

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'B' NEW DELHI**

**BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
&
SHRI K.N. CHARY, JUDICIAL MEMBER**

**ITA No.-2566/Del/2014
(Assessment Year: 2004-05)**

DLF Info City Devp. (Chennai) Ltd. 10 th Floor, Gateway Tower, DLF City Phase-III, Gurgaon. AAACR1725J	vs	Addl. CIT Range-1 Gurgaon.
Assessee by	Sh. R.S. Sighvi, Ca Sh. Satyajeet Goel, CA	
Revenue by	Sh. F.R. Meena, Sr. DR	

Date of Hearing	25.10.2017
Date of Pronouncement	03.11.2017

ORDER

PER SHRI K.N. CHARY, JUDICIAL MEMBER

Aggrieved by the order dated 02.01.2014 in appeal no. 117/13-14(A)-V passed by the Ld. Commissioner of Income Tax (Appeals)-V, Chennai (hereinafter for short called as the "Ld. CIT (A)") assessee preferred this appeal on the following grounds:

1. *"That the impugned order dated 02.01.2014 passed by the Ld. Commissioner of Income Tax (Appeals) is bad in law and wrong on facts.*
2. *That the Ld. Commissioner of Income Tax (Appeals), erred in law, in upholding the order of the Assessing Officer in disallowing the claim of loss of Rs. 1,64,286 under the head "Profits and Gains of Business or Profession".*

- 2.1 *That the Commissioner of Income Tax (Appeals), erred in law, in upholding the Order of the Assessing Officer, that the appellant has not carried on any business activity during the year and in assessing the interest income of Rs. 32,710/- received by the appellant company through money lending business under the head 'Income from Other Sources' and restricting the claim of expenditure at Rs. 35,744/-.*
3. *That the Commissioner of Income Tax (Appeals), erred in law, in upholding the order of the Assessing Officer, in assessing the liquidated damages amounting Rs. 9,34,500/- under the head 'Income from Other Sources' as against treated by the appellant as 'Capital Receipt'.*
 - 3.1 *That alternatively, without prejudice to the above, the liquidated damages could only be assessed as 'Capital Gains' and not as 'Income from Other Sources'.*
4. *That the Ld. Commissioner of Income Tax (Appeals), erred in law, in upholding the order of the Assessing Officer, in treating the rights transferred as a short term capital asset, adopting the guideline value of Rs. 53,98,763/- and calculating the short term capital gain at Rs. 28,78,692/-.*
5. *That the appellant craves leave to add, alter, amend, substitute, forgo any or all the grounds of appeal before or at the time of hearing."*

2. Briefly stated facts are that the predecessors of the assessee insofar as the subject matter of this appeal is concerned was one Road Tech Construction Pvt. Limited. They were engaged in the business of development of buildings and money lending. For the AY 2004-05 they have filed their return of income declaring a total income as per Income Tax Act as Nil and book profit u/s 115JB at Rs. 7,09,831/-. The assessee company through its incidental objects in the memorandum of association carried on the business of money lending and received a sum of Rs. 32,710/- as interest. During the 143(3) proceedings AO noticed that the assessee acquired undivided right in respect of 4.431% of 8 grounds and

843 sq. ft of land in New R.S. No. 543/14 (part) and New R.S. No. 543/15 (part) on 19.01.2001 for a total consideration of Rs. 22,20,387.50/- and by way of an agreement with M/s Chaitanya Builders and Leasing Private Limited, they agreed to pay Rs. 30,29,612.50 for construction of their office space. After completion of the building, according to the assessee, they incurred an extra expense of Rs. 2,99,683/- towards cost of Genset and Air conditioner, but since the assessee found the said accommodation as insufficient for their office, they sold the same to one M/s Vaishnavi Associates for a consideration of Rs. 60,46,840/- during the previous year relevant to the AY 2004-05, i.e. holding it for more than 36 months after the acquisition of the property and treated the loss as capital loss of Rs. 2,39,912/-. According to the assessee M/s Chaitanya Builders and Leasing Pvt. Ltd. completed and handed over the building to the assessee with a delay of three months and 28 days after the stipulated time, as such, they paid liquidated damages by way of extra allotment of office space of 440 sp. ft valuing it at 2100 sq. ft which comes to Rs. 9,38,700/- and compensation for loss of rent at Rs. 2,95,500/-. Assessee accounted the liquidated damages as an extra ordinary item of receipt below the line in profit and loss account and excluded the same from taxable income holding it as capital receipt. The assessee also

claimed the business expenditure at 1,96,996/-. However, the Ld. AO held that since there was no business activity during the year, the business expenditure claimed had to be restricted to the amount pertaining to other sources i.e. Rs. 35,744/- and allowed deduction to that extent only. In so far as the alleged liquidated damages is concerned, AO treated the same as Revenue expenditure and made an addition of Rs. 9,34,500/- on that ground. While calculating the receipts on account of the sale of property to M/s Vaishnavi Associates, AO had taken the value of the property sold by applying Section 50C of the Income Tax Act, 1961 (for short called as the 'Act') and reached its value at 53,98,763/-. By adding value of construction of Rs. 30,29,612/- to it, AO reached the total sum realizable by the assessee at 84,28,375/- out of which he deducted the cost of Rs. 55,49,683/- and calculated the gains at Rs. 28,78,693/- as short term capital gains. Assessee is challenging the disallowance of the business expenses to an extent of Rs. 1,64,286/- and also the method of calculation of gains as well as the treatment given to the gains as short term capital gains instead of long term capital gains, in view of the fact that the property was acquired on 19.01.2001 and was sold on 27.03.2004 i.e. after holding the same for more than 36 months. Ld. CIT

(A) dismissed the appeal of the assessee and confirmed the additions made by the AO. Hence, this appeal by the assessee.

3. In so far as the disallowance of the office expenses to a tune of Rs. 1,64,286/- is concerned. it is the argument of the Ld. AR that the action of the AO is arbitrary and without pointing out to any defect in the books of accounts of the assessee or showing the escalation of the expenses by the assessee, it is not open for the AO to arbitrarily disallow any part of expenses. He drew our attention to page nos. 13 & 14 of the Paper Book and to the details of the expenditure enumerated therein. He further submitted that the assessee derived income from interest as well as rentals from property and profit on sale of property rights, which is evident from the books of accounts. The profit and loss account at page no. 14 of the Paper Book clearly shows that the assessee derived income from rentals profit on sale of property rights and interest income to a tune of Rs. 9,06,827/-, as such, it is not correct on the part of the AO to conclude without any basis that there was no business activity during the year. On a careful consideration of this matter with reference to the details furnished by the assessee, we are of the considered opinion that the AO should not have disallowed the expenses in the absence of any

discrepancy pointed out with reference to the books of accounts of the assessee. We, therefore, direct the AO to delete the same.

4. Now coming to the transaction of the property, it is the argument of the Ld. AR that the property was sought to be acquired for the purpose of office space of the assessee and this fact is evident that the assessee held the same for more than three years after getting the office space constructed by entering into the agreement dated 19.01.2001 and 27.01.2002, and by spending Rs. 30,29,612/- for construction. Spending Rs. 2,99,683/- for Genset and Air conditioner establishes that they wanted to use it as their office, but because the space was not sufficient they sold it away to M/s Vaishnavi Associates for a total consideration of Rs. 60,46,840/-. Grievance of the assessee is three fold now. Firstly, the liquidated damages in respect of the delay occurred in delivering a capital asset which reduced the cost of acquisition is not a revenue receipt, secondly, that while calculating the gains on the sale of property AO while applying Section 50C of the Act has taken the guideline value i.e. 53,98,763/- to which he added the cost of construction. Assessee submits that the assessee had purchased only a right in respect of 4.431% on eight grounds and 843 sq.ft of undivided land and the sale deed dated 27.03.2004 clearly shows that the assessee has not received

the entire sale consideration of Rs. 48,31,250/- but they have received only a part thereof as is mentioned at page Nos. 12, 13 i.e. a sum of Rs. 24,15,625/- whereas the balance was paid to one G.K.S. Holdings, as such, out of the guideline value of Rs. 53,98,763/- the gains have to be apportioned to the assessee in the same ratio of the sale consideration. However, in this matter without noticing the fact that the assessee did not receive the entire sale consideration AO valued the sale consideration at Rs. 84,28,375/- by invoking Section 50C and attributed it to the assessee, which is an error apparent on the face of record. Thirdly, assessee submits that having regard to the period of holding of the asset, the gain or loss is only long term one, but not short term one. Basing on this it is the submission of the assessee that the gains of the assessee have to be reworked out on the apportionment of the guideline value and also by reducing the cost of acquisition by the liquidated damages received and whatever the figure that the AO reaches on this exercise, he has to treat it as long term capital gains.

5. We have gone through the record, and the decisions in *Rita Sunil Manaktala vs. Income Tax Officer (Mumbai)* (In ITA No. 255/Mum/2013) and *Delhi Development Authority vs. Income Tax Officer (1995) 53 ITD 19 (Delhi)*, wherein it is held that the composition paid on account of delay in

construction of a building would represent a non taxable capital receipt. In the decisions cited by the assessee the coordinate benches of this Tribunal held that the compensation paid on account of construction is a non taxable capital receipt. We have also perused the agreements dated 19.01.2001 and 27.01.2002, and sale deed dated 27.03.2004. It is clearly mentioned therein that out of 48,31,250/- the assessee received only a sum of Rs. 24,15,625/- and the balance of Rs. 18 lacs was received by one G.K.S. Holdings and on this aspect it is the submission of the Ld. AR that whatever may be the consideration receivable by the vendors under the sale deed had to be apportioned between the assessee and GKS Holdings and the entire Rs. 53,98,763/- cannot be thrown to the share of the assessee. Further the documents indicate that the assessee held the property for more than three years and the acquisition of the property was for the purpose of their office and it is only since it was insufficient for their office they sold it away to one Vaishnavi Associates. Period of holding of the property and the expenses for Genset and Air conditioner also support the contention of the assessee that the property was purchased as a capital asset but not stock in trade.

6. Having regard to all this factual situation, we are of the considered opinion that it is a verifiable fact as to what exactly the portion of the sale

consideration under sale deed dated 27.03.2004 was receivable by the assessee so as to apportion the amount of Rs. 53,98,763/- could be attributed to the assessee. While working out the amounts received or receivable by the assessee the liquidated damages have to be taken into consideration for the purpose of reducing the cost of acquisition. For this purpose, we deem it just and proper to set aside the matter to the file of the AO and AO will consider the questions of the sale consideration attributable to the assessee while taking into consideration the liquidated damages and the period of holding of the asset by the assessee. Needless to say that AO will afford opportunity to the assessee to produce the evidence, if any, on this aspect. With this view of the matter, we restore the issue to the file of the AO for implementing the above direction.

7. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 03.11.2017

Sd/-
(G.D. AGRAWAL)
ACCOUNTANT MEMBER

Dated: 03.11.2017

*Kavita Arora

Sd/-
(K.N. CHARY)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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ASSISTANT REGISTRAR
ITAT NEW DELHI