

**IN THE INCOME TAX APPELLATE TRIBUNAL,
BANGALORE BENCH 'A'**

**BEFORE SHRI N.V VASUDEVAN, JUDICIAL MEMBER
AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER**

ITA No.1153/Bang/2017
(Asst. Year – 2012-13)

Smt. Roopa Jagadish
No. 85/C, Pavitra, 6th Main,
Jayalakshmi Puram,
Mysuru.

. Appellant

Vs.

The Pr. Commissioner of Income-tax Officer,
Mysuru.

. Respondent

Appellant by : Shri P. Dinesh, Advocate
Respondent by : Shri B.K. Panda, CIT-DR

Date of Hearing : 11-04-2018
Date of Pronouncement : 18 -04-2018

ORDER

PER SHRI N.V VASUDEVAN, JUDICIAL MEMBER :

This is an appeal by the assessee against the order dated 27/3/2017 of Pr. Commissioner of Income-tax (Appeals) - 2, Mysuru relating to asst. year 2012-13.

2. The assessee is an individual. The assessee was co-owner of land in Bangalore. She entered into a registered joint development agreement (JDA) along with other co-owners dated 31/1/2008 for development over the land by putting up multi storied apartments, with a developer by name M/s Oasis Constructions.

3. As per JDA, the developer agreed to develop the property by constructing multi-storied apartments. The developer was to get 63% of the built up area. The assessee and other co-owners were to get 37% of the built up area. The assessee and other co-owners agreed to convey 63% of undivided share of land to the developer in return for developer constructing and delivering to the assessee and other co owners 37% of the built up area. The Assessee's share of built up area was 1/5th of the 37% built up area which was to be given by the developer as the owner's share of built up area in the project.

4. For asst. year 2008-09, the assessee filed a return of income and the capital gain on transfer of the land under JDA was brought to tax by the AO at Rs.62,59,081/-.

5. The assessee during the previous year relevant to asst. year 2012-13 sold 3 flats which she had got as her share of built up area under JDA dated 31/1/2008. The assessee declared capital gain (short term capital gain as the property was held for less than 36 months) of Rs.42,82,056/-. The AO passed an assessment order u/s 143(3) of the Act dated 27.3.2015 accepting the short term capital gain declared by the assessee. The CIT, Mysuru in exercise of his power u/s 263 of the act was of the view that the aforesaid order of the AO was erroneous and prejudicial to the interest of the Revenue for the following reasons :-

“(a) The assessee has declared a sum of Rs. 43,41,570/- as Short Term Capital gains on the sale of Flats B3 104 and C204. While calculating the short term capital gains, the assessee has

adopted the cost of construction at Rs. 1790/- per square feet which is the cost incurred by the developer for construction of the flats. If the assessee has not reflected any capital gains at the time of Joint Development Agreement, the assessee cannot avail the benefit of reducing the cost of construction incurred by the developer at this stage. Hence, the claim for cost of construction of Rs. 73,83,750/- needs to be disallowed.

(b) The assessee has capitalized a sum of Rs. 1,62,87,012/- as cost of flats received from the developer. Said amount is not offered for tax, hence the same needs to be brought to tax.”

6. The assessee in reply to the show cause notice of the CIT submitted the facts with regard to the assessment of Long term Capital Gain on the JDA in AY 2008-09, as stated in paragraph-5 of this order. The Assessee submitted that it was not right on the part of the CIT to say that the capital gain on transfer of land under JDA was not offered to assessee to tax.

7. The assessee pointed out that in asst. year 2008-09, the AO made addition on account of capital gain and the assessee challenged the same by filing an appeal before the CIT. Later, the assessee filed a declaration under the Tax Dispute Resolution Scheme 2016 and the dispute was settled. The assessee thus submitted that the assessee was entitled to deduction on account of cost of acquisition of the flat while computing short term capital gain in the asst. year 20012-13 and the order of the AO dated 27.3.2015 accepting the computation of Short Term Capital Gain as declared by the Assessee was neither erroneous nor prejudicial to the interest of the revenue.

8. The CIT after considering the reply of the assessee was of the following view -

“5. I have considered the written submissions of the Ld. AR of the assessee and the contentions are examined with reference to the

assessment records. The relevant issues emanating from the assessment order which are erroneous as well as prejudicial to the interests of revenue are dealt with as under:

On a perusal of the materials on record, it is seen that the assessee along with a few others had entered into a Joint Development Agreement (JDA) with a developer during the previous year relevant to the assessment year 2008-09. The co-ownership land measured approx. one acre/43,560 sft. and as per the JDA the co-owners of the land were entitled to a constructed area of 37%, in lieu of the transfer of undivided interest in the land to the extent of 63% in favour of the developer. On completion of the project the assessee received seven flats measuring a built up area of 9,346 sft., in lieu of her share of undivided interest in the land transferred to the developer. An assessment dated 30-03-2014 u/s 144 read with 147 of the Act was made in respect of the assessee. In the assessment order the AO has adopted the sale consideration at Rs.57,660/- and on that basis arrived at long term taxable capital gains of Rs.3,12,95,444. Further the AO has adopted 1/5th of capital gains only as the assessee's share and worked out the same at Rs.62,59,0811-. It is seen from the records that the number of co-owners including the assessee were only four and therefore the AO who has passed the assessment order for the Asst. Year 2008-09 has committed an error in adopting the share of the assessee as 1/5th. Needless to say that, to that extent the assessee's income was under-assessed while passing the assessment order for the AY 2008-09. However such an error does not impact the correct computation of capital gains on sale of the flats at a subsequent stage. that is, FY 2011-12/ AY 2012-13 for the following reasons.

It is seen from the assessee's submissions that she had preferred an appeal against the said order but later withdrew the same and filed a declaration under the Direct Tax Dispute Resolution Scheme. It is further seen that the assessee has also paid the taxes and the applicable penalty under the DTDRS and obtained a certificate from the Pr. Commissioner-7, Bengaluru. Thus the sale consideration and the long term capital gains adopted by the AO in the assessment order for the Asst. year 2008-09 have reached finality. Accordingly the basis of working of the capital gains for the AY 2008-09 would remain the basis for working out the capital gains on disposal of flats during the FY 2011-12/ AY 2012-13. In the assessment order the AY 2008-09, for the purpose of arriving at the capital gains, the AO has adopted the aggregate sale consideration in respect of all the co-owners at Rs.4,44,57,660!-. Since the AO had adopted the assessee's share as 1/5th, and since the assessee has accepted the same under the

declaration filed under DTDRS, her share of sale consideration has to be adopted at Rs.88,91,532/-. On the same basis the cost of construction per sft. has to be arrived at in the hands of the assessee. The working is as under –

Sale consideration / Built up area to the share of the assessee Cost per sft. Rs.88,91,532 / 9,346 = Rs. 951 per sft.

For any subsequent capital gains computation arising on account of disposal of flats, the cost required to be adopted is Rs. 951 per sft. However the AO while framing the assessment order for the AY 2012-13 has erroneously adopted the cost of construction at Rs.1,790, which is prejudicial to the interests of the revenue.

6. *It is apparent that while concluding the assessment the Assessing Officer has accepted the short term capital gains declared by the assessee amounting to Rs.42,78,451/- on the sale of three flats (B 305, C 104 and C 204). The aggregate sale consideration declared in respect of the three flats sold was Rs. 1, 1 7,25,320/-. The assessee had submitted that the aggregate cost of the three flats sold was Rs.73,83,750/which was based on a cost of construction of Rs. 1,790/- per sq. feet. It is seen that the AO has inadvertently accepted the contention of the assessee with regard to the cost of construction at Rs. 1,790/- without due verification of the relevant facts and materials and without proper application of mind. The cost of construction of Rs. 1,790/- per sq.ft, adopted by the assessee for arriving at the short term capital gains, is apparently based on a working of the cost of construction per sq.ft. stated to have been incurred by the developer, who executed the JDA.*

7. *The cost of construction attributed to the developer does not automatically become the cost for the owner of the land in a JDA, who had received the constructed area in lieu of the transfer of undivided interest in the land in exchange for the constructed area. The correct methodology is to adopt the cost of construction arrived at on the basis of the assessment order for the AY 2008-09, wherein the capital gains arising on account of execution of JDA has been brought to tax. Now the very same basis has to be adopted to assess the capital gains arising on disposal of the constructed area, that has come to the share of the assessee. As worked out above the cost of construction has to be taken at Rs. 951, as against Rs. 1790 adopted by the AO in the assessment order. In order to arrive at the capital gains on disposal of flats one more element of cost has to be taken into account, which is the undivided interest in the land retained by the assessee in the JDA. Out*

of such retained undivided interest in the land, the cost of undivided interest attributable to the flats sold has to be furnished by the assessee to enable the AO to arrive at the net capital gains. Accordingly the AO is hereby directed to recompute the capital gains and arrive at the correct tax liability. An adequate opportunity of hearing may be given to the assessee while passing the consequential orders, based on this order.

8. Aggrieved by the aforesaid order of the CIT, the assessee has preferred the present appeal before the Tribunal.

9. We have heard the rival submissions. It is seen that the CIT has adopted the cost of construction of the flat at 1/5th of the sale consideration received on transfer under the JDA dated 31/1/2008. The assessee's share is only 1/4 in the entire property and, therefore, this basis adopted by the CIT was not correct. It is a different matter that in the asst. year 2008-09 capital gain on sale of land under JDA was assessed on the basis that the assessee has 1/5th share. Apart from the above, we do not know the basis of the determination of full value of consideration received on sale of the land under JDA dated 31/1/2008 at Rs. 4,44,57,660/-. In these circumstances, we are of the view that the order u/s 263 of the act has to be modified. The question of determination of cost of acquisition of the flats sold by the assessee during the previous year should be left open for adjudication of the AO. The direction with regard to adopting the cost per Sq ft of built up area of flats sold by the assessee at Rs. 955/- Sq ft is deleted/modified and AO is directed to determine the cost after taking into consideration all the aspects with regard to determination of computation of capital gain on sale of land under JDA dated 31/1/2008 in asst. year 2008-09. With these modifications, we uphold order of the CIT and direct the AO to compute short

term capital gain after affording reasonable opportunity of being heard to the assessee. It is made clear that all the issues are left open. With these observations the appeal of the assessee is partly held.

11. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on **18th April, 2018.**

Sd/-
(JASON P BOAZ)
ACCOUNTANT MEMBER

Sd/-
(N.V VASUDEVAN)
JUDICIAL MEMBER

Bangalore
Dated : /4/2018
Vms

Copy to :1. The Assessee
2. The Revenue
3.The CIT concerned.
4.The CIT concerned.
5.DR
6.GF

By order

Sr. Private Secretary, ITAT, Bangalore

1. Date of Dictation
2. Date on which the typed draft is placed before the dictating Member
3. Date on which the approved draft comes to Sr. P. S.....
4. Date on which the fair order is placed before the dictating Member
5. Date on which the fair order comes back to the Sr. P.S.
6. Date of uploading the order on website.....
7. If not uploaded, furnish the reason for doing so
8. Date on which the file goes to the Bench Clerk
9. Date on which order goes for Xerox & endorsement.....
10. Date on which the file goes to the Head Clerk
11. The date on which the file goes to the Assistant Registrar for signature on the order
12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order
13. Date of Despatch of Order.