

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH : KOLKATA

[Before Hon’ble Shri M.Balaganesh, AM & Shri S.S.Viswanethra Ravi, JM]

I.T.A No. 507/Kol/2015

Assessment Year : 2010-11

Arindam Mukherji
[PAN: AEVPM 3352 G]
(Appellant)

-vs-

ITO, Ward-31(2), Kolkata
(Respondent)

For the Appellant : I. Banerjee, FCA
For the Respondent : Shri Soumyajit Dasgupta, Addl. CIT

Date of Hearing : 13.11.2017

Date of Pronouncement : 01.12.2017

ORDER

Per M.Balaganesh, AM

1. This appeal by the Assessee arises out of the order of the Learned Commissioner of Income Tax(Appeals)-9, Kolkata [in short the Id CIT(A)] in Appeal No.63/CIT(A)-9/Wd-31(2)/2014-15/Kol dated 12.01.2015 against the order passed by the ITO, Wd-31(2), Kolkata [in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 25.03.2013 for the Assessment Year 2010-11.

2. During the course of hearing, the Id. AR before us stated that he is not pressing ground nos. 3,6, and 8 raised by the assessee as the grievance of the assessee is addressed in other grounds itself. Accordingly, we do not deem it necessary to adjudicate the ground nos. 3,6 and 8.

3. Ground no. 9 raised by the assessee is general in nature and does not require any specific adjudication.

4. In respect of the remaining grounds, though the assessee had raised several grounds, we find that only effective issue to be decided in the instant case is with regard to the determination of fair market value of the property that has been sold during the year under appeal.

5. The brief facts of this issue is that the assessee sold two rooms in a building situated at 124/1, B.B. Ganguly Street, Kolkata-700012. The details of the sale are as under:

717.80 Sq. Ft. room - Sold for Rs. 10 lacs.

2009 Sq. Ft. room - Sold for Rs. 20 lacs.

The assessee computed the long term capital gains after indexation at Rs. 28,23,980/-. Since, the assessee had invested Rs. 30 lacs. in capital gains account scheme on 22.10.2009 which is well within the due date prescribed for the same, the assessee claimed deduction u/s 54F for the same restricted to the value of gains at Rs. 28,23,980/- as stated herein above. In effect the assessee declared NIL capital gains on account of sale of these two rooms in a building. The Ld. AO adopted that the value determined by the Stamp Valuation Authority for the purpose of levy of stamp duty in terms of Section 50C(1) of the Act. The value determined as per 50C(1) of the Act is as below:

717.80 Sq. Ft. room - Rs. 52,95,928/-

2009 Sq. Ft. Room - Rs. 1,48,22,402/-

There is no dispute with regard to cost of acquisition and the indexation benefit claimed by the assessee thereon. The assessee during the course of assessment proceedings did not agree with the value proposed to be determined in accordance with section 50C(1) of the Act and accordingly, requested the Ld. AO to refer the case for valuation to

Valuation Officer of the Income Tax Department in accordance with section 50C(2) of the Act. The Valuation Officer determined the value thereon as under:

717.80 Sq. Ft. Room	-	Rs. 25,85,516/-
2009 Sq. Ft. Room	-	Rs. 72,36,418/-

The assessee objected to the value determined by the Valuation Officer by pointing out various fallacies thereon. These fallacies were even pointed out before the Valuation Officer before finalization of the valuation report. The assessee also furnished a registered valuer's report dated 10.12.2012 before the Ld. AO in respect of two rooms that were sold to the extent of 2726.80 Sq. Ft (717.80 +2009), wherein the fair market value of the property on the date of sale was worked out at Rs. 890 per sq. ft and accordingly the market value was arrived at Rs. 24,26,852/-. The assessee justified its sale consideration reflected in the sale deed at Rs. 30 lacs. and stated that the sale consideration actually received is more than the fair market value determined by the registered valuer vide registered valuer's report dated 10.12.2012. In fact this registered valuer's report was also submitted by the assessee before the Assistant Valuation Officer (in short "AVO") of the Income Tax Department. The assessee also brought on record both before the AVO and the Ld. AO with regard to existence of various tenancy disputes in the property that has been sold. In fact the following tenants are staying in the property that has been sold by the assessee :-

Sl.No.	Name of Tenant	Rent Per month	Floor
1.	Siddhartha & Nandadulal Saha	900/-(Charli Garments)	Ground
2.	Shew Kumar & Monorama Chowrasia	200/- (fruit juice/tea)	Ground
3.	Jagabandhu Mondal	735/-(kamala Shoe)	Ground
4.	Mandira Mira	100/- (Tea shop)	Ground
5.	Upen Panigrahi	90/- (pan shop)	Ground
6.	Sukdev & Brothers	75/- (loto)	Ground
7.	Shew Charan Prasad	75/-(loto)	Ground
8.	S.M. Enterprise	640/- (Wine)	Ground
9.	Tapan Ghosh	700/-(Raj Laxmi Jewelers)	Ground
10.	Goutam Ghosh	100/-	Ground

