

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम
IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गराव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A.No.535/Vizag/2014
(निर्धारण वर्ष / Assessment Year: 2010-11)

Kodanda Ramaiah Varadhi
Visakhapatnam
[PAN No.AAQPV2803A]
(अपीलार्थी / Appellant)

ITO, Ward-5(1),
Visakhapatnam

(प्रत्यार्थी / Respondent)

अपीलार्थी की ओर से / Appellant by
प्रत्यार्थी की ओर से / Respondent by

: Shri C. Subrahmanyam, AR
: Shri Y. Sesa Srinivas, DR

सुनवाई की तारीख / Date of hearing

: 25.09.2017

घोषणा की तारीख / Date of Pronouncement

: 06.10.2017

आदेश / ORDER

PER D.S. SUNDER SINGH, Accountant Member:

This appeal filed by the assessee is directed against order of the Commissioner of Income Tax(Appeals){CIT(A)}, Visakhapatnam vide ITA No.0249/2013-14/ITO W-5(1)/2014-15 dated 12.8.2014 for the assessment year 2010-11.

2. All the grounds of appeal are related to the expenses claimed by the assessee for acquiring property and for sale of the property in computing the capital gains. Assessee filed the return of income declaring total income of Rs.80,42,430/- and the agricultural income of Rs.30,000/- on 30.3.2011. During the assessment proceedings the A.O. found that the assessee sold two properties owned by the assessee along with his wife Smt. V. Gunavati. The assessee admitted Rs.17,61,775/- being 50% share in the property as capital gains.

The assessee sold property of 328 Sq.yds. of site with 1330 Sqft. in ground floor and 1987 sq.ft. in first floor RCC house at Dr.No.47-10-7/2, Dwarakanagar, Visakhapatnam for a consideration of Rs.1,41,33,000/- and admitted his share of capital gains at Rs.6,31,547/- as per the workings given below:

	Sale consideration		Rs.1,41,33,000/-
Less:-	Cost of acquisition (10-01-2007)	Rs.98,37,120/-	
	Selling expenses (commission)	Rs.6,00,000/-	
	Selling expenses (stamp duty)	Rs.13,42,785/-	
	Cost of improvement (maintenance and demolishing)	Rs.1,00,000/-	
	Selling expenses (interest)	Rs.9,00,000/-	
	Selling expenses (house tax)	Rs.90,000/-	
			Rs.1,28,69,905/-
	Net Capital gains		Rs.12,63,095/-
	50% share of the above		Rs.6,31,547/-

(2) Another property i.e., 369 sq.yards with 1600 sft. Madras terraced house at D.No.47-10-7/1, Dwarakanagar, Visakhapatnam was sold for a consideration of Rs.1,40,25,500/- and admitted his share of capital gains at Rs.11,30,227/- as per the workings given below:

	Sale consideration		Rs.1,40,25,500/-
Less:-	Cost of acquisition (26-12-2006)	Rs.87,42,470/-	
	Selling expenses (commission)	Rs.6,00,000/-	
	Selling expenses (stamp duty)	Rs.13,32,575/-	
	Cost of improvement (maintenance and demolishing)	Rs.1,00,000/-	
	Selling expenses (interest)	Rs.9,00,000/-	
	Selling expenses (house tax)	Rs.90,000/-	
			Rs.1,17,65,045/-
	Net Capital gains		Rs.22,60,455/-
	50% share of the above		Rs.11,30,227/-

3. The assessee claimed cost of acquisition for both the properties as under:

		Property (1)	Property (2)
1	Document cost	Rs.85,00,000/-	Rs.75,00,000/-
2	Stamp duty	Rs.8,07,120/-	Rs.7,12,470/-
3	Commission paid	Rs.5,00,000/-	Rs.5,00,000/-
4	Watchman salary paid	Rs.30,000/-	Rs.30,000/-
	TOTAL	Rs.98,37,120/-	Rs.87,42,470/-

4. The Assessing Officer (A.O.) disallowed Rs.5 lakhs in each property relating to the commission paid for acquiring the property and Rs.30,000/- salary paid to the watchman and computed the cost of acquisition of the property at Rs.93,07,120/- and Rs.82,12,470/- as under:

Cost of acquisition of properties that were sold, relating to assessee Sri V. Kondanda Ramaiah and Smt. V. Gunavathi:-

(i) Purchase value as per document	--	Rs.85,00,000/-
Add:- Registration, stamp duty, etc.	--	<u>Rs. 8,07,120/-</u>
Total		<u>Rs.93,07,120/-</u>
(ii) Purchase value as per document	--	Rs.75,00,000/-
Add:- Registration, stamp duty, etc.	--	<u>Rs. 7,12,470/-</u>
Total		<u>Rs.82,12,470/-</u>

5. Aggrieved by the order of the A.O., the assessee went on appeal before the CIT(A). The Ld. CIT(A) confirmed the order of the A.O. observing that the assessee had purchased the property from Visakhapatnam Cooperative House Building Society regulated by the Registrar of Co-operative Societies. Further, the sale deeds reveal that the sale deed document No.1049 of 2009 dated 8.6.2009, the property was sold to the assessee being highest bidder on 5.1.2007 after advertisement of purported sale in the news paper. Therefore, the Ld. CIT(A) was of the view that there was no justification for payment of commission for such purchase. Though the Id. A.R. contended that for the assessment year 2007-08, the assessee's case was scrutinized and the assessment was completed u/s 143(3) of the Act and the claims are

taken to have been proved, the Id. CIT(A) did not accept the claim of the assessee for deduction of commission, accordingly, dismissed the appeal of the assessee. Aggrieved by the order of the CIT(A), the assessee is in appeal before this Tribunal.

6. Appearing for the assessee, the Ld. Authorised Representative (A.R.) argued that the assessee had made the payment of Rs.10 lakhs as commission for acquiring the property @ Rs.5,00,000/- each and in support of the payment of commission, the assessee has furnished confirmation letters from the recipients of the commission. The said commission was recorded in the books of accounts and submitted the returns before the assessing officer during the relevant assessment year 2007-08. Since the A.O. has verified the cost of acquisition of property in the assessment order, the same issue cannot be revisited by the A.O. at the time of the sale of the property. Therefore, the Ld. A.R. argued that there was no case for making any addition, the expenditure to be allowed.

7. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The assessee has furnished confirmation letters from the following persons for receipt of commission which are placed in page Nos.14 to 17 of the paper book.

P. Tata Rao	Rs.2,50,000/-
B. Siva Prasad	Rs.2,50,000/-
K. Doctor Rao	Rs.2,50,000/-
K. Appa Rao	Rs.2,50,000/-

7.1. The assessee has furnished the confirmation letters, dated 26.12.2006 and the payments to all the recipients were made in cash. The assessee has declared the cost of acquisition of the property inclusive of the commission paid in the balance sheet for the FY 2006-07. The Ld commissioner of Income tax confirmed the addition, since the assessee did not explain the services rendered by the individuals and the assessee had purchased the property from Visakhapatnam Co-Operative House Building Society for which no intermediaries are allowed and sold to the highest bidder as per the advertisement made in the news papers.

7.2 In this regard the Ld.AR explained that no doubt the property was purchased through co-operative societies but the commission was paid as the concerned individuals have facilitated in purchase of the property by rendering their services at various stages including by giving their expertise in following the bidding process. The learned Commissioner of Income Tax (A) with mere suspicion taken the view that there is no scope to give commission when the property was purchased through bidding process. However, the learned CIT(A) ought to have known that the assessee is an advocate by profession and as

he was in the look out for purchase of property the two individuals to whom the commission was paid have brought this property into the notice of the assessee and facilitated in the entire process till the property was acquired. For the services rendered payments were made. The expenditure made in this regard has been reflected in the books of accounts which have been subjected for scrutiny and were accepted. In the present proceedings the Assessing Officer expressed a different view by disallowing the expenditure, this way a different position was taken on the concluded issue which is not correct. Ld. A.R. submitted that even though the property was purchased through cooperative society, the commission was paid to the concerned individuals who rendered the services at various stages including by giving their expertise in following the bidding process. The expenditure was included in the cost of acquisition and declared in the balance sheet of the year in which it was purchased. The assessee referring to page no.24 of the paper book has shown the values of the properties declared for the assessment year 2007-08. On the other hand, Ld. Departmental Representative (D.R.) supported the order of lower authorities.

7.3 We have gone through the paper book and it is evident that the assessee had declared the cost of acquisition of the property at

Rs.98,07,120/- in the case of 328 sq.yds and Rs.87,12,470/- in the case of 369 sq.yds. Since the assessee had already declared the cost of acquisition in the assessment year 2007-08 and furnished the relevant balance sheet along with return of income, we do not see any reason to disturb the cost of acquisition declared by the assessee in the return of income. The fact that the cost of acquisition declared by the assessee was not disputed by the assessing officer. Having declared the cost of acquisition by the assessee in the year of acquisition and filed the relevant balance sheet it is not correct to revisit the issue again in the year under consideration. Therefore, we set aside the order of the Ld.CIT(A) and direct the assessing officer to allow the cost of acquisition of properties as declared in the balance sheets and the return of income relating to the year in which it was acquired. This ground of the appeal of the assessee is allowed.

8. The next issue is related to the payment of commission for sale of the property. The assessee had claimed various expenses for the sale of property, out of which commission paid was ₹ 12 lakhs. During the assessment proceedings, the assessee did not furnish confirmations from the recipients of the commission. However, the payment was made by cheque and the full addresses were furnished but no evidence was furnished to establish that the payments were made really for sale

of property as commission. Therefore, the A.O. disallowed the payment of commission and added back to the income.

9. Aggrieved by the order of the A.O., the assessee went on appeal before the Ld. CIT(A) and the Ld. CIT(A) confirmed the order of the A.O. holding that the assessee did not prove the genuineness of the payment. For the reference we extract the relevant paragraph of the Ld.CIT(A) order as under:

"8.2 I have considered the submissions and details filed. The admitted position is that the assessee had not filed any confirmation letter for the services availed in lieu of the alleged payment of commission. Even during the appeal proceedings, the assessee could not file any evidence in this regard. Therefore, I am of the view that the assessee had not discharged his burden that the said expenses were incurred in relation to the transfer of the subject properties. The mere claim of payment to certain parties would not be sufficient to prove that the impugned payments were incurred in connection with the transfer of the said properties. Further, the perusal of the bank statement bearing A/c no.716010022199 with ING Vysya Bank shows that the assessee had received an amount of Rs.5 lakhs from Shri D. Srinivas on 8.1.2007 which clearly indicates that the impugned payment may not be towards commission. In these factual scenario, I am of the view that AO is justified in making the impugned disallowance while computing the capital gains. Accordingly, this ground of appeal is dismissed."

10. Aggrieved by the order of the CIT(A), the assessee is in appeal before this Tribunal. Appearing for the assessee, the Ld. A.R. argued that the recipients of commission have rendered the services to the assessee in disposing the property. There were disputes in the property and the purchaser of the property was residing in Delhi and the tenants are not vacating the property, hence Mr. Srinivas, Mr. Udaya Bhaskara

Rao and Mr. S. Prakash have acted on behalf of the assessee and rendered the services to dispose of the property. The payment was made through bank cheques, which was debited to the bank account of the assessee. However, the assessee was unable to furnish confirmation letters from the middle men who received the commission. Since the assessee has made the payment through cheque, the Ld. A.R. argued that the payment of commission was genuine, which should be allowed as an addition.

11. On the other hand, the Ld. D.R. argued that the assessee has not established the payment of commission and did not explain the services rendered by the commission agents for payment of commission. The Ld. D.R. further argued that the assessee was unable to produce any evidence for payment of commission in the form of confirmation letter from the payee, hence argued that CIT(A) has rightly confirmed the addition and no interference is called for.

12. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The assessee has claimed to have paid the commission of Rs.6 lakhs to each property in respect of two properties sold by the assessee. The assessing officer noted that the assessee failed to produce confirmation from the parties for the said commission received. The payment was

made by cheque and there was no evidence adduced by the assessee to show that the payment of commission was in fact made for commission. The assessee made payment of commission to 3 persons by name one Mr. D. Srinivas of Rs.4 lakhs, second Mr. T. Satya Prakash of Rs.4 lakhs and third Mr. E. Udaya Bhaskara Rao of Rs.4 lakhs. It was also observed by the CIT(A) that from the bank account of the assessee with the ING Vysya Bank account no.716010022199 shows that the assessee had received an amount of Rs.5 lakhs from D. Srinivas on 8.1.2007, which indicates that impugned payment may not be towards commission. During the appeal hearing, the Ld. A.R. did not bring any evidence to show that the payment in fact was made for the commission. However the assessee has furnished the addresses and the AO should have verified the genuineness of payment of commission. When the addresses were given without making enquiries taking adverse view is unjustifiable. Therefore we are of the considered opinion that the issue should go back to the file of the assessing officer to make the necessary enquiries with regard to the payment of commission and decide the issue afresh on merits. Accordingly we set aside the orders of lower authorities and remit the, matter back to the file of the AO for fresh consideration. It is needless to say that the A.O. should give

reasonable opportunity to the assessee. The appeal of the assessee on this ground is allowed for statistical purposes.

13. The next issue is with regard to expenditure incurred by the assessee towards the stamp duty expenses. The assessee claimed payment of stamp duty expenses of Rs.13,42,785/- and Rs.13,32,575/- respectively for two properties. These expenses should be borne by the buyer and these expenses should form part of the cost of acquisition of the property for the buyer. However, the assessee had stated that the stamp duty and the registration charges was incurred by the assessee and claimed a sum of Rs.13,42,785/- for property at Dr.No.47-10-7/2 and a sum of Rs.13,32,575/- for Dr.No.47-10-7/1 at Dwarakanagar, Visakhapatnam aggregating to Rs.26,75,360/- as deduction, however, the assessee's share is being 50% out of the above expenses claim was restricted to his share. The assessing officer disallowed the above expenses holding that the expenses required to be borne by the buyer but not by the assessee. Aggrieved by the order of the A.O., the assessee went on appeal before the CIT(A) and the Ld. CIT(A) confirmed the disallowance of expenses as under and dismissed the appeal of the assessee. For ready reference, we extract the relevant part of the Ld. CIT(A) order which reads as under:

"7.2 I have considered the submissions and perused the details filed. It is seen that the assessee had entered into a sale agreement with Shri Yedla Vasudeva Rao on 28.3.2008 for the sale of subject properties. At para 7 of the agreement, it is mentioned that "Under this contract of sale as they are tenants in schedule mentioned property and Vendors are not able to get physical possession of the property by evicting tenant in physical possession of schedule mentioned property and Vendee is prepared to take symbolic delivery of schedule mentioned property and make his own arrangements to evict the tenants, the stamp duty and registration charges for the sale deed are being and to be borne by the Vendors at the time of execution of registered sale deed." With reference to this clause, the assessee contended that he has to bear the stamp duty and registration charges. However, the assessee did not furnish any evidence as to the disputes in the subject properties. In fact, one of the properties which is of an extent of 369 Sq.Yds was a vacant site which is evident from the sale deed dated 8.6.2009. The recitals in the sale deeds of both properties mention that physical possession was delivered to the buyer in respect of both the properties. Therefore, I am not convinced with the plea that assessee has to bear the stamp duty expenses for the reason that he was not able to deliver physical possession of the properties. Further, it has to be seen whether the expenditure incurred towards stamp duty could be considered as an expenditure incurred wholly and exclusively in connection with the transfer. It is an established practice that the stamp duty expenses are borne by the buyer of the properties as it confers conveyance of title as per law to the buyer. As it is the buyer who would be interested in a proper conveyance and title to the property transferred, the expenses in relation thereto are borne by the buyers. It is also relevant to note that the assessee borne the stamp duty expenses as 'buyer' while purchase of the subject properties. Therefore the stamp duty expenses form part of cost of acquisition and are allowed as deduction and it is never considered as expenses in relation to transfer in the hands of transferor. Therefore, it cannot be said that it is an expense incurred wholly and exclusively for the transfer. The impugned expenditure does not in any way confer better title or conveyance to the buyer or grant any benefit to the so called tenant. Effectively, it only reduces the consideration for the transfer. In the instant case, the assessee has borne this expenses on account of agreement entered with the buyer. The effect of such agreement/arrangement is that it goes to reduce indirectly the value of consideration received by the seller and also violates the mandate specified in Sec.50C of the Act. Such a private agreement/arrangement cannot be considered as an expense incurred wholly and exclusively in connection with the transfer. Therefore, I am of the view that the impugned disallowance of Rs.26,75,360/- in the computation of capital gains is justified. Accordingly, this ground of appeal is dismissed."

14. Aggrieved by the order of the CIT(A), the assessee is in appeal before this Tribunal. Appearing for the assessee, the Ld. A.R. argued that the property was in litigation and due to pendency of litigation and not vacating the property by the tenant the assessee had agreed to incur the stamp duty expenses also, which is supported by the sale agreement dated 28.3.2008. As per the agreement, the stamp duty and registration charges for the sale deed had to be borne by the vendors and the Ld. A.R. further argued that the assessee has paid the above stamp duty expenses through DD and debited to its bank account. As an evidence, the assessee referred the paper book page no.38 and 39 bank account copy and the Registration and Stamp department's customer copy and argued that the expenses required to be allowed as deduction.

15. On the other hand, the LD. D.R. vehemently opposed the assessee's argument and argued that the expenses were not incurred in connection with the transfer of property.

16. We have considered the submissions of both the parties perused the material placed before us. As per the provisions of section 45 of the Act, the expenses incurred for transfer of the property is allowable as deduction. Stamp duty and registration charges forms part of the cost of acquisition of the property, which is required to be borne

by the buyer. As per the provisions of section 48 of the Act, the expenditure incurred wholly and exclusively in connection with the transfer of property is allowed as deduction. Since the stamp duty and registration cost is not considered as expenses in relation to transfer in the hands of the transferor, the same is not allowable. Further, as rightly observed by the Ld. CIT(A), the arrangement of incurring stamp duty and registration charges by the vendor effectively reduces the value of the consideration received by the vendor and also violates the mandate specified in the section 50C of the Act. In such case, while determining capital gains, the value as per the stamp valuation authorities has to be adopted for the purpose of computing the capital gains. Therefore, we do not find any infirmity in the order of the Ld. CIT(A) and the same is upheld.

17. The next addition agitated by the assessee was payment of interest of Rs.6 lakhs in respect of payment made to M/s. VPL Projects. The assessee had claimed a sum of Rs.6 lakhs towards interest for cancellation of sale agreement dated 10.1.2007 with M/s. VPL Projects and claimed the deduction from capital gains. The A.O. disallowed the expenses for non production of proper evidences. The assessee went on appeal before the CIT(A) and argued that the assessee had entered into an agreement for sale of one of his properties at Anakapalle

admeasuring 3.29 ½ acres of agricultural land for a consideration of Rs.40 lakhs to M/s. VPL Projects and received the consideration. Out of which, the assessee had used the amount of Rs.30 lakhs on 10.1.2007 for acquiring the impugned property, which was sold during the year under consideration. The transaction for sale of the property with M/s. VPL Projects Pvt. Ltd. required to be finalized within 9 months. The proposed sale of property to VPL Projects Pvt. Could not take place and had to pay the compensation for cancellation of the agreement. Since the amount was utilized for the purpose of acquiring the impugned property the assessee claimed the sum of Rs.6 lakhs paid as compensation. The A.O. disallowed the claim and the Ld. CIT(A) confirmed the addition observing that there was no evidence on record to show the nexus with the sale of impugned property and payment of compensation to M/s. VPL Projects Ltd. to establish that the expenditure was wholly and exclusively incurred in connection with the transfer of the property. The transaction was not a loan transaction and the payment of Rs.6 lakhs was not admittedly the interest.

18. During the appeal hearing, referring the paper book page No.73 of paper book, the Ld. A.R. argued that the assessee had entered into the agreement for sale of agricultural property with M/s. VPL Projects Pvt. Ltd. for a consideration of Rs.40 lakhs and received Rs.30 lakhs on

10.1.2007, which was paid to the vendor of the impugned property. Subsequently, the sale transaction entered with M/s. VPL Projects Pvt. Ltd. could not be materialized, therefore, the assessee had to pay a sum of Rs. 6 lakhs towards compensation. Since the funds were utilized for the purpose of acquiring the property, the Ld. A.R. argued that the compensation should be treated as expenditure incurred for the purpose of acquiring the property and the same required to be allowed as a deduction.

19. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. In this case, the assessee has not taken any loan for acquiring the property and the compensation was not in the nature of interest. The assessee has entered into an agreement for sale of its agricultural property located at Visakhapatnam district, Anakapalle Mandal, Rebaka village in survey no.241/8/10/12 and 18, 3.29 ½ acre to M/s. VPL Projects Pvt. Ltd. Private limited by an agreement dated 10.1.2007. According to the agreement, the assessee had received Rs.30 lakhs on 10.1.2007 and the same was paid for acquiring property. The remaining amount of Rs. 10 lakhs was also received by the assessee on 6.2.2007. The assessee had received the entire amount of Rs.40 lakhs and as per the sale agreement, the land required to be registered by the assessee in favour

of the vendee but not registered the said property for which the reasons were not furnished. From the agreement it is observed that there was no clause of payment of any compensation. However, the assessee stated that he had to pay Rs.6 lakhs as compensation because the sale transaction did not go through. When the assessee has received the entire amount what are the reasons for not concluding the sale transaction was not explained by the assessee. When there was no fault with the assessee in sale of the property, there is no valid reason and for payment of compensation. No agreement for cancellation was furnished by the assessee. In any case the compensation was not relatable to acquiring the property and it was with regard to the sale of agricultural land. The same cannot be linked with the sale of the impugned property. Further, the asset is capital asset and taxed under the head Capital Gains but not business income. Under the head Capital gains only direct expenses relatable to transfer of property are allowed as deduction. Therefore, the cancellation expenses should not be held to be incurred either for acquiring the property or for transfer of property and accordingly, we do not find any infirmity in the order of the Ld. CIT(A) and the same is upheld. This ground of appeal raised by the assessee is dismissed.

20. In the result, the appeal filed by the assessee is **partly allowed**.

The above order was pronounced in the open court on 6th Oct'17.

Sd/-

(वी. दुर्गराव)

(V. DURGA RAO)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

लेखा सदस्य/ACCOUNTANT MEMBER

विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 6th Oct'17.

VG/SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant – Kodanda Ramaiah Varadhi, D.No.13-45-1, Opp. Sudha Hotel, Gajuwaka, Visakhapatnam
2. प्रत्यार्थी / The Respondent – The ITO, Ward-5(1), Visakhapatnam
3. आयकर आयुक्त / The CIT-1, Visakhapatnam
4. आयकर आयुक्त (अपील) / The CIT (A), Visakhapatnam
5. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम / DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, VISAKHAPATNAM