and others have accepted and the orders were passed considering the disclosure made at survey as business income. Thus the business had been a going concern and the same was also accepted by Shri P S Mani. As per records, the assessee is not a member of the AOP. However she is one of the co-opted trustees. The assessment as proceeded by the assessing officer, ITO Ward - 1 , Vellore holds good or M. Mageswari too. Though she is not a member of AOP, the formation of AoP is only an arrangement and her involvements in the sale of land and in particular with M/s. Kumaran Real Estate & Builders have been proved beyond doubt during the scrutiny proceedings. sworn statements etc. After having recorded so many statements, deep verification carried out and also after a number of hearings, the conclusion was drawn by the ITO Ward -2, Vellore. In line with the same,

the assessments in the case of M Mageswari is also completed based on the reports as under:

<i>Total income returned</i>	<i>: Rs.82,600/</i>
<i>Income from house property (as returned)</i>	<i>Rs.82,600/-</i>
<i>Income from business</i>	<i>Rs.33,25,000/-</i>
	<hr/> <hr/>
<i>Total income assessed :</i>	<i>₹ 34,07,600/-</i>
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5. Being aggrieved by the assessment order the assessee preferred an appeal before learned CIT(A). Before the learned CIT(A), the assessee submitted that the Assessing Officer has erred in arriving at a conclusion that income derived by the assessee from sale of land is assessable under the head income from business or profession, as against income admitted under the head long term capital gain without appreciating the fact that assessee is neither a member of AOP, nor involved in the activity of buying and selling lands. The assessee further contended that Assessing Officer on wrong assumption of facts has concluded that the assessee is also a part of AOP and further involved in the activity of buying & selling lands, but facts remains that assessee was not a member of AOP and this fact has been admitted by the Assessing Officer . The Assessing Officer, having accepted the fact that assessee is not a member of AOP, wrongly assessed

the income under the head income from business or profession. even though the assessee has furnished various evidences to prove that lands sold by her are different from the lands sold by AOP and consequently, profit derived from sale of land is assessable under the head income from long term capital gains.

6. The learned CIT(A), after considering relevant submissions of the assessee rejected the claim of the assessee that income derived from sale of land is assessable under the head income from long term capital gain by holding that the role played by the assessee in real estate business is same as that of the other associates in whose hands, income was assessed as income from business or profession. The records related to survey and related statement and also the fact that income has been assessed as business income in the hands of other associates clearly prove that income of the assessee is liable to be assessed under the head income from business. Accordingly, rejected the arguments of the assessee and confirmed additions made by the Assessing Officer towards profit derived from sale of lands under the head income from

business or profession. Aggrieved by the learned CIT(A) order, the assessee is in appeal before us.

7. The learned AR for the assessee submitted that the learned CIT(A) has erred in fact and in law to confirm the findings of the Assessing Officer in assessing profit derived from sale of lands under the head income from business or profession as against income admitted under the head long term capital gains, without appreciating the fact that the assessee was neither a member of AOP nor involved in activity of buying and selling of lands. The AR further submitted that the Assessing Officer has taken wrong facts to come to the conclusion that the assessee is also involved in activity of selling lands on the basis of one settlement deed executed by the assessee for a piece of land in favour of M/s. Sri Kumaran Educational & Charitable Trust, Minjur, Chennai, ignoring the fact that said land was settled in favour of the charitable trust for objective of the trust, whereas business activity was carried out by M/s. Kumaran Real Estate Builders as an AOP at Vellore.

8. The learned DR, on the other hand, supporting the order of learned CIT(A) submitted that facts brought out by the Assessing Officer and learned CIT(A) in light of findings of survey and further survey report clearly indicate that the assessee is also involved in the activity of buying and selling of lands, like other members of AOP and hence, once income from sale of land is assessed under the head income from business in case of other members, no different view can be taken in the case of the assessee, unless assessee demonstrates that lands sold by her are different from lands sold by AOP and further, she has sold lands as investment activity. In this case, the assessee has failed to file any further evidences to prove that admission during the course of survey is incorrect to assess the profit under the head income from capital gains.

9. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The Assessing Officer has assessed profit derived from sale of land under the head income from business or profession on the sole basis of survey report received from

Office of the Income Tax Officer, Vellore in the case of M/s. Kumaran Real Estate & Builders, Vellore as an AOP. To arrive at such conclusion, the Assessing Officer has taken support from survey report coupled with statement recorded from members of AOP during the course of survey, where they have admitted the fact that they are involved in the activity of real estate development and profit derived from sale of lands is assessable under the head income from business. The Assessing Officer has also taken support from assessment orders of AOP and its members, where the Assessing Officer has assessed profit derived from sale of land under the head income from business and profession as against income admitted under the head long term capital gains. The Assessing Officer has not disputed the fact that the assessee is not a member of AOP. In fact, he has categorically admitted that the assessee is not a member of AOP, but went on to assess income under the head income from business, only on the basis of letter filed by one Mr.P.S.Mani, member of AOP, where he has admitted capital gains from sale of lands in the hands of the assessee. It was the contention of the assessee before the

Assessing Officer as well as learned CIT(A) that she is neither a member of AOP, nor engaged in the business of buying and selling of lands. She further contended that lands sold by AOP are different from the lands sold by her in individual capacity. To support her argument, she has filed various evidences including settlement deed executed by her in favour of Sri Kumaran Educational & Charitable Trust. We find that the Assessing Officer has taken support from settlement deed executed by the assessee to arrive at conclusion that the assessee also engaged in real estate development. But on perusal of details filed by the assessee including settlement deed dated 24.11.2008 executed in favour of Sri Kumaran Educational & Charitable Trust, we find that the said land was settled in favour of trust for the purpose of public charity and other good reasons without any consideration. The assessee further clarified that she has not derived any income from property settled in favour of charitable trust, whereas, income declared under the head long term capital gain is derived from some other lands, which were sold in her individual capacity as an investment activity. She further clarified that lands sold by

AOP at Vellore and lands sold by her in her individual capacity are different lands and there is no connection between the activities carried by AOP and herself.

10. We have gone through various averments made by the assessee in light of facts brought out by the Assessing Officer as well as learned CIT(A) and find that the Assessing Officer having accepted the fact that assessee is not a member of AOP, ought to have verified the income declared under the head long term capital gain with reference to lands sold by her in her individual capacity by ascertaining the fact that whether the assessee has sold lands as part of AOP or not. In case, lands sold by the assessee are not part of activity of AOP, but are independent lands, then assessability of profit from sale of lands should be independently examined without any influence from survey report in the case of M/s. Kumaran Real Estate & Builders, Vellore, because assessment of AOP and its members were made solely based on the findings of the survey and statement recorded from the members during the course of survey. Therefore, we are of the considered view that Assessing Officer has arrived at a conclusion that income

derived by assessee from sale of lands is assessable under the head income from business or profession without carrying out an independent enquiry with regard to land sold by the assessee. Hence, we are of the considered view that the issue needs to go back to the file of Assessing Officer for both assessment years to ascertain the fact with regard to the land sold by the assessee in her individual capacity to determine nature of income and assessability of such income under the head income from business or profession or capital gains. Hence, we set aside both appeals to the file of the Assessing Officer and direct him to reconsider the issue in light of various evidences filed by the assessee including settlement deed executed in favor of M/s. Sri Kumaran Educational & Charitable Trust and to ascertain nature of income declared by the assessee under the head income from long term capital gains.

11. In the result, appeal of the assessee for both the assessment years are allowed for statistical purposes.

Order pronounced in the open court on 19^h March, 2021

Sd/-
(वी.दुर्गा राव)
(V. Durga Rao)
न्यायिक सदस्य /Judicial Member

Sd/-
(जी. मंजुनाथ)
(G.Manjunatha)
लेखा सदस्य / Accountant Member

चेन्नई/Chennai,
दिनांक/Dated 19th March, 2021
DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. Appellant
2. Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.

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