5.1. The assessee also submitted the list of litigated tenants that are pending before various City Civil Courts with regard to fixation of rents and other disputes as under:

Sl. No.	Name of the tenants	Rent Per Month	Floor	Disputes where pending
1.	Sriniwas Gupta sub lessee State Bank of India	5000/-	1 st	TS No. 520/03 with the City Civil Court, Bench-13.
2.	Surya Kanti Jaiswal	5000/-	3 rd	TS No. 747/03 & BT Case No. 4/04, City Civil Court, Bench-13.
3.	Shanti Devi Gupta	5000/-	2 nd	TS 748/03 & B T case No. 04/04 Tribunal
4.	Sriniwas Gupta	800/-	Ground	TS 1391/02 & Misc. Case no. 24/04
5.	Probodh & Prakash Maity	250/-	Ground	TS 1392/02 City Civil Court, Bench-13
6.	Bishu Das	100/-	Ground	EI 224/03 Second Court, 3 rd Bench.
7.	Sriniwas Gupta	100/-	Ground	EI 225/03 Second Court, 3 rd Bench.
8.	Sriniwas Gupta	1200/-	Ground	EI 226/03 Second Court, 3 rd Bench.
9.	Sriniwas Gupta & Probhat Maity	100/-	Ground	TS 1609/99 City Civil Bench-13.

5.2. The assessee sold M/s Kamal Shoe stores & Punjabi Hindu Hotel to Senco Gold for Rs. 20 lacs. The assessee sold Charly Shop to Senco Gold with tenant for Rs. 10 lacs. Both these properties are situated in ground floor. The assessee sold the property in September, 2009. The property was purchased by the assessee in 1995 and since there was some dispute with regard to levy of stamp duty thereon, there was a pending litigation and ultimately the stamp duty to be paid by the assessee was finally determined only on 13.07.2007 in response to the property purchased by the assessee, which is the subject matter of part of the sale in this year under appeal. The stamp duty value on the date of purchase was determined by the Stamp Valuation Authorities at Rs. 86,88,200/- for the whole property. This was determined only on 13.07.2007. The assessee objected to the valuation done by the AVO that, in respect of 717.80 Sq. Ft. sold by the assessee for Rs. 10 lacs which works out to Rs. 1393.14 per sq. ft, the AVO value u/s 50C(2) of the Act was Rs. 25,85,516/- which worked out to 3602 per sq. ft. Similarly in respect of 2009 sq. ft room sold by the assessee for Rs. 20 lacs which works out to 995.52 per sq. ft as against which, AVO value u/s 50C(2) of the Act was Rs. 72,36,418/- which worked out to 3602 per sq. ft. The assessee filed objections before AVO mentioning various fallacies which are enclosed pages in 95 to 97 of the paper book. The AVO without resorting to these objections proceeded to determine the value at Rs. 3602 per sq. ft. The assessee also pleaded before the Id. AO that the registered valuer's report reflects only Rs. 890 per sq. ft. which is determined based on

the value as prevalent in the year 2007 and thereafter the registered valuer had added 50% growth to the said value and finally arrived at the value of Rs. 890/- per sq. ft. This in the opinion of the assessee was to be accepted as the fair market value. The assessee further pleaded that he had sold on 18.12.2011 relevant to assessment year 2012-13, the remaining part of the subject mentioned property, wherein, the value as per section 50C was worked out at Rs. 15,86,58,001/-. The assessee made the similar objections for the same before the Id AO and the Id AO referred the case to the AVO in terms of section 50C(2) of the Act. The AVO determined the fair market value of the property at Rs. 3,47,83,000/- vide his report dated 16.03.2015. Hence, it was argued even as per AVO, the value of the property as on 08.12.2011 of the very same property was only Rs. 1832 per sq. ft., which having been adjusted with index factors, works out to Rs 1474 per sq. ft on reverse working basis. The assessee's actual rate on an average was Rs. 1104 sq. ft. in the year 2009. Hence, the value shown by the assessee was prayed to be adopted as the fair market value even as per the subsequent valuation of the AVO for the very same property made for the assessment year 2012-13. The assessee also filed property price index given by National Housing Bank to understand the growth in real estate market from the years 2007 to 2011. Based on that, the assessee pleaded that the real estate market did not register a growth of 9.15 times as determined by the AVO in his valuation report. Alternatively, the assessee pleaded that when the value shown in the sale deed is sought to be substituted by the fair market value determined by the AVO which shows a higher value than the registered valuer's report submitted by the assessee and the actual sale consideration reported by the assessee, then the alternative mechanism to be adopted for determining the fair market value would be based on rental method as admittedly the subject mentioned property was duly given on rent to various tenants. In this regard, he stated that the various tenancy disputes pending with various City Civil Court also are to be taken into account while determining the fair market value.

6. The Id. AO ignored all the submissions and fallacies pointed out by the assessee and reworked the long term capital gains and sale of 2726.80 sq. ft. (717.80 + 2009) by adopting the value determined by the AVO as full value of consideration in accordance with section 50C(2) of the Act and determined the long term capital gain at Rs. 66,45,914/- after giving the deduction u/s 54F of the Act to the tune of Rs. 30 lacs. This action of the Ld. AO was upheld by the Ld. CIT(A). Aggrieved, the assessee is in appeal before us on the following grounds:

1. That on the facts and circumstances of the case and in law the Order passed by the Ld. CIT(A), is bad in law and therefore liable to be reversed and cancelled in full, in view of its total omission to take lawful and appropriate cognizance of the facts and evidence on record, explanations furnished in this behalf and thereafter, adjudicate the Appeal in this light of pertinent provisions of law and after judicious application of mind, thereto.

2. That on the facts and circumstances of the case and in law, the Ld. CIT(A) was in gross error in upholding, for the purpose of computation of Capital Gain, the Deemed Full Valuation of Consideration of the Property at Rs. 9821084/-, determined by the Ld. Assistant Valuation Officer (AVO) u/s 50C(2), as against the actual consideration of Rs. 30 lacs received by the appellant, after founding his decision on superficial and arbitrary findings.

4. That on the facts and circumstances of the case and in law, the Ld. CIT(A), has grossly erred in endorsing the Deemed sale price, arrived at by the Ld. AVO u/s 50C(2), at Rs. 9821084/-, as the Deemed Full Valuation of Consideration, in the place of actual consideration after totally ignoring the Valuation Report, furnished by the Appellant.

5. That on the facts and circumstances of the case and in law, the Ld. CIT(A), has grossly erred in endorsing the Deemed Sale Value, arrived at by the Ld. AVO u/s 50C(2), at Rs. 9821084/- as the Deemed Full Valuation of Consideration, after not appreciating the merit and need of a much lower determination, based on "Rent Multiplier Method", in the light of the diminishing and adverse factors like actual rent realized, rent in arrears, existence of a number of suits, Long Term Leases, etc.

7. That on the facts and circumstances of the case and in law, the Ld. CIT(A), while dismissing the appeal, ought to have considered the Ld. AVO's Valuation

of the Market Value at Rs. 9821084/- after omitting to appreciate the flawed, gross anomalous and irrational adoption of per sq. ft. rate of Rs. 3602/-, determined on the basis of regression of some future sale and some fictional upward adjustments.

7. We have heard the rival submissions. The Ld. AR reiterated the submission made herein above before the lower authorities. In response, the Ld. DR argued that AVO has determined the fair market value of the property based on commercial potentiality of the subject mentioned property and accordingly is justified in determining the value fixed thereon. The Ld. AR also placed reliance on the decision of the Co-ordinate Bench of this Tribunal in the case of Prafulla Kr. Bhowse vs. ITO in I.T.A. No. 316/Kol/2015 for assessment year 2007-08 dated 18.11.2015 wherein it was held that fair market value of the let out portion of the property is to be determined by taking into account rent actually received/receivable by the assessee. The Ld. DR defended this Tribunal's decision by arguing that in that case, the subject mentioned property was a residential property and not a commercial property. Hence, the same ratio cannot be made applicable to the facts of the instant case.

7.1. We find that the Ld. AVO had arrived at the value of Rs. 3602 per sq. ft which is worked out as under:

Rate as on 08.12.2011	Rs. 3091.00/Sq. Ft
Less @ 8% per year	(-) Rs. 247.00/Sq. Ft
Rate as on 07.12.2010	Rs.2844.00/Sq. Ft.
Less @ 8% per year	(-) Rs. 228.00/Sq. Ft
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Rate as on 06.12.2009	Rs. 2616.00/Sq. Ft
Less @ 1.65% (From 06.12.09 to 23.09.09=2.47months@.67% per month)	Rs. 43.00/Sq. Ft
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Rate as on 23.09.2009	Rs. 2573.00/Sq. Ft

In fact, the Ld. AVO had back worked the value as on the date of sale on 23.09.2009 by taking into account the 50C value on 08.12.2011. We find that the Ld. AVO to this value of Rs. 2573 per sq. ft. had added 40% for commercial potentiality and accordingly added Rs. 1029 per sq. ft. Accordingly, he arrived with the fair market value of the property as on 23.09.2009 at Rs. 3602 per sq. ft. But we find that the said 50C value had been objected by the assessee in assessment year 2012-13 proceedings and reference to the ld. AVO was requested to the Ld. AO in assessment year 2012-13. The Ld. AVO had valued the subject mentioned property at Rs. 3,47,83,000/- which works out to Rs 1832 per sq. ft. In this scenario, it is pertinent to note that the value of this property on 08.12.2011 as per AVO's report was only Rs. 1832 per sq. ft. whereas the AVO had determined the value as on 23.09.2009 of the very same property at Rs. 3602 per sq. ft. This proves the fallacy and mistake committed by the ld. AVO beyond doubt. Hence, we hold that the Ld. AO ought not to have resorted to adoption of the said AVO's value ignoring the practical considerations connected with the subject mentioned property. Having said so, we are now left with fair market value based on registered valuer's report. At the same time, it cannot be ignored that reference to AVO was done at the instance of the assessee in terms of section 50C(2) of the Act. But we find that the fair market value could also be determined by an alternative method i.e. based on rental methods. In this regard, we find that the reliance has been rightly placed by this Tribunal wherein the ratio laid down by the Hon'ble Jurisdictional High Court in the case of CIT vs. Asha Devi Agarwal was relied upon. We find that this Tribunal in the case of Prafulla Kr. Bhose vs. ITO in I.T.A. No. 316/Kol/2015 for assessment year 2007-08 dated 18.11.2015 had held as under:

6. We have heard the arguments of both the sides and also perused the material available on record. At the time of hearing before us, ld. Counsel for the assessee has raised a limited issue that while determining the fair market value of the assessee's property, the valuation of the portion occupied by tenant should be determined by

applying the rent capitalization method taking the rent actually received by the assessee and not the fair market rent as done by the DVO. It is observed that this claim of the assessee is duly supported by the decision of the Hon'ble jurisdictional High Court in the case of Asha Devi Agarwal (supra), wherein it was held by Their Lordships that while estimating the value of a property on rental basis, only the rent, which is actually payable by the tenants to the owners of the property, as the landlords should be taken into account. It was held that when the property is a tenanted property, the owner is entitled to collect only the rent payable by the tenants and a purchaser of such tenanted property would be in the same position as the vendor, i.e. original owner. It was held that a purchaser, therefore, would be restricted to collection of rent only from the tenants and the value of such property in the hands of the owner or transferee, if calculated on the rental basis, would have to be determined by the rent, which is available to them for collection. At the time of hearing before us, no authority has cited on behalf of the Department taking a contrary view on this issue. We, therefore, respectfully follow the ratio of the decision of the Hon'ble jurisdictional High Court in the case of Asha Devi Agarwal and direct the Assessing Officer/Departmental Valuation Officer to compute the fair market value of the let out portion of the assessee's property by taking into consideration the rent actually receivable by the assessee from the tenants. Ld. Counsel for the assessee has also contended that if the valuation of the let out portion of the assessee's property is done by taking into consideration, the actual rent receivable by the assessee from the tenants, the total fair market value of the property of the assessee as per such revised estimation would be less than the sale consideration of Rs.1,30,00,000/- shown by the assessee and there would be no case of making addition on account of capital gain. We direct the Assessing Officer to verify this contention of the ld. Counsel for the assessee and if it is found after recomputation of the valuation of the assessee's property that the fair market value is less than the sale consideration shown by the assessee, no addition shall be required to be made on this issue".

Respectfully following the decision of this Tribunal, we hold that the fair market value of the property should be determined based on rental value only. If the value determined thereon is higher than the actual sale consideration reported by the assessee, then the value that was determined based on rental method should be considered as full value of consideration for the purpose of computing capital gains. If the value based on rental method is found to be less than the actual consideration reported by the assessee, then the actual consideration reported by the assessee should be considered as full value of

consideration for the purpose of computing capital gains. With these directions we direct the Ld. AO to re-compute the capital gains and decide accordingly. Accordingly, grounds raised by the assessee are allowed for statistical purposes.

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

Order pronounced in the Court on 01.12.2017

Sd/-

[S.S. Viswanethra Ravi]
Judicial Member

Sd/-

[M.Balaganesh]
Accountant Member

Dated : 01.12.2017
SB, Sr. PS

Copy of the order forwarded to:

1. Arindam Mukherji, 79/1, Serpentine Lane, Kolkata-700014
2. ITO, Ward-31(2), Kolkata, 10, Middleton Row, Kolkata-700071.
- 3..C.I.T.- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches