IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad

Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri B. Ramakotaiah, Accountant Member

ITA No.1689/Hyd/2016
(Assessment Year: 2005-06)

Shri Sharad Badrivishal Pitti Hyderabad PAN: ADFP2418K *(Appellant)*	Vs	Dy. Commissioner of Income Tax, Circle 16(3) Hyderabad *(Respondent)*

For Assessee : Shri Laxmi Niwas Sharma
For Revenue : Smt. N. Swapna, DR

Date of Hearing: 04.04.2018
Date of Pronouncement: 11.04.2018

O R D E R

Per Smt. P. Madhavi Devi, J.M.

This is assessee's appeal for the A.Y 2005-06 against the order of the CIT (A)-4, Hyderabad, dated 13.10.2016. The assessee has raised the following grounds of appeal:

> *"1. The learned CIT (A) erred in facts and law while passing assessment order u/s 143(3) rws 254 of income tax act 1961.*
>
> *2. The learned CIT (A) erred in not deciding the issue on merits and dismissing assessee appeal.*
>
> *3. The learned CIT (A) erred in both law and facts by not adjudicating the grounds raised by assessee as follows:*
>
> *a. The assessing officer erred in taxing hypothetical income whereas no sale consideration was received by assessee from the other co-owner nor property transferred.*

b. The AO erred in treating the demarcation between the co-owners as transfer when there is neither relinquishment nor extinguishment of right over property.

c. The AO erred in not considering the fact that share of ownership of the assessee in the property remains same since 1985.

4. For these & other ground which may be raised during or before the appeal is heard. It is prayed that the relief be granted".

2. Brief facts of the case are that the assessee, an individual, filed his return of income for the A.Y 2005-06 on 26.07.2005 admitting a total income of Rs.70,60,379. The return was initially processed u/s 143(1) on 21.07.2006. Subsequently, the assessment was reopened u/s 147 of the Act, by issuance of a notice u/s 148 of the Act. In response to the said notice, the assessee filed a revised return withdrawing the long term capital gain offered by him. Vide letter dated 4.02.2010, the assessee explained that the asset in question is co-owned property which was divided amongst the co-owners with demarcation in the relevant A.Y and therefore, there is no transfer and there is no capital gain arising therefrom. It was also submitted that since the construction of the property in the year 1986, the income from the property was offered and assessed under the head "income from House Property" in the hands of each of the co-owners in the ratio of their holding and no depreciation on the same was claimed/allowed. The AO however, was not convinced and treated it as short term capital gain presuming that, the property was owned by 'Shri Lakshmi Narsing Associates' which was dissolved on 24.09.2004; and that the asset is depreciable in nature as it was utilized by the partnership firm for business

purpose; and therefore, the gains therefrom have to be treated as short term capital gain only.

3. Aggrieved by the order of the AO, the assessee filed an appeal before the CIT (A), who dismissed the same vide orders dated 9.5.2011. The assessee further appealed to the ITAT which remitted the matter back to the file of the AO with a direction to verify whether any return has been filed by the firm i.e Shri Lakshmi Narsing Associates and also to see whether the property was fully leased out and the assessee was getting 40% of the income from the property and whether that has been utilized by the partnership firm for its business purposes and also as to the actual status of the entity M/s. Shri Lakshmi Narsing Associates.

4. The AO vide orders dated 31.3.2014, while giving effect to the ITAT order, observed that the assessee, along with Shri Badrivishal Pitti and Shri Radheyshyam Loya had developed a property at Sultan Bazar, Hyderabad in the year 1985 and after developing, the building was given on rent and the rentals were offered as income from house property in the ratio of 40:60 in the respective hands and that "Shri Lakshmi Narsing Associates" though had existed with PAN No.AAOFSS5198K, it ceased to exist with effect from 29.04.2004 and there is no record of the firm filing any returns of income or being assessed to tax. The AO, thereafter, held that there is a transfer of property and the gain is taxable as LTCG. Aggrieved by the order of the AO, assessee preferred an appeal before the CIT (A) stating that there was no transfer of the property in the financial year 2004-05 relevant to

the A.Y 2005-06 and hence there is no capital gain, either LTCG or STCG. The CIT (A), however, confirmed the order of the AO and the assessee is in second appeal before us.

5. The learned Counsel for the assessee, while reiterating the submissions made before the authorities below, submitted that though the building was constructed in the year 1986-87, there was no demarcation of the property by metes and bounds between the owners & developer of the property and the rental income from the building was being shared in the ratio of60:40, 60% to the developers and 40% to the land owners and the same was being offered to tax under the head “income from house property” in the respective hands. It was submitted that there was no partnership business nor was any income in the firm. It was submitted that in the year 2004-05, the partnership firm got dissolved and there was no transfer of any capital asset. It was submitted that the demarcation of the building by metes and bounds took place in the relevant A.Y and the assessee under a mistaken understanding had offered the long term capital gain to tax in his return of income. Therefore, he pleaded that there is no capital gain to be brought to tax and the assessee has rightly withdrawn the LTCG in the revised return of income.

6. The learned DR however, supported the orders of the authorities below and submitted that the assessee could not have withdrawn the LTCG offered in the original return of income in the return filed by the assessee in reply to the notice u/s 148 of the Act. She relied upon the decision of the Hon'ble Supreme

Court in the case of CIT vs. Sun Engineering Works (P) Ltd reported in (1992) 198 ITR 297 (S.C).

7. Having regard to the rival contentions and the material on record, we find that the property at Sultan Bazar was constructed by the assessee and the Loya family in the year 1986-87 and the rental income was being enjoyed by each of the parties in the ratio of 60:40. It is also not in dispute that the assessee has been offering the income from the property under the head income from house property. The firm M/s Shri Lakshmi Narsing Associates was dissolved on 29.4.2004 and the assessee has filed the copy of the said dissolution deed. Therefore, the said firm was not in existence after 29.4.2004 and did not derive any income whatsoever from any source even till that date during the relevant period. In the year 2004-05, the assessee and the developer have only demarcated the property by metes and bounds and there is no transfer of the property. It is seen that the assessee, under a mistaken understanding, that there is a transfer of property has offered the LTCG. However, Article 265 of the Constitution of India mandates that the tax can be collected only in accordance with law. When there is no transfer and there is no capital gain arising to the assessee, the same cannot be brought to tax even if the assessee offered it for taxation in his return of income. The Revenue's objection that the assessee cannot claim a benefit in a return filed in response to the notice u/s 148 is not sustainable, because the assessee is not making a claim in the return filed in response to the notice u/s 148 of the Act but is withdrawing a mistaken claim already made in the original return of income. Further, the AO and the CIT (A) have not disallowed the

assessee's withdrawal of LTCG on this ground. Therefore, such an objection cannot be raised before this Tribunal in the second appeal and in the second round of litigation. In view of the same, we are of the opinion that the assessee's withdrawal of the LTCG in the return filed in response to the notice u/s 148 is justified as there is no transfer of property and therefore, there is no long term capital gains be brought to tax.

8. In the result, assessee's appeal is allowed.

Order pronounced in the Open Court on 11th April, 2018.

Sd/-	**Sd/-**
(B. Ramakotaiah)	**(P. Madhavi Devi)**
Accountant Member	**Judicial Member**

Hyderabad, dated 11th April 2018.
Vinodan/sps

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2 DCIT Circle 16(3) Hyderabad
3 CIT (A)-4 Hyderabad
4 Pr. CIT – 4 Hyderabad
5 The DR, ITAT Hyderabad
6 Guard File

By Order