
(2015) 06 KAR CK 0222

Karnataka High Court

Case No: I.T.A. No. 75 of 2009

The Commissioner of
Income Tax and Others

APPELLANT

Vs

Dinesh D. Ranka

RESPONDENT

Date of Decision: June 11, 2015

Acts Referred:

- Income Tax Act, 1961 - Section 132, 143(3), 153A, 153-A, 2(14)

Citation: (2015) 4 AKR 278 : (2015) 280 CTR 224 : (2015) ILR Kar 3817 : (2016) 380 ITR 440

Hon'ble Judges: Mohan M. Shantana Goudar, J; Aravind Kumar, J

Bench: Division Bench

Advocate: K.V. Aravind, Standing Counsel, for the Appellant; S. Parthasarathi, Advocates for the Respondent

Judgement

Mohan M. Shantana Goudar, J.

1. This appeal is filed by the Revenue against the order passed by the Income Tax Appellate Tribunal, Bangalore Bench in ITA No. 1163/Bang/07 (Assessment year 1999-2000). The appellant has sought confirmation of the orders passed by the Commissioner of Income Tax (Appeals)-VI {"Appellate Commissioner" for short} as well as the Assistant Commissioner of Income Tax, Central Circle - 2(3), Bangalore.

2. This appeal came to be admitted to consider the following substantial question of law:

"Whether the Tribunal was correct in holding that the amount received of Rs. 3,47,75,000/- by the assessee from L and T, the developer of the adjoining land in respect of the transfer of 7575.37 square meters of FAR in assessee's residential plot measuring 1.6 acres is not transferable as the same is not a capital asset and consequently no capital gains can be levied?"

3. Brief facts of the case are as under:

"The respondent - assessee is carrying on the business in real estate. Admittedly, he owned 35 acres 6 guntas of land at Kothanur Village. The entire land was converted from agriculture to housing purposes in the year 1992. The Bangalore Development Authority approved the plan for residential group housing scheme over the said land. Subsequently, the plan was renewed on 19.2.1998. The plan covered entire area of 35 acres 6 guntas and the same was signed by the respondent as the owner. The total Floor Area Ratio (TAR" for short) area sanctioned for the project consisting of 35 acres and 6 guntas is 2,61,912.30 square meters. Out of the same, FAR relating to 1 acre 6 guntas would be 8589.53 square meters. Out of the total extent of 35 acres 6 guntas of land, an area of 34 acres was the subject matter of Joint Development Agreement dated 19.10.1995 entered into between the respondent and the Larsen and Tourbo Limited ("L and T" for short). The remaining extent of 1 acre 6 guntas of land was not covered under the Joint Development Agreement entered into between the parties. Admittedly, the said area of 1 acre 6 guntas of land was kept by the respondent for his personal use i.e., for construction of his residential house."

In respect of the assessment year 1999-2000, the assessee filed return of income on 14.2.2000 declaring total income of Rs. 4,90,000/-. The assessment under Section 143(3) of the Income Tax Act ("the Act" for short) came to be concluded determining the total income at Rs. 5,20,000/-. A search came to be conducted in the premises of Assessee under Section 132 of the Act on 4.2.2004. Certain documents were seized. It was found from the seized records that the income earned from the Joint Development Agreement entered into by the assessee with the L and T was shown year after year under the head "income from business". Though the assessee had retained an area of 1 acre 6 guntas for his personal purposes and though the total FAR which was available for the assessee in respect of an area of 1 acre 6 guntas retained by him was 8589.53 square meters, the assessee gave up 7575.37 square meters in favour of L and T (which is the developer of remaining adjoining property measuring 34 acres) and consequently, the assessee retained FAR relating to 1,014.16 square meters only. This was detected from the seized document vide A/DDR-1/5 at pages 46 and 64 under the head "1.6 Account". The seized document also disclosed that an amount of Rs. 3.15 crores was paid by L and T to the respondent for utilizing the FAR relating to 7575.37 square meters. Pursuant to search, notice under Section 153-A of the Act came to be issued by the Revenue to the assessee and in response to said notice, the assessee filed return of income declaring the loss of Rs. 1,28,668/-.

4. The Assistant Commissioner of Income Tax, Central Circle 2(3), Bangalore framed the assessment order on 31.1.2006 under Section 143(3) r/w Section 153A of the Act. The Assessing Officer held, on facts that the FAR of 7575.37 square meters out of total extent of FAR of 8589.53 square meters relating to 1.6 acres of land retained by the assessee is taken over by the L and T for utilizing the same in its adjoining project (which was coming up in 34 acres of land, which is the subject matter of Joint Development Agreement between L and T and the assessee) for a advance consideration of Rs. 3.15 crores and

same would amount to transfer" which is liable to capital gain tax. Consequently the long term capital gains were worked out to Rs. 2,48,45,970/-. It is also concluded by the Assessing Officer that the assessee has not declared the long term capital gains either in the original return or in the return filed consequent to notice issued under Section 153A of the Act and assessee had concealed the particulars of income and consciously tried to evade tax and therefore penalty proceedings under Section 271(1)(c) was initiated.

5. The assessment order passed by the Assessing Authority against the assessee was questioned by the assessee before the Commissioner of Income Tax (Appeals) {"Appellate Commissioner" for short} in Appeal No. ITA 315/ACIT.Cen.Cir.2(3)/CIT(A)-VI/2005-06/BLR vide Annexure-B. The Appellate Commissioner on re-appreciation of the entire material on record concluded that the relinquishment of FAR of 7575.37 square meters by the assessee in favour of the L and T comes within the definition of transfer as found in Section 2(47) of the Act and therefore the Appellate Commissioner held that the capital gains have arisen to the assessee. Consequently, the Appellate Commissioner upheld the addition of Rs. 2,48,45,970/- under the head of "capital gains".

6. The orders passed by the Assessing Officer as well as the Appellate Commissioner were carried further in appeal by the assessee before the Income Tax Appellate Tribunal, Bangalore Bench in ITA No. 1163/Bang/07. The Tribunal allowed the appeal filed by the assessee and set aside the orders passed by the Assessing Officer as well as the Appellate Commissioner by its order dated 10.10.2008 on the ground that area of 1 acre 6 guntas retained by the assessee is not a capital asset and it was not transferred by the assessee in favour of Developer and there was no transfer of immovable property as defined under Section 2(47) of the Act.

Hence, the Revenue has filed this appeal questioning the order passed by the Income Tax Appellate Tribunal, Bangalore Bench and consequently prayed for confirmation of the orders passed by the Assessing Officer and the Appellate Commissioner.

7. As aforementioned, the assessee was the exclusive owner of 1 acre 6 guntas of land which adjoins 34 acres of land. The said area of 1 acre 6 guntas of land was held by the assessee for his personal use. The adjoining property of 34 acres was the subject matter of the Joint Development Agreement dated 19.10.1995 between the assessee and the L and T (Developer). It is also relevant to note that the assessee, who had paucity of funds, approached one Mr. Udhav H Buxani who provided financial assistance to the assessee and in the agreement dated 20.9.1993, it was decided that the profits will have to be shared between the assessee and Udhav H Buxani equally. As aforementioned, the assessee entered into joint development agreement with L and T for developing 34 acres of land. The project was called South City. The assessee has received Rs. 5.00 crores as interest free deposit. Out of which, Rs. 2.50 crores was non-refundable. As per the joint development agreement, the assessee was to receive 25% of the built up area. It was also agreed that since the building was being constructed by the developer (L and T), the

saleable space alongwith the amenities and undivided rights and interest in the land could be shared between the assessee and the developer in the ratio of 25% and 75% respectively. Out of such 25% of the profit earned by the assessee, Udhav H. Buxani would be entitled to 50% of the said profit i.e., 12 1/2 % of the total built up area/profit. It was further agreed that as and when the proceeds with regard to the sale of built up area were collected, proportionate amount would be credited to the assessee's account. Subsequently on 25.3.1996, on Udhav H. Buxani staking his claim, a four party agreement was entered into i.e., between the assessee, Udhav H. Buxani, M/s. Town and Country Developers Private Limited represented by Udhav H. Buxani and L and T. By way of the four party agreement, the security deposit to the assessee and Sri Udhav H. Buxani was decided to be Rs. 2.50 crores each, out of which Rs. 1.25 crores was refundable. It is also not in dispute that the assessee had authorized L and T (developer) to market all the built up area of South City project and he did not intend to retain any portion thereof for himself.

8. The income arising from 34 acres which was the subject matter of the joint development agreement has been shown under the head "income from business" in assessment year after assessment year. However the income earned out of the rest of 1 acre 6 guntas of land had not been shown at all by the assessee in any of the assessment years. According to the assessee, there is no need to show such income as it was a non-taxable capital asset. Admittedly, 1 acre 6 guntas of land was kept by the assessee for his personal use. During the course of search as mentioned supra, the documents were seized, which depicted that the assessee had also received income from L and T by entering into a joint development agreement in respect of 1 acre 6 guntas of land also by surrendering FAR. The relevant portions of the seized documents containing aforementioned particulars are reproduced in the order passed by the Appellate Commissioner as well as in the order of the Assessing Officer.

9. We have carefully perused the relevant portions as depicted in the orders passed by the Appellate Tribunal, Appellate Commissioner and the Assessing Officer. On plain reading of the contents of such documents, it is clear that the details are found relating to consolidated statements of amount to be paid to the assessee towards the joint development agreement. The seized documents clearly show that the assessee has entered into joint development agreement with the L and T in respect of his personally owned asset of 1 acre 6 guntas of land also. The said fact becomes crystal clear from the letter dated 23.12.1999 addressed to the appellant by the L and T, which reads thus:

"LTCG/BLORE/PDBU/HSC/1797

September 23, 1999

Mr. Dinesh Ranka

Ranka Group

Ranka Chambers

31, Cunningham Road

Bangalore-560052

Phone: 2260426/2262351

Dear Mr. Ranka,

Sub: FAR area accrued on account of 1 acre 6 guntas in "South City" project Bangalore bearing Survey Nos. 90/1, 91, 92, 93, 94, 95 and 96/1 part.

It is noticed from the Joint Development Agreement dated 19th October 1995 that only 34 acres have to be developed. However, the available approved FAR area is for 35 acres 6 guntas. FAR accrued on account of 34 acres only, in South City project, is to be shared amongst M/s. Larsen and Toubro Limited, M/s. Dinesh Ranka and Associates and M/s. Buxani, as per ratios defined in the supplemental agreement dated 22nd July 1999. The FAR area accrued on the balance area of 1 acre 6 guntas will be shared between M/s. Larsen and Toubro Limited and M/s. Dinesh Ranka and Associates, as per ratios defined in the Joint Development Agreement dated 19th October 1995.

Thanking you,

Yours faithfully,

For Larsen's & Tourbo Limited

Sd/-

(H.S. Chandrashekar)

General Manager

Property Development Business Unit."

(Emphasis Supplied)

10. From the aforementioned letter, it is clear that there was joint development agreement dated 19.10.1995 governing development of 1 acre 6 guntas of land also owned by the assessee and the accounts of the above have been made in pages 46 and 64 of the seizure memo No. A/DDR-1/5 respectively by the L and T and the assessee separately under the head "1.6 Accounts". The said letter and other documents seized also prove that there was transfer of right (FAR) in favour of L and T in respect of 1 acre 6 guntas of land for the development. What has been transferred in favour of the L and T by the assessee is FAR to an extent of 7575.37 square meters in respect of the land measuring 1 acre 6 guntas held by the assessee, though same was not the subject matter of the joint development agreement entered into on 19.10.1995.

11. As aforementioned, by way of an amended plan approved during the previous year relevant to the assessment year 1999-00, the assessee was eligible for an FAR of 8589.53 square meters. The records make it clear that the assessee as per the plan decided to retain FAR only to an extent of 1014.16 square meters for his residence and surrendered the balance of 7575.37 square meters in favour of developer (L and T) for construction of flats. Therefore there is a transfer within the meaning of Section 2(47) of the Act since the assessee has surrendered FAR of 7575.37 square meters. The word, transfer" as defined under Section 2(47) of the Act in relation to a capital asset includes

the sale, exchange or relinquishment of the asset or the extinguishment of any rights therein. In the matter on hand, the assessee has relinquished his rights over the FAR to an extent of 7575.37 square meters and consequently his right in FAR relating to his plot of 1 acre 6 guntas of land to the said extent gets extinguished. Thus it is a clear case of transfer within the definition as found in Section 2(47) of the Act. The seized material also discloses that L and T has paid Rs. 3.15 crores towards such surrender of FAR and the same would amount to sale proceeds.

12. The transfer is complete on the day when the plan was sanctioned and the building of the apartment complex started since there is no way of the assessee either getting back the FAR or using the same. Even if such a situation arises, it would be another transfer on that day with L and T as the transferor. The argument of the assessee that the said amount of Rs. 3.15 crores is to be adjusted out of the proceeds of the built up area relatable to FAR of 1 acre 6 guntas which according to them could be constructed in the end, cannot be accepted. Such adjustment though presumed in favour of the assessee, does not change the taxability of capital gains since the same is taxable in the year of transfer during the assessment year 1999-2000.

13. Section 2(47) begins the definition of transfer with the words "in relation to a capital asset". Under Section 2(47) of the Act, the term "transfer" in relation to a "capital asset" has been defined to include the sale, exchange or relinquishment of the asset. A "capital asset" means property of any kind held by an assessee whether or not connected with his business or profession but does not include what is defined under sub-clause(i) and (ii) of Section 2(14) namely the definition clause of capital asset. A right to construct additional stories on account of increase in available floor space index (FSI) is a capital asset and an assignment of the same is a capital receipt. However, where no consideration is paid and such right is not embedded in land, it would not be liable to tax as capital gains. In the instant case as already noticed by us hereinabove the assessee was eligible for a FAR of 8589.53 Sq. Mtrs. However as per the approved plan the assessee retained FAR only to an extent of 1014.16 Sq. Mtrs. for his residence and surrendered the balance of 7575.37 Sq. Mtrs. in favour of Developer (L and T) for construction of flats by receiving consideration of Rs. 3.15 Crores. Thus, the transaction in question would squarely fall within the definition of "transfer" as defined under section 2(47) of the Act inasmuch as the words employed in sub-clause(1) is "sale", "exchange", or "relinquishment" and under sub-clause(2) the words employed is "extinguishment of any rights therein". The said definition is an inclusive definition. The expression must be read widely and not narrowly. It denotes extension and cannot be treated as restricted. A transaction whereunder the right to exclusive possession and enjoyment stood transferred, even subject to right of reversion in favour of the transferor would be covered by this section. In that view of the matter, we are of the considered view that the transaction in question namely transfer of capital asset i.e., an extent of 7575.35 Sq. Mtrs. of the total extent of FAR which related to 1.6 acres of land retained by the assessee to the developer (L and T) would stand fully covered by the definition clause of section 2(47) of the Act.

14. The search as aforementioned came to be conducted on 4.2.2004 wherein number of vital documents were found against the assessee and L and T. Even thereafter a letter dated 7.6.2005 as mentioned supra came to be written to the assessee (wherein they have enclosed a letter dated 23.9.1999) confirming the terms on which the amount in respect of the FAR surrendered to be paid. It is clearly mentioned in the said letter that the available approved FAR area is for 35 acres 6 guntas though the joint development agreement dated 19.10.1995 was only in respect of 34 acres of land. It is also mentioned in the said letter that the FAR area accrued on the balance area of 1 acre 6 guntas will be shared between the L and T and assessee as per the ratio defined in the joint development agreement dated 19.10.1995, which clearly means that the assessee is entitled to 25% of the profit earned by utilizing 7575.37 square meters of FAR relating to 1 acre 6 guntas of land. However, curiously another letter came to be issued by the L and T on 4.7.2005 mentioning that the amount of Rs. 3.15 crores paid to the assessee is in the nature of advance. Such letter is clearly an after thought inasmuch as, the search was made in the year 2004 and this self-serving letter written by the L and T to protect the assessee from tax liability by any stretch of imagination cannot be said to be reliable. Thus, the explanation of the L and T deserves to be rejected as the same is after thought.

15. Having regard to the totality of facts and circumstances of the case, we concur with the opinion expressed by the Assessing Officer and Appellate Commissioner that the assessee has surrendered FAR to an extent of 7575.37 square meters in respect of 1 acre 6 guntas exclusively held by him in favour of the L and T and has earned Rs. 3.15 crores as advance in that regard. We have already clarified supra that surrendering of the said FAR by the assessee in favour of the L and T amounts to transfer within the definition of Section 2(47) of the Act. All these aspects are considered in detail by the Appellate Commissioner as well as the Assessing Officer. The Income Tax Appellate Tribunal is not justified in concluding that there is no transfer of FAR relating to 1 acre 6 guntas during the relevant year. The Appellate Tribunal is also not justified in holding that no income has accrued during the year as no construction has taken place relating to such FAR. The reasons assigned by the Income Tax Appellate Tribunal while setting aside the orders passed by the Assessing Officer and the Appellate Commissioner cannot be accepted in view of the reasons mentioned supra.

Accordingly, the appeal is allowed. The substantial question of law is answered accordingly in favour of the Revenue. The order passed by the Income Tax Appellate Tribunal, Bangalore Bench "A", Bangalore in ITA No. 1163/Bang/07 (Assessment year 1999-2000) stands set aside. Consequently, the orders passed by the Appellate Commissioner and the Assessing Officer stand restored.