

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI**

**BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
&
SHRI K.N. CHARY, JUDICIAL MEMBER**

**ITA No.-948/Del/2017
(Assessment Year: 2012-13)**

Better Option Estates P. Ltd. 4 th Floor, Punjabi Bhawan, 10, Rouse Avenue, New Delhi. PAN No. AACCB8384K	vs	DCIT Circle 4(2), New Delhi.
Assessee by	Sh. M.P. Rastogi, Adv.	
Revenue by	Sh. Ravi Kant Gupta, Sr. DR	

Date of Hearing	09.05.2018
Date of Pronouncement	25.07.2018

ORDER

PER K. NARSIMHA CHARY, J.M.

Challenging the order dated 21.10.2016 in appeal no. 102/15-16 passed by the Commissioner of Income Tax (Appeals)-2, New Delhi ("Ld. CIT(A)"). Assessee preferred this appeal.

2. Facts of the case are that Better Option Estates Pvt. Ltd. the assessee, is a company incorporated on 23/02/2006 and was trading in properties. For the assessment year 2012-13 the assessee filed their return of income on 29/03/2013 declaring a total income of Rs.

6,51,07,627/- and revised the same on 12/04/2013. During the year under consideration the assessee company had shown income from capital gains and income from business and profession.

3. During the scrutiny proceedings, Learned Assessing Officer (Ld. AO) observed that assessee company had shown long term capital gains of Rs.6,49,69,400/- on the sale proceeds of immovable properties situated in SEZ, Jaipur for Rs.16,34,13,960/- in its computation of income. On being asked to submit the details and explain, the assessee submitted that the relevant land was purchased in the financial year 2006-07 at Rs.6,28,95,310/- and the cost inflation index for such year was 519, whereas it was 785 for the financial year 2011-12, as such on application of cost inflation index, the indexed cost came to Rs.9,51,30,671/-.

4. Further according to the assessee, on 24/09/2010 the assessee company sold 90,000 square meters of land in SEZ, Jaipur to M/s. Smart Estates Private Limited ("SEPL" or "Smart Estates") @ Rs. 2300/-per square meter and received an advance sum of Rs. 2 crores by way of cheques and cash namely, Rs.1,48,94,900/- vide cheque No. 000065 dated 20th September 2010, Rs.51,00,000/- vide cheque No. 000062 dated 10th September 2010 drawn on Citibank NA, New Delhi and Rs.5,100/- in cash. Subsequently by way of supplementary Agreement dated 20/09/2011 the area of land was reduced from 90,000

square meters to 78,043.125 square meters and the sale price was increased from Rs. 2300/- to Rs. 2400/-.

5. According to the assessee as per the agreements the purchaser may get the sale deeds in respect of the plots comprising of the said land registered either in its own name or in the name of the nominee and also that out of the amounts receivable from the end purchasers, assessee shall be entitled to receive sale consideration as agreed under the Agreement. Pursuant to the said agreements an account in Punjab National Bank, Bhikaji Cama Place, New Delhi was opened. Subsequently in accordance with the terms of the above agreements, the assessee registered the sale deeds in favour of the persons suggested by the SEPL. Out of the sale consideration of Rs.21,74,05,935/- the assessee appropriated a sum of Rs.16,34,13,960/- under the Agreements whereas the balance amount of Rs.5,39,91,975/- was received by SEPL.

6. The Ld. AO issued summons to SEPL. The representative of the SEPL appeared before the Ld. AO on 26/02/2015 and filed a letter dated 25/02/2015 admitting that there is an Agreement between the assessee and SEPL under which SEPL agreed to purchase 78,043.15 square meters of land at Rs. 2400/- per square metre, and was also mutually agreed that all the payments relating to the sale of plots would be collected by the assessee and the assessee will transfer the amounts to Smart Estates after adjusting their balance amount under the agreements. It is further stated that

SEPL has already been merged with M/s AEREN R. Enterprises Pvt. Ltd. w.e.f. 1st April 2011 vide High Court order dated 25th April 2015 in Writ Petition No. 298/2013 and M/s AEREN R. Enterprises Pvt. Ltd. (AEREN) is assessed to tax vide Permanent Account No. AABCS7613A by the Assessing Officer, Central Circle 18, New Delhi along with that letter, Smart Estates representative filed the income tax return for assessment year 2012-13 along with computation of income and also the copies of the agreements.

7. Again on 10/03/2015 the representative of the Smart Estates attended before the Ld. AO to file the Balance Sheet and P & L Account of Smart Estates for the assessment year 2012-13. From such details the Ld. AO observed that as per the P & L Account the assessee had earned profit of Rs.6,41,86,704/- for the financial year 2011-12 whereas as per the return submitted by the assessee, vide hearing dated 26/02/2013 in the name of M/s. Aeren R Enterprises Private Limited it had shown losses of current year to the tune of Rs.2,03,75,586/-. Ld. AO asked for further details and documents and obtained reply from the assessee.

8. After hearing the assessee Ld. AO issued a show cause notice as to why not the entire transaction with M/s. Smart Estates Private Limited be treated as ingenuine and the sale transaction shall not be taken as between the assessee company and the individual buyers, and also why not sale consideration being increased to the

value as per section 50C for the purpose of computation of capital gains. Assessee disputed the proposal made by the Ld. AO basing on the documents submitted by them and also submitted that it is not at all correct and highly unjustified to increase the sale consideration to the value as per section 50C for the purpose of computation of capital gains. Ld. AO, however, recorded a finding that the whole arrangement that was pleaded by the assessee was only to reduce the sale consideration received by the assessee and thereby lowering its tax liability under they had capital gains. On this premise the Ld. AO made an addition of Rs.8,93,27,615/- to the income of the assessee.

9. In appeal, Ld. CIT(A) dealt with the question as to whether the sale consideration and consequently the capital gain on sale of its land purportedly to assess Smart Estates Private Limited was correctly disclosed by the assessee? Or whether it was suppressed the by an amount of Rs.8,93,27,615/-? Ld. CIT(A) held that the assessee was not able to rebut the findings of the Ld. AO in his order as well as the judgements relied upon by the Ld. Assessing Officer and held that the purported agreements pressed into service by the assessee were not genuine agreements and were only devices adopted by the assessee to evade tax on the differential amount received from the individual buyers over and above the amount of Rs.16,34,13,960/- shown to have been received by the assessee on sale of Jaipur land. Ld. CIT(A) further

observed that even the sale consideration received from the individual buyers is less than the consideration as per circle rates and the assessee could not explained why sales by each have not been booked at the stamp value rate of Rs. 25.27 crores and why section 50C should not be invoked in this case. For these reasons, Ld. CIT(A) dismissed the appeal and upheld the findings of the Ld. AO. The assessee, therefore, filed this appeal challenging the findings of the authorities below.

10. It is the argument of Ld. AR that the Agreement to sell dated 24/09/2010 read with supplementary Agreement dated 28/09/2011 amounts to disposing of interest by the assessee in the land and creation of interest in favour of M/s. Smart Estates Private Limited and is in the nature of transfer contemplated under section 2 (47) of the Act as explained in the decisions reported in Gulshan Malik 223 Taxman 243 (Del); CIT vs. Tata Services Ltd. 122 ITR 594 (Bom); CIT vs. Ram Gopal 230 Taxman 205 (Del); CIT vs. Lakshmi Devi 296 ITR 363 (MP); K.R. Srinath vs. ACIT 268 ITR 436 (Mad), and consequently the charging of capital gain in the hands of the assessee without referring to the amount receivable under the Agreement but with reference to the sale price mentioned in the sale deed executed in favour of the end purchaser at the instance of measures Smart Estates is not tenable.

11. While assailing the observations of the Ld. AO that M/s. SEPL had collected payments from individual buyers

in the name of the assessee company is also not supported by any documentary evidence, Ld. AR submitted that the agreements clearly show that Mr Ajai Sehgal and Mr Rajesh Singhal belong to the M/s Smart Estates and they in fact operated the bank accounts and acted on behalf of M/s Smart Estates. According to Ld. AR the Agreement and the supplementary Agreement in this matter are evidencing the commercial transaction prevalent in the real estate business and consequently the chargeability of the capital gain wholly in the hands of the assessee with reference to the sale price specified in the sale dates executed by the representatives of M/s Smart Estates Private Limited in favour of the end purchasers and not with reference to the amount recoverable under the agreements is also not tenable .

12. Ld. AR further argued that the Ld. CIT(A) failed to appreciate the substance of the commercial transaction as entered with M/s Smart Estates Private Limited vide Agreement to sell dated 24/09/2010 and supplementary Agreement dated 28/09/2011 in respect of sale of land, with the final sale proceeds deposited in the Punjab National Bank, operated by the authorized persons of M/s. Smart Estates Private Limited were from the amount over and above the sale price as agreed between the assessee and M/s Smart Estates Private Limited has been appropriated by M/s. Smart Estates Private Limited and consequently the chargeability of the capital gain with reference to the total sale consideration specified in the

sale deeds executed by the representatives of M/s Smart Estates cannot be taxed in the hands of the assessee. Ld. AR argued that inasmuch as the right to get the sale deeds executed as acquired by SEPL is a capital asset in terms of Section 2(14) of the Act and once such right has been assigned in favour of third person, then the amount realized on account of such a “right to acquire the property” is liable to tax in the hands of the person who holds such “right to acquire the asset”.

13. According to him the Ld. CIT(A) had failed to appreciate that the assignment of the right to get conveyance, which is a capital asset, by M/s Smart Estates Private Limited in favour of its nominees that is the and purchasers, amounts to transfer of capital asset in the hands of M/s Smart Estates Private Limited and accordingly the Ld. AO has to apportion such sale consideration between the assessee and M/s Smart Estates Private Limited in terms of the Agreement and consequently the capital gain with reference to the total amount of sale consideration specified in the sale deeds executed by the representatives of M/s Smart Estates Private Limited cannot be charged in the hands of the assessee .

14. It is further argued by Ld. AR that the authorities below ignored the fact that the 78,043.15square metres of land sold by the assessee to M/s Smart Estates Private Limited and the subsequent sale of same by M/s Smart Estates are duly reflected in the books of accounts of M/s

Smart Estates Private Limited and also reflected in the Note No 08 and Note No 10 of the Balance Sheet of M/s Smart Estates Private Limited for the year ended on 31.03. 2012 placed on record of the Ld. AO by M/s Smart Estates Private Limited through the letter dated 25/02/2015 pursuant to the summons issued under section 131 of the Act.

15. The next contention of Ld. AR is that in utter disregard to the Agreement to sell dated 24/09/2010 and supplementary Agreement dated 28/09/2011 with their consequential effect, the Ld. AO invoked the provisions of section 50C of the Act in this case. According to him the Ld. AO should have apportioned the deemed sale consideration as contemplated under section 50C of the Act, being the value as a determined by the stamp authorities, between the assessee and M/s Smart Estates Private Limited in proportion to the rights owned and enjoyed by the parties in the property, as such the authorities below ought not to have charged the capital gains wholly in the hands of the assessee. He further submitted that the taxability of capital gain in terms of section 50C of the Act on the basis of valuation made by the stamp authorities is meant for execution of sale deeds and the actual value in terms of subsection (2) of section 50 C of the Act has to be determined. Further these reasons Ld. AR prayed to allow the appeal and to delete the impugned addition.

16. Per contra, it is the submission of Ld. DR that the Agreements to sell the property are unstamped and unregistered. They are not valid agreements especially after the amendment to Stamp Act, 1999 and requirement of section 53 A of the Transfer of Property Act are not complied with. Ld. DR placed reliance on the decision reported in Suraj Lamp & Industries Private Limited vs. State of Haryana (SC) 2009 (7) SCC 363 and CIT vs. Balbir Singh Maini (SC) 2017-SC-TS-444 for the principle that the immovable property can be legally and lawfully transferred or conveyed only by registered deed of conveyance and not through any GPA sales.

17. Lastly by placing reliance on the decision reported in CIT vs. M/s. Akash Association (Judgement dated 05/09/2017 in Tax Appeal No. 646 of 2017 by the Hon'ble Gujarat High Court) he submitted that section 50C of the Act provides for special provision for full value of consideration in certain cases; that subsection (1) of section 50 C provides for the adoption of value taken by the stamp valuation authority for the purpose of stamp duty not only when it is adopted or assessed but where it is assessable by such authority and the expression "adopted" or "assessable" or "assessable" would include even a case where the document evidencing transfer of the capital asset has not been presented for registration. The expression "assessable" would permit the revenue authorities to apply what is popularly referred to as Jantri rates with respect to the land in question for the purpose

of section 48 of the Act with the aid of deeming fiction contained in subsection (1) of section 50 C of the Act. Ld. DR, therefore, related to dismiss the appeal.

18. We have carefully perused the record in the light of the submissions made on either side. As stated above, in this appeal, grievance of the assessee is twofold. Firstly, assessee is challenging the action of the Ld. AO in not referring the matter under 50 C (2) of the act to the DVO for redetermination of the fair market value. Secondly assessee is disputing the observations of the authorities below that the arrangement between the assessee and M/s. Smart Estates is a device only to evade tax.

19. It is evident that the entire edifice of the case of the assessee is basing on the agreements dated 24/09/2010 and 20/09/2011. According to the assessee under lease to agreements, M/s. Smart Estates acquired a right to get the conveyance in respect of the property on the names of the 3rd parties they suggest. According to the assessee such type of agreements or in vogue in the trade of real estate. Ld. AR, therefore, submits that the inasmuch as the SEPL acquired the right to get the sale deeds executed on the names of the 3rd parties, any amount realized on account of such a right to acquire the property is liable to be taxed in the hands of M/s Smart Estates. For this purpose Ld. AR placed reliance on the additions reported in CIT vs. Daksha Ramanlal 197 ITR 123 and also CIT vs. Ramgopal to 90 Taxman 205 (Delhi), CIT vs. Laxmi Devi to 96 ITR 363 (MP).

20. Further, by placing reliance on the edition reported in CIT vs. Motor And General Stores Private Limited 66 ITR 692 (SC) and CIT vs. BM Khanna 72 ITR 603, Ld. AR submitted that when the transactions are embodied in a document, the liability to tax depends upon the meaning and context used in accordance with the ordinary rules of construction and the taxing statute has to be applied in accordance with the legal rights of the parties to the transactions and not on “substance of the matter” unless the transaction is prohibited by law.

21. On this aspect, it is the observation of the Ld. AO that on two occasions the representative of the M/s Smart Estates appeared before him and filed letters admitting the transaction evidenced by the agreements of sale, along with the copies of the Balance Sheet and P & L Account. Whether or not any rights passed under the agreements of sale in question for want of stamp duty and Registration does not fall for consideration before the Ld. AO, inasmuch as the proceedings before the Ld. AO are not relating to the enforcement of any rights emanating from the agreements. Compliance with the Stamp and Registration laws in respect of the agreements is not relevant for the consideration of the Ld. AO for the taxability of the amounts in view of the fact that the recipient of the alleged amounts admits to have entered into such agreements and does not deny to have received any amounts relatable to them