

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
' B' BENCH : CHENNAI

श्री अब्राहमपी.जॉर्ज, लेखा सदस्य एवं
श्री जॉर्ज माथन, न्यायिक सदस्य के समक्ष

**BEFORE SHRI ABRAHAM P GEORGE, ACCOUNTANT MEMBER
AND SHRI GEORGE MATHAN, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A.Nos.1879, 1880 & 1881/CHNY/2016
निर्धारण वर्ष /Assessment years : 2009-10, 2010-11 & 2011-12

Shri A.Lalichan,
4/234D,M.G.R.Salai,
Palavakkam, Chennai-600 041.
[PAN AABPL 7067 R]
(अपीलार्थी/Appellant)

Vs. The Income Tax officer,
Non-corporate Ward-15(3),
Chennai -34.
(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Mr.Philip George, Advocate
प्रत्यर्थी की ओर से /Respondent by : Mr.R.V.Aroon Prasad, JCIT, D.R
सुनवाई की तारीख/Date of Hearing : 11-07-2018
घोषणा की तारीख /Date of Pronouncement : 12-07-2018

आदेश / ORDER

PER GEORGE MATHAN , JUDICIAL MEMBER

ITA Nos.1879 to 1881/CHNY/2016 are the appeals filed by the Assessee against the separate orders of the Commissioner of Income Tax (Appeals)-15, Chennai, in ITA No.189/CIT(A)-15/14-15 dated 18.03.2016 for the assessment year 2009-10, ITA No.180/CIT(A)-15/14-15 dated 18.03.2016 for the assessment year 2010-11, and ITA No.181/CIT(A)-15/14-15 dated 18.03.2016 for the assessment year 2011-12.

2. As all the appeals are related to the same assessee and inter-connected, all appeals are disposed off by this common order.

3. Mr.Philip George represented on behalf of the Assessee, and Mr.R.V.Aroon Prasad represented on behalf of the Revenue.

4. In all these appeals, basically three issues are involved. First one raised in grounds Nos.2 to 2.5 is common in all these three appeals and is against the action of the Ld.CIT(A) in upholding the addition on account of car parking space made by the Id. Assessing Officer.

5. It was submitted by Id.A.R that assessee is an individual, who is deriving income from long term capital gains. The income of assessee has been assessed under the head 'Business'. It was a submission that there was a survey u/s.133A on the business premises of assessee. In the course of survey, it is noticed that the assessee had entered into a Joint Venture Agreement with M/s.Heera Constructions Co. Pvt. Ltd., for the development of property at Kerala. It was a submission that assessee had received certain flats as a share in the joint venture. It was a submission that the assessee had sold these flats to various persons. In the course of survey, as statement was recorded from the assessee on 06.06.2012 wherein in respect of Question (Qn) No.5, the question and answer are recorded as follows:-

Qn No.5 *Please state the details of Joint Venture with M/s.Heera Constructions Co. Pvt. Ltd.*

Answer As per the above two agreements dated 05.10.2007 & 17.07.2008, I have been allotted 46 flats out of the constructed flats by the promoter and Rs.4 crores had been paid to me. There is no separate payment from the promoter for car parking. However, I collected Rs.2.5 lakhs per flat (as mentioned by me on page No.28 of the yellow diary Annexure No.1-ANN/DL/A.L/B&D/Imp-1) as car parking charges from the buyers of 20 flats out of 46 flats. I have not charged the car parking charges from the buyers who have purchased the flats at the initial stages.

Subsequently, it was a submission that Qn.14 also referred to the issue of car parking space charges, the question No.14 and its answer are recorded as follows:-

Qn No.14 *You collected parking space sales amount at Rs.2.5 lakhs per flat as per page No.28 of the yellow dairy as per Annexure: ANN/DL/A.L/B&D/Imp-1 why it should not be presumed that you received the same or more for the balance flats.*

Answer I have charged for six flats – 2 from Joseph and Alfred @ 2 lakhs each and 4 for Suresh Kumar @ 2.5 lakhs each. I have received total of Rs.14 lakhs towards sale of car parking.

It was a submission that the assessee had very clearly admitted that he had charged only ₹2.5 lakhs per flat as car parking space sales in respect of six flats and the same was also recorded in the yellow diary at page-28. The Id. Assessing Officer without considering the specific reply of assessee in respect of Qn No.14, took to interpreting the

reply of assessee in response to Qn No.5 and made additions in respect of car parking charges in respect of other purchasers of the flats. It was a submission that the statement of the purchasers had also been recorded by the Id. Assessing Officer and they had specifically denied having paid any car parking space charges to the assessee. It was a submission that the statements recorded had not been granted to the assessee as the same was not used against the assessee. It was a submission that the addition as made by the Id. Assessing Officer and confirmed by the Ld.CIT(A) was liable to be deleted.

6. In reply, the Id.D.R vehemently supported the orders of Id. Assessing Officer and the Ld.CIT(A).

7. We have heard both the parties and perused the material on record. We have also perused the statement recorded from the assessee on 06.06.2012. A perusal of answer to Qn No.5 clearly shows that the assessee has categorically admitted to have received ₹2.5 lakhs per flat as mentioned by him in page-28 of yellow diary as car parking charges. It is mentioned in answer to Qn No.5 that this was collected from the buyers of 20 flats out of 46 flats. However, Qn No.14 is very specific towards page No.28 of yellow diary. In reply to that, the assessee has categorically specified the buyers of six flats

from whom the assessee has collected the car parking space sales. Now, this statement of assessee has not been rebutted for dislodged by the Id. Assessing Officer in the assessment order. However, in the assessment order, the Id. Assessing Officer mentions that assessee has accepted in his statement that he has received ₹2.5 lakhs per flat towards sale of car parking space and made addition. When particular evidence, more specifically the evidence in the form of diary, has been found in the course of survey and the assessee has explained the said evidence being a yellow diary, to discard the recordings in that diary, in the absence of any substantial or cogent evidence is impermissible. This being so, as no further evidence has been found to show that the assessee has sold car parking space to more than six persons as has been recorded in the diary, which is the foundation evidence, on the basis of which the assessment has been done in the assessee's case, no further addition can be made in the hand of assessee. Consequently, the additions made on the issue of car parking spaces sold stands deleted, to such extent as is in excess to car parking space sold in respect of six flats as has been mentioned in page-28 of yellow diary. In the result, ground No 2 to 2.5 of assessee's appeal for all the three assessment years stand allowed.

8. The second issue raised in Ground Nos. 3 to 3.5 of assessee's appeal for assessment years 2009-10 & 2010-11 is against the action

of the Ld.CIT(A) in confirming the addition made by the Id. Assessing Officer representing additional consideration received by the assessee.

9. It was submitted by Id.A.R that the assessee had admitted to have received additional consideration from one Shri P.Kinger in respect of assessment year 2009-10 to an extent of ₹25,80,000/-. However, the Id. Assessing Officer on the assumption that the assessee must have received additional sale consideration from other purchasers of the flats, made addition of ₹51,60,000/- in respect of flat purchased by Smt.Lakshmi Krishnakumar and Shri V.Krishnakumar. It was a submission that the assessee had sold totally 15 flats during the assessment year 2009-10, in which the assessee had received additional consideration in respect of one flat and it had also been admitted by the assessee. The Id. Assessing Officer had made addition in respect of two other flats and had accepted that no additional consideration was received in respect of balance 12 flats. Similarly, for assessment year 2010-11, the assessee had sold 10 flats and had received additional consideration in respect of 3 flats, the additional consideration being total of ₹54,99,000/- and the Id. Assessing Officer had made an adhoc addition towards additional consideration of sales by the assessee in respect of 5 flats and accepted the sale consideration in respect of two flats. For the subsequent assessment year, no addition has been

made. It was a submission that the Id. Assessing Officer had examined most of the purchasers and they had all accepted that no on-money or additional consideration had been paid by them other than what has been agreed by them and as recorded by the assessee. It was a submission that the addition has been made by the Id. Assessing Officer and confirmed by the Ld.CIT(A) without any evidence. It was a submission that the addition made by Id. Assessing Officer for assessment year 2010-11 was to an extent of ₹87,11,000/-. It was a prayer that the addition was liable to be deleted.

10. In reply, the Id.D.R vehemently supported the orders of Id. Assessing Officer and the Ld.CIT(A).

11. We have heard both the parties and perused the material on record. A Perusal of the assessment orders and the orders of Ld.CIT(A) clearly shows that no evidence whatsoever has been found to show the receipt of additional sale consideration of (₹77,40,000/- minus ₹25,80,000/-) ₹51,60,000/- in the course of survey. In fact, the assessment order also does not talk of any evidence, much less the Ld.CIT(A) in respect of any evidence has been found to show that the assessee had received any additional sale consideration other than what has been disclosed by the assessee for assessment years

2009-10 & 2010-11 also, no evidence has been recorded to show that the assessee has received additional sale consideration of ₹1,42,10,000 less ₹54,99,000 = ₹87,11,000/-. In fact, Revenue has not been able to dislodge the claim of assessee nor does Revenue deny that the Revenue had not recorded the statements from the purchasers of the flats who have denied having paid any amounts as additional consideration. This being so, the addition made by the Id. Assessing Officer and confirmed by the Ld.CIT(A) on this issue is liable to be deleted and we do so. In the circumstances Ground Nos. 3 to 3.5 for assessment year 2009-10 & Ground Nos.3 to 3.4 for assessment year 2010-11 stand allowed.

12. It was submitted by the Id.A.R that in respect of Ground Nos. 4 to 4.6 for assessment year 2009-10, Ground Nos.4 to 4.6 for assessment year 2010-11 and Ground Nos.3 to 3.6 for assessment year 2011-12, the issue was against the action of Ld.CIT(A) in confirming the action of the Id. Assessing Officer in computing the cost of acquisition of 2.38 acres of land by the assessee at Irumanam, Cochin, Kerala at ₹4,49,33,080/- as against the claim of ₹10,05,28,650/-. The Id.A.R placed before us a break-up of the cost of acquisition as under:-

Notes on cost of Acquisition

Rate per cent	₹3,88,000
Total Cents purchased	238.061
Cost of 238.061 Cents	9,23,67,668
Commission paid	9,20,000
	9,32,80,000
Total	
Add: Other related Expenditure	
Document Writing	3,00,000
Registration Fee	6,72,180
Stamp paper	33,60,900
Vehicle Maintenance	23,128
Bank Charges	3,25,110
Rent	80,000
Levelling & Compound Wall	24,62,590
Telephone charges	9,770
Vehicle Insurance	14,972
Total Cost of Acquisition	10,05,28,650

It was submitted by Id.A.R that the Id. Assessing Officer agrees that the assessee had spent ₹10,05,28,650/- for the acquisition of the said 2.38 acres of land. However, on the ground that the assessee had paid ₹5,15,55,000 in cash, and the source for the same was not supported by documentary evidences, restricted the cost of acquisition to ₹4,49,33,080/-. The Id.A.R placed before us the copy of agreement entered into by the assessee with the sellers of the said land. The said agreement is dated 24.01.2007. The Id.A.R placed before us the break-up of the payments made to the sellers of the land for ₹9,32,80,000/- between 24.01.2007 and 20.08.07. He also drew our attention to page-2 of the agreement wherein the rate per cent subject to measurement has been agreed at ₹3,88,000/-. It was a submission that the agreement specified the cost of acquisition at cent basis and

the agreements have been accepted by the Revenue. It was a submission that the difference between ₹9,32,80,000/- and ₹10,05,28,650/- show the cost representing the commission payments, which had been accepted by the Id. Assessing Officer. The Stamp Paper costs of ₹33,60,900/- was accepted by the Id. Assessing Officer and Registrar fee of ₹6,72,180/- has been accepted by the Id. Assessing Officer. The other cost representing document writing costs, vehicle maintenance, bank charges, rent, leveling and compound wall, telephone charges and vehicle insurance had not been accepted by the Id. Assessing Officer. It was the prayer that the cost of acquisition as disclosed by the assessee may be accepted.

13. In reply, the Id.D.R vehemently supported the orders of Id. Assessing Officer and the Id.CIT(A).

14. We have considered the rival submissions. A perusal of the agreement in respect of purchase of the 2.38 acres of land clearly shows that the agreement has been entered into on 24.01.2007 relevant to assessment year 2007-08 and the payments had been made to the extent of ₹9,32,80,000/- between 24.01.2007 and 20.08.2007 i.e. between assessment years 2007-08 & 2008-09. At the outset, what comes to mind is how can the cost of acquisition in respect of property acquired by the assessee during the assessment

years 2007-08 & 2008-09 to be considered for determination of cost of acquisition for the assessment years 2009-10, 2010-11 & 2011-12. This is not permissible. In any case, the fact that the agreement itself specifies that the cost of the land is ₹3,88,000 per Cent and this agreement has been accepted by the Revenue as a genuine and being indisputed documents, the cost of acquisition of ₹9,32,80,000/- cannot be disturbed, just because there are cash payments. If there are cash payments and the source of same are not explained, then the addition if any, can be made for the relevant assessment years, when those payments had been made subject to the condition that the same is permissible under the law. In any case, this is not what has been done. Thus, the total cost claimed at ₹9,32,80,000/- is indisputably the cost of the land. The Id. Assessing Officer has not disputed the Stamp paper cost, or the Registrar fee and the commission paid. Out of the balance, the assessee has produced the evidences of the document writing paid by cheque to the extent of ₹3 lakhs, which is part of the cost of acquisition. Consequently the same is allowed. The bank charges in respect of taking DD's is also substantiated with evidences and consequently is allowable expenditure. Expenses under the head Vehicle maintenance, the Rent, Leveling and compound wall, Telephone charges and vehicle insurances have not been shown to be intrinsically associated with the

acquisition of the said land and consequently, the same cannot be treated as part of the cost of acquisition of land. Consequently, the Id. Assessing Officer is directed to treat the cost of acquisition of the said land at

Cost of 238.061 Cents	₹9,32,80,000
Commission paid	9,20,000
Stamp Paper Fee	33,60,900
Registrar Fee	6,72,180
Documentary writing fee	3,00,000
Bank Charges	3,25,110
Total Cost of acquisition	9,88,58,190

15. In the result, all the appeals of assessee for assessment years 2009-10, 2010-11 & 2011-12 are partly allowed.

Order pronounced on 12th July, 2018, at Chennai.

Sd/-
(अब्राहमपी.जॉर्ज)
(ABRAHAM P GEORGE)
लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-
(जॉर्ज माथन)
(GEORGE MATHAN)
न्यायिक सदस्य/JUDICIAL MEMBER

चेन्नई/Chennai

दिनांक/Dated: 12th July, 2018.

K S Sundaram

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |