

(2013) 11 MAD CK 0229

Madras High Court

Case No: Tax Case (Appeal) Nos. 697 and 698 of 2013

R. Krishnaswamy

APPELLANT

Vs

Commissioner of Income Tax,
Co. Circle

RESPONDENT

Date of Decision: Nov. 26, 2013

Citation: (2014) 222 TAXMAN 270

Hon'ble Judges: T.S. Sivagnanam, J; Chitra Venkataraman, J

Bench: Division Bench

Judgement

Chitra Venkataraman, J.

Raising the following questions of law,

1. Whether in the facts and circumstances of the case, the Appellate Tribunal was right in coming to the conclusion that even though the vacant possession of the property was handed over only on 25.03.2004 the capital gains will arise for the assessment year 2003-2004 and not for the assessment year 2004-2005?
2. Whether in the facts and circumstances of the case the Appellate Tribunal was right in coming to the conclusion that the part of the sale consideration was received on 21.12.2002 hence the capital gains will arise only for the assessment year 2003-2004 and not for the assessment year 2004-05?
3. Whether in the facts and circumstances of the case the Appellate Tribunal was right in coming to the conclusion that the sale consideration was received on 21.12.2002 and the property was handed over on the same day even though the possession of the property was handed over only on 25.03.2004?

the assessee seeks admission of these tax case (Appeals). The assessment year under consideration is 2003-2004 and 2004-2005.

The assessee, now represented by his legal representative, entered into an agreement of sale on 7.12.1999 with M/s. Alacrity Housing Limited, a company

registered under the Companies Act, 1956 for the sale of his property situated at 18/1, Unnamalai Ammal Street, T. Nagar, Chennai for a total consideration of Rs. 75,78,750/-. The agreement states that the assessee had received an advance of Rs. 7,00,000/-. Thus the balance of sale consideration came to Rs. 68,78,750/-. The agreement stated that the assessee agreed to sell the subject land under several sale deeds for a specified undivided share for the total consideration as mentioned above. On receipt of the balance sale consideration, the assessee covenanted with the agreement holder to handover vacant possession of the property and the title deeds relating to the property to the company. Clause 8 of the agreement provided for payment of interest at 12%, in the event of a delay in payment of the balance of sale consideration. The agreement further stipulated various activities to be undertaken by the agreement holder like getting clearance certificate from the Income Tax Department, plan approval etc. Thus the agreement contemplated sale of undivided share to the company or to its nominees and the total consideration would remain at Rs. 75,78,750/-. Admittedly, the assessee received the full consideration as early as 21.12.2002. Further the sale deeds were registered on various dates viz.,

It is stated by the assessee that possession was handed over to the agreement holder on 25.03.2004 and the construction was completed in October 2005 and the completion certificate by CMDA was given on 12.06.2006. It is further seen from the order of remand on the capital gains arising on the transfer of his immovable property, the assessee claimed deduction u/s 54EC of the income tax Act, 1961 investing the entire sale consideration of Rs. 75,78,750/-. As regards capital gain of Rs. 64,84,545/- arising out of the sale transaction, the assessee claimed deduction u/s 54EC of the income tax Act, 1961 by investing the entire sale consideration of Rs. 73,00,000/- in the notified bonds, the details of which are as follows:

In the light of the investment thus made, the assessee claimed exemption from payment of capital gain tax. The Assessing Officer, however rejected the said claim and pointed out that the assessee had transferred the capital asset in favour of the nominees of the agreement holder by way of separate individual registered sale deeds on different dates. As per clause 9 of the agreement to sell, the assessee had agreed to hand over vacant possession of the property to the company immediately on receipt of the entire sale consideration and the assessee admitted the receipt as early as on 21.12.2002 itself. In the circumstances, the Assessing Officer viewed that the transactions, which took place between 27.02.2003 and 07.03.2003 would be liable to capital gains for the assessment year 2003-04 and in respect of sales effected relating to Sl. Nos. 5 to 16, would be liable to capital gains during the assessment year 2004-2005. Out of these transactions, Sl. Nos. 5 to 12 would fall outside the scope of Section 54EC of the income tax Act, 1961, since the investment had been made beyond the time limit given under the said Section. Further Sl. Nos. 13 to 16, the four sale deeds effected on 23.03.2004 would be eligible for benefit of Section 54EC of the income tax Act, 1961. Thus the Assessing Officer brought to tax

those sale deeds, which were registered between 27.02.2003 and 14.05.2003, considering the fact that investments had been made beyond six months period. The position is same as regards the assessment year 2003-2004.

2. Aggrieved by this, the assessee went on appeal before the Commissioner of income tax (Appeals) for the assessment years 2003-04 and 2004-05. On a consideration of the facts and the terms of the agreement, the Commissioner of income tax (Appeals) called for a remand report from the Assessing Officer in the context of the affidavit filed by the builder, viz., the agreement holder dated 08.05.2008 and the completion certificate dated 12.06.2006 issued by the Chennai Metropolitan Development Authority. The remand report pointed out clause (9) of the agreement and the receipt of the consideration on 21.12.2002 and defended his assessment made for the assessment years. The First Appellate Authority, however, rejected the report and held that the capital gains accrued only in the year ending 31.03.2004 relating to the assessment year 2004-2005 and not for the assessment year 2003-2004 on account of clause (8), which represented payment of interest on belated payment. In the circumstances, the First Appellate Authority allowed the appeals and directed the income tax Officer to accept the income tax return for accepting the claim u/s 54EC of the income tax Act, 1961.

3. Aggrieved by this order, the Revenue went on appeal before the Income Tax Appellate Tribunal.

4. On going through the various clauses in the agreement, particularly, clause (9) and terms of the individual sale agreement, the Income Tax Appellate Tribunal came to a conclusion that the respective sale deeds made no mention about the agreement entered into between the assessee and the builder nor there was any reference of the buyers, being nominees of the builder/agreement holder. The Income Tax Appellate Tribunal held that going by the conveyance deeds, date of handing over of possession would have to be considered as the date of sale deed registered. Thus, going by the various sale deeds executed by the assessee in favour of 16 persons, the only possible conclusion that one could arrive at was that on the date of payment of full consideration, i.e., on 21.12.2002, possession was also handed over to the builder.

5. Referring to the affidavit filed by the assessee executed by the builder apart from the letter given by the builder, the Income Tax Appellate Tribunal viewed that they were self serving exercise done by the assessee in an effort to escape from the rigours of capital gain liability. Applying the definition of Section 2(47) of the income tax Act, 1961, the income tax Appellate Tribunal referred to the decision of the Apex Court in [Shrimant Shamrao Suryavanshi and Another Vs. Pralhad Bhairoba Suryavanshi by Lrs. and Others](#), and came to the conclusion that the transfer as contemplated u/s 2(47)(v) of the income tax Act, 1961 took place as early as 21.12.2002. Hence, capital gains was exigible even in the assessment year 2003-2004, the assessee would not be entitled to claim any deduction u/s 54EC of

the income tax Act, 1961. In the circumstances, the Income Tax Appellate Tribunal directed the Assessing Officer to tax the entire capital gain in the assessment year 2003-2004 and not in the year 2004-2005.

6. Aggrieved by this the present appeals have been preferred by the assessee for the assessment years 2003-2004 and 2004-2005.

7. Learned counsel appearing for the assessee pointed out that even though respective sale deeds were executed in favour of the purchasers of the undivided shares, those purchasers were handed over possession giving the extent of the undivided share in the property. The possession was handed over by the assessee on 25.03.2004. The assessee deposited the entire consideration within six months thereon. Consequently, the question of denying the benefit of 54EC is not correct. He further pointed out that the builder could complete the construction only after taking full possession of the property and that the completion certificate issued by the Chennai Metropolitan Development Authority dated 12.06.2006 pointed out that the construction got completed only in the year 2005. Thus, learned counsel for the assessee pointed out that mere payment of the consideration on 21.12.2002 would not lead to the completion of the transfer. The sale was completed only when the sale deeds were executed and possession handed over thereon. Thus, the Income Tax Appellate Tribunal committed serious error in invoking Sub clause (v) of Section 2(47) of the income tax Act, 1961 in this case.

8. In this connection, learned counsel for the assessee placed reliance on the decision of the Supreme Court in [Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and Another](#), to contend that the limitation on the investment has to be worked out from the date of handing over of possession as per the registered sale deed and not as per the agreement with the developer.

9. Contradicting the claim of the assessee, learned Standing counsel appearing for the Revenue submitted that the assessee does not deny the fact that sale deeds executed by the assessee contained the recital that possession was handed over on the date when the sale deeds were registered. If that be the case, the time limit for investment had to be construed as falling within the very respective sale deed dates. In the circumstances, going by the agreement clause, the possession thus to be handed over on the payment of the sale consideration on 21.12.2002 as per Section 53-A of the Transfer of Property Act, 1882 r/w 2(47)(v) of the income tax Act, 1961, the assessee was not entitled to claim deduction in respect of those investments made beyond six months period and she placed reliance on the decision of this Court in [Smt. D. Kasturi Vs. Commissioner of Income Tax and Another](#), and Before the Authority for Advance Rulings (Income Tax) Jasbir Singh Sarkaria, (2007) 294 ITR 196 .

10. We have heard learned counsel appearing for the assessee and learned Standing counsel appearing for the Revenue.

11. As already seen in the preceding paragraphs, the assessee entered into an agreement to sell as early as 07.12.1999. Clause (2) of the agreement referred to the advance received by the assessee of a sum of Rs. 7,00,000/-, which would be reduced from the consideration payable under the agreement, which was stated to be a sum of Rs. 75,78,750/-. Clause (6) of the agreement pointed out that on receipt of intimation of the Income Tax Clearance within 15 days pertaining to the list of nominees, the company had to present the related sale deeds to the assessee to have the sale deeds registered. Simultaneous to the presenting of the deeds before the Registering Officer, the company had to pay a sum of Rs. 68,78,750/- being the balance sale consideration. Clause (9) stipulated that the vendor should hand over possession of the property immediately on receipt of the balance sale consideration by the vendor, viz., the assessee. Clause (8) provides for the default clause. In the event of any delay in payment, the assessee would be compensated by payment of interest.

12. In the background of this agreement, we may have to see the respective sale agreement executed by the assessee, which is referred to by the Income Tax Appellate Tribunal. A reading of clause (4) of the sale agreement executed in favour of the 16 purchasers recite as follows:

4. VENDOR has handed over to said representative all available original deeds/papers of title to B-PROPERTY, and physical/vacant possession of property would be handed over to said representative as agreed, on payment of sale consideration, when this DEED is presented/admitted for registration.

From this clause, it is difficult for any one to draw an inference as to that part of the undivided share in the property purchased by the respective purchasers being given possession thereof. In considering the subject matter of sale, the date of sale and the total consideration for the sale, one cannot lose sight of the agreement that the assessee had, had with the Company-the agreement holder entered into on 07.12.1999. The company was given various responsibilities in the matter of finalising the sale and as already pointed out in clause (9) it was specifically stated that the company would have the vacant possession of the property only on receipt of the balance of sale consideration, viz., Rs. 68,78,750/-.

13. Thus, even though individual sale agreement mention about giving vacant possession of the property, the same has to be read with in continuation of clause (9) of the original agreement that the assessee had had with the company through whom the sale was finalized. We may also note that the individual sale was on undivided share to the various buyers and given the nature of the sale, it is difficult for anyone to pinpoint, which portion of the property was in fact handed over possession. Thus, clause (4) has to be read with in the context of clause (9) in the original agreement with the builder and the fact that even though as per clause (9) on receipt of final payment on 21.12.2002, the assessee had to put the company in full possession of the property, the assessee handed over possession of the

property only on 25.03.2004. We do not think this date of handing over of possession on 25.03.2004 would not in any way alter the decision that we are making in this case.

14. As seen in the details given in the preceding paragraphs, the assessee executed documents in favour of 16 persons on various dates from 27.02.2003 to 25.03.2004. The assessee does not dispute the fact that even though it had received the final payment as early as 21.12.2002 for reasons best known the registered sale deeds were made only on various dates starting from 27.02.2003 and admittedly possession was given only on 25.03.2004. Thus, in the eye of law, the sale got completed when sale deeds were registered pertaining to the undivided share of the immovable property.

15. In the context of this fact, the decision relied on by learned counsel for assessee in *Suraj Lamp & Industries (P.) Ltd.* (supra) has to be seen. The Apex Court pointed out that immovable property can legally and lawfully transferred or conveyed only by the registered deed of conveyance, and without this, the Court will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in immovable property. Except to the limited extent of Section 53A of the Transfer of Property Act, 1882, we do not think that the decision relied on by the assessee would be of any assistance to the assessee in the case on hand to accept the assessee's case that the investment made on the entire capital gain based on the last date of the sale deed as indicating the completion of the sale, Section 54EC of the income tax Act, 1961 would be of benefit to the assessee.

16. Learned Standing Counsel for the Revenue placed reliance on the decision of this Court in *Smt. D. Kasturi* (supra). This decision dealt with the case of part performance. There, the assessee after receipt of full consideration, handed over possession to the developer and this Court held that the subsequent act of the assessee in executing the power of attorney and the sale deeds executed by the power holder on the basis of such power of attorney would not in any way alter the status of the parties to the agreement for the applicability of the doctrine of part performance.

17. In yet other decision relied on by the Revenue reported in the case of *Jasbir Singh Sarkaria* (supra) the Authority for Advance Rulings (Income Tax) held that when the developer is given possession enabling to exercise general control over the property so as to make use of it for the intended purpose, that would be sufficient to attract Section 2(47)(v) of the income tax Act, 1961.

18. Both the decisions relied on by the Revenue has no relevance as far as the present case is concerned.

19. On the facts found by the Authorities, the Assessing Officer as well as the other Authorities, even though the assessee had received the final payment on

21.12.2002, there being no evidence that the assessee had put the company into vacant possession as on the date of the full payment as contemplated under clause (9) of the agreement and that possession admittedly, being handed over only on 25.03.2004 and some of the sale deeds registered even prior to this date, the starting point for the purpose of limitation could neither be on the date of receipt of full consideration nor the date of handing over of possession. On the other hand, the date on which, the registered documents were executed alone could be taken in this case as the starting point for limitation.

20. In the absence of any part performance as contemplated u/s 53A of the Transfer of Property Act, 1882 and as pointed out in the decision in Suraj Lamp & Industries (P.) Ltd. (supra), registration of sale deed alone completes the transfer. Thus, read in the context of the decision of the Apex Court if, on 27.02.2003, 27.02.2003, 07.03.2003 and 07.03.2003, four sale deeds came to be registered, on the consideration received for the purposes of Section 45 and Section 54EC of the income tax Act, 1961, capital gains arising on the sale under those deeds would be considered only in the assessment for the assessment year 2003-2004. As regards the sale deeds executed between the dates, 11.04.2003 and 23.03.2004, we find there are at least 12 sale deeds executed on various dates. Sale Deed Nos. 13, 14, 15 and 16 were executed on 23.03.2004 and on the same date, the assessee admits that the capital gains arising thereon not being invested in REC 54EC bonds from 30.04.2004 onwards. Considering the fact that sale deeds were executed on 11.04.2003 [3 deeds]; 28.04.2003 [2 deeds]; 14.05.2003 [3 deeds]; the consideration in respect of these deeds not being invested within the time limit of six months from the date of transfer, we have no hesitation in holding that the capital gains would fall itself within the scope of Section 54EC of the income tax Act, 1961. In other words, the liability would be assessed for the assessment year 2004-05. Thus, the sale deeds executed on 23.03.2004 (4 deeds) alone would have the benefit of Section 54EC of the income tax Act, 1961 and not any other sale deed.

21. The Tabular column given by the assessee as contained in para. No. 5 of the assessment order thus, gives us the dates on which the deposits were made. However, for the purpose of re-computing the relief to the assessee to grant the relief in respect of the sale deeds executed on 23.03.2004, the matter demands a remand back to the Assessing Officer to re-work the liability of the assessee.

22. Accordingly, while disposing of these Tax Case (Appeals), we direct the Assessing Officer to re-work the liability in respect of the assessment years 2003-2004 and 2004-2005. We make it clear that the assessee would not be entitled to the relief for the assessment year 2003-04 and as far as the assessment year 2004-2005 is concerned, in the light of the four sale deeds executed on 23.03.2004 alone, the assessee is entitled to exemption u/s 54EC of the income tax Act, 1961.

23. As far as the view of the Income Tax Appellate Tribunal, based on the individual sale deed is concerned, we do not find any justification to accept the said reasoning

in the context of clause (9) of the agreement that the assessee had had with the agreement holder and we do not also think that we need to go into the genuineness or otherwise of the same. With the above direction, both these Tax Case (Appeals) are disposed of. No costs. Consequently, the connected miscellaneous petition is closed.