

**IN THE INCOME TAX APPELLATE TRIBUNAL "F", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
&
SHRI SANDEEP GOSAIN, JM**

**ITA No.3107/Mum/2012
(Assessment Year :2005-06)**

ITO 8(3)(4), R.No.217, Aayakar Bhavan, M.K. Marg,Mumbai – 400 020	Vs.	M/s. Vertex Manufacturing Co. Ltd., Vertex Vikas, A, 6 th Floor, 222, Sir Mathuradas Vissanji Road, Andheri (E), Mumbai – 400 069
PAN/GIR No.		AAACV2450N
Appellant)	..	Respondent)

Revenue by	Ms. Pooja Swaroop
Assessee by	Ms. Arti Satne & Ms. Shalini Divatia
Date of Hearing	17/11/2017
Date of Pronouncement	14/02/2018

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the Revenue against the order of CIT(A)-18, Mumbai dated 29/02/2012 for the A.Y.2005-06, in the matter of order passed u/s.143(3) of the IT Act.

2. Following grounds have been taken by the Revenue:-

1. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in- directing the AO to compute LTCG on sale of development rights by taking the date of acquisition as 06-05-1947, i.e. the date on which the plot was originally purchased, without appreciating the fact that the assessee had sold the land to Vikas Vertex Cooperative Hsg.Soc.Ltd.(VVCHSL) vide deed dated 09-08-2004 and offered LTCG arising out of such transfer of land."

2. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to compute LTCG on sale of development rights by

taking the date of acquisition as 06-05-1947, without appreciating the fact that vide a separate deed dated 09-08-2004 with VVCHSL. the assessee acquired leasehold rights in the plot and sold the development rights in the same to M/s.Aditi Constructions by an agreement dated 23-10-2004, amounting to sale of short term capital asset resulting into STCG."

3. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to compute LTCG on sale of development rights, without appreciating the fact that as the assessee had sold the land to VVCHSL, its ownership right therein had ceased and the leasehold rights acquired in the same land by the assessee by a separate deed dated 09-08-2004 for payment of Re. 1 p.a. was a distinct and separate capital asset from the erstwhile plot of land owned by the assessee."

4. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to compute LTCG on sale of development rights, without appreciating the fact that the assessee had acquired leasehold right in land vide sale deed dated 09-08-2004 and sold the same on 23-10-2004, resulting into STCG on such transfer." "

5. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to allow deduction U/S.54EC for the investment made in NABARD Bonds, without appreciating the fact the AO had rightly denied the same as the transfer of development rights had resulted into STCG and hence the assessee was not entitled for such deduction u/s.54EC against the same."

3. Revenue has also filed additional ground which reads as under:-

(i) " Whether on the facts and in the circumstances of the present case and in law, it should be held that capital gain on the transfer of land vide agreement to sell dated 15/11/1980 is not taxable in the current year as there is no transfer of capital asset in the year under consideration and only conveyance was effected in current year ? "

(ii) " Whether on the facts and in the circumstances of the case and in law, the capital loss of Rs. 15566857/- is not assessable in the current year as there is no transfer of land under consideration as land on which loss has been computed stood transferred on 15/11/1980 when the assessee signed agreement with M/s. Vikas Properties? "

(iii) "Whether on the facts and in the circumstances of the case and in law, the CIT(A) has erred in failing to arrive at the correct conclusion on the issue of date of transfer of land i.e. year of taxability of capital gain, by exercising hisas held by the Apex court in the case of KapurchandShrimal vs. CIT (131 ITR 451)(SC)?" "

4. Rival contentions have been heard and record perused. Facts in brief are that the assessee has during the year under consideration offered for tax long term capital gain in respect of two transactions. The computation

in respect of the said gain is, as filed in the computation of income accompanying the return of income is reproduced here.

I. Sale of land	Rs. 51,25,033
Cost of selling (-)	<u>Rs. 58,250</u>
Net sale consideration	Rs. 50,66,783
FM Vason 1.4.1981 indexed (-)	<u>Rs. 206,33,640</u>
Long term capital loss	Rs.155,66,857
II. Sale of land	Rs. 7,00,00,000.
Cost of selling (-)	<u>Rs. 15,08,741.</u>
Net sale consideration	Rs. 68,491,259.
FMV as on 1.4.1981 indexed (-)	<u>Rs. 23,78.126.</u>
Long term capital gain	Rs. 661,13,133.
Setoff loss in 1 above	Rs. 155,66,857.
Net long term capital gain	Rs. 505,46,276
Less: Investment u/s 54EC	<u>Rs. 505.46,276.</u>
Taxable long term capital gain	Nil.

5. The assessee has alongwith the return of income, inter-alia, enclosed a copy of a Development Agreement dated 23.10.2004 (herein after 'the Development Agreement') entered into by the assessee with M/s. Aditi Constructions (hereinafter 'Aditi').

6. On the perusal of the said agreement, which is duly registered with the State Revenue Authorities, AO observed the following sequence of events.

(i) On 06.05.1947 the assessee purchased land admeasuring 5903.6 square meters at Andheri described as C.T.S. No. 673 from S/Shri Yusufbhai Saheb Najmuddin and Tayebbhai Saheb Zakuddin. The consideration for the

purchase is not mentioned. The deed evidencing the action is stated to have been registered with the relevant Authorities.

(ii) On 15.11.1980 the assessee entered into an agreement to sell this land to M/s Vikas Properties (herein after Vikas*) subject to the certain conditions. Neither the consideration nor the conditions are mentioned. However from the submissions made in this regard vide letter dated 4.12.2007 it is apparent that the monetary consideration of the deal was Rs.92,00,000/-. In addition Vikas was supposed to have provided, free of cost to the assessee, an office premises admeasuring 2000 sq. ft., a premises of about 1000 sq.ft of saleable built up area in the form of a godown and also construct a bungalow of about 1100 sq. Yards on a carved out portion of the property which was to be leased in perpetuity to the assessee for* Re. 1/- per annum. The actual measurement of the carved out plot finally turned out to be 1196.88 sq Mts. (herein after 'the bungalow plot).

(iii) Vikas constructed two buildings named as Vertex Vikas 'A' and Vertex Vikas 'B'. Two separate Housing Societies; i.e. Vertex Vikas Cooperative Housing Society Ltd (herein after 'the Society') and Andheri Vertex Vikas Premises Cooperative Housing Society Ltd respectively were framed to manage and control the said buildings.

(iv) On 16.05.1992 the assessee signed a Memorandum of Understanding (herein after 'MOU) with Vikas. This MOU was a result of renegotiations that was necessitated as Vikas defaulted on some of the obligations stipulated in the agreement dated 15.11.1980. With this MOU the agreement dated 15.11.1980 stood extinguished.

(v) Vikas paid the assessee a sum of Rs. 13 Lakhs as the cost of construction of the bungalow which Vikas was supposed to construct for the assessee. The assessee now decided not to construct the bungalow but retain an old existing bungalow which was in the occupation of one of the Directors of the assessee.

(vi) The assessee lost 1561.1 sq. mts of the plot to a Development Plan Road, which runs across the plot thereby, bifurcating the plot into two parcels of land. The larger parcel admeasuring 2215.71 sq. mts. of land on which Vikas-Vertex 'A' Stands and the smaller parcel admeasuring sq.mts. on which Vertex Vikas 'B' stands. This larger parcel also includes the bungalow plot.

(vii) On 30.07.2004 the Collector, Mumbai Suburban District vide an order remembers the parcel admeasuring 2215.71 as C.T.S.NO. 673A and the parcel admeasuring 2126.79 sq.mts as C.T.S. No. 673B the area lost by the assessee for the road is renumbered as C.T.S.No.673C.

(viii) The assessee now owned two plots admeasuring 2215.71 sq. mts and 2126.79 sq. mts respectively. An individual Cooperative Housing Society stands on each of the two plots. The bungalow stands on the larger plot along with the society.

(ix) The building known as Vertex Vikas 'A' was sold by Vikas to various members of the Society and as per the individual agreements entered into by Vikas with the individual buyers. Vikas was supposed to have conveyed the land to the Society formed by these individual buyers subject to a perpetual lease in respect of the carved out plot for the bungalow being granted in favour of the assessee. On 09.8.2004 the assessee on being approached by the members of the Society entered into a Deed of Conveyance with the Society, Vide this deed the assessee conveyed the entire parcel of land admeasuring 2215.71 sq. mts of land which is renumbered by the collector as C.T.S. No. 673A to the Society. The assessee got a perpetual lease of the bungalow plot carved of the plot assigned in its own name.

(x) On 23.10.2004 the assessee entered into a Development Agreement with Aditi for development of the bungalow plot for a consideration of Rs. 851,00,000/-.

7. From the above sequence of events it is clear that the assessee conveyed the parcel of land admeasuring 2215.71 sq. mts to the Vikas Vertex Cooperative Housing Society Limited

vide agreement dated 09.08.2004. The deed of conveyance is duly registered with the Stamp Duty Authorities. It is brought out here for the sake of clarity on the issue that the consideration of Rs. 146,85,250/- mentioned in the conveyance agreement and assessed at Rs. 196,00,000/- by the Stamp Duty Authorities is the amount already paid by the members of the Society to Vikas. The assessee has then acquired a perpetual lease of the bungalow plot which is a part of C.T.S. No. 673A, vide a clause in this conveyance agreement.

8. AO observed that there are three separate transactions involved in the process.

(i) Conveyance of 2515.71 sq.mts of land to the Society by the assessee vide agreement dated 09.08.2004. Though the assessee has apparently not received any consideration in respect of this conveyance, since the property is conveyed in the year under consideration, the assessee has offered for the calculation of the gain arising during the year, that part of the amount received from Vikas in 1980, which pertains to this part of the land out of the overall amount received from Vikas, then

(ii) Obtaining of perpetual lease of an area admeasuring 1196.88 sq, mts. also vide agreement dated 09.08.2004 for a sum of Rs, 999/- i.e. Re. 1/- for each of the 999 years of lease which the assessee has paid the Society; and

(iii) Selling of Development right of the 1196.88 sq mts land to Aditi Construction for a sum of Rs. 851,00,000/-.

9. The first leads to a long term capital gain assessable in the hands of the assessee. The assessee has worked out capital loss of Rs.155,66,857/- on the transaction. The second has no tax implication and the third transaction the assessee has worked out long term capital gain of Rs.661,13,133/- which has been reduced by the loss of Rs.155,66,857/- and the residual gain has been reduced to nil by the claim of deduction u/s 54EC of the Act.

10. After considering the various terms of deed of the conveyance dated 09/08/2004, AO concluded as under:-

4.3.2.3. The gain arising to the assessee in respect of the conveyance deed is reworked in line with the above discussion

<i>Sale Consideration (as submitted)</i>	<i>Rs. 51,25,033.</i>
<i>Less : Cost of sale (as claimed)</i>	<i><u>Rs. 58,250.</u></i>
	<i>Rs. 50,66,783.</i>
<i>Less: Cost (FMV as on 01.04.1974)</i>	<i><u>Rs. 8,70,705.</u></i>
<i>Long term capital gain on conveyance</i>	<i><u>Rs. 41,96,078.</u></i>

4.3.2.4. As mentioned in the opening paragraphs of this order the assessee has claimed relief under the provisions of section 54EC of the Act by investing amounts in bonds eligible as per the section. The assessee has however claimed relief against what it perceives to be long term gain arising from the execution of the Development Agreement dated 23.10.2004 with Aditi, This claim of the assessee has been rejected in those paragraphs of this order which deal with the gain arising to the assessee from the transaction, later in this assessment order. However in view of these facts the assessee's investment in the eligible bonds need to be tested for relief against the long term gain assessed in its hands in

respect of the Deed of Conveyance. It is an admitted position that the assessee had transferred the asset now conveyed, in 1980. It is also admitted that the assessee had received the sale consideration in respect of this asset thereabouts. It is a further admitted fact that the assessee has not received any consideration as a result of the Deed of Conveyance dated 09.08.2004. The assessee has offered the gain in respect of the transaction in the year under consideration because the transaction has been completed on 09.08,2004 by virtue of conveying the asset to the society. That the assessee has purchased 2700 bonds on 23,03.2005, 2500 bonds on 24.03.2005 and 850 bonds on 28.03.2005 is a matter of record. The assessee is therefore not eligible to claim any relief, from the gain assessed, as per the provisions of section 54EC of the Act. Section of the Act stipulates that the assessee has, at any time within a period of six months from the date of transfer which is 09.08.2004 in the case under consideration, invest the whole or any part of the capital gain in the eligible bonds. The facts of the case clearly indicate that the assessee has missed the deadline of six months from the date of the transaction. The fact that the invested amount is not a part of the sale consideration is an issue mentioned here though it is not of relevance to the cause at hand. The assessee cannot therefore derive any relief whatsoever from the capital gain arising from the Deed of Conveyance deed 09/08/2004 and so assessed in this order under the provisions of Section 54EC of the Act.

11. By the impugned order, CIT(A) accepted assessee's claim of long term capital loss after observing as under:-

5.3. I have considered the submissions of the learned counsel and in view of my findings in ground of appeal No.2 – in favour of the appellant – this too is decided in favour of the appellant and as a consequence of the above – A.O. is directed to allow deduction u/s.54EC of IT Act to the appellant – as claimed by him. Hence, this ground of appeal is allowed.

6. The fourth ground of appeal is as follows:

"The learned AO erred in determining the full value of the consideration in terms of the Development Agreement at Rs.8,51,00,000/-,

6.1 The A.O. has determined the full value of the consideration at Rs. 8.51 crores u/s. 50C in terms of the development agreement. The appellant had objected to the same as an amount of Rs. 1.51 crores out of Rs. 8.51 crores was contingent on the grant of permission for use of TDR which in turn of subject to the outcome of the litigation pending before Hon'ble Supreme Court. The appellant has vide its letter dated 5th March 2011 stated that Hon'ble Supreme Court has permitted the use of TDR and hence, this ground is not pressed.

Hence, this ground of appeal is therefore, dismissed.

7. The fifth ground of appeal is as follows:

"The learned A.O. erred in determining the cost of acquisition of the plot No. .673A-10 at Rs.999/-."

7.1. The learned counsel has submitted as follows:

"The Learned AO on page 8 (para 4.3) of his order has concluded that "Disputes between Vikas and the assessee had the ultimate result of annulment of the agreement and it was left to the assessee to convey the land to the said society."

Without prejudice and in the alternative, it is submitted that in view of the aforesaid findings and the facts of the case , the aforesaid transaction becomes liable to tax pursuant to the MOU dated 16.5.1992 since at that time the provision of Section 2(47) of the Act, the definition "Transfer" included transaction where under possession of the property had been handed over in accordance with Section 55A of the Transfer of Property 'Act, 1982.

In such a case the transaction of 'sale' to Vikas Properties and the consequential flow of the leasehold rights (as alleged by the AO) would be deemed to have taken place on 16.5.1992 notwithstanding the point of time when the Conveyance in respect thereof were executed. Hence the sale of Development Rights in respect of the Bungalow Plot (in Oct 2004) would have taken place after more than 12 years and hence constitute Long Term Capital Gain.

7.2. I have considered the submissions of the learned counsel and since in the second ground of appeal - the appellant has succeeded on the ground that the 'critical date' for conveyance is 06-05-1947 - this. ground of appeal does not survive for adjudication and is therefore. dismissed.

8. In the result, the appeal is partly allowed.

12. Against the above order of CIT(A), revenue is in further appeal before us.

13. We have considered rival contentions and carefully gone through the orders of the authorities below and found from record that assessee has claimed long term capital loss of Rs.1,55,66,857/- out of sale of land. Similarly for other land it has claimed long term capital gain of Rs.6,61,13,133/-. The assessee has asked for set off of loss of Rs.1,55,66,857/- out of this profit of Rs.6,61,13,133/-. Accordingly, in the return of income assessee has shown long term capital gain of Rs.5,05,46,276/- against which reduction was claimed in respect of investment made u/s.54EC which resulted into nil capital gain. The AO did not accept assessee's contention of capital gain shown and also disallowed investment u/s.54EC.

14. By the impugned order, CIT(A) held that it was a long term capital gain in so far as land was acquired on 06/05/1947. In view of the detailed finding given by the CIT(A) vis-à-vis judicial pronouncements cited by learned AR, we are in agreement that it was a long term capital gain in so far as assets were held for more than three years. Contention of the AO is that assessee has continued the parcel of land admeasuring 2215.71 sq. mts. to Vikas-Vertex vide agreement dated 09/08/2004 which is duly

registered with the Stamp Duty Authority, thereby resulting into assets being held by the assessee for less than 36 months is not enabled. However, while rejecting the assessee's claim of long term capital gain, the AO has directly jumped to the conclusion without going into the fair market value of asset as on 01/04/1981 and indexed value thereof. However, assessee has also not given any justification for the loss of Rs.1,55,66,857/- having been incurred on sale of land which was purchased way back in the year 1947 and sold in the year 2004. It is a matter of general knowledge that land value during the last 15-20 years have increased number of times, therefore, it is not acceptable that even after holding land more than 57 years, assessee has incurred loss of Rs.1,55,66,857/-. In the interest of justice, we restore the matter back to the file of the AO with a limited issue to find out exact amount of capital gain so earned after giving benefit of indexation and determining the fair market value as on 01/04/1981. So far as CIT(A) conclusion regarding assessee having earned long term capital gain, we are in full agreement with learned AR that there is no infirmity in this part of the order of the CIT(A). In view of the above, assessee having earned long term capital gains, is eligible for deduction u/s.54EC of I.T.Act. Accordingly, we modify both the orders of the lower authorities and direct the AO to recompute the long term capital gain after determining fair market value as on 01/04/1981 and

thereby allowing indexation and also benefit of investment u/s.54EC.

15. In the result, appeal of the Revenue is allowed in part for statistical purposes.

Order pronounced in the open court on this 14/02/2018

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 14/02/2018
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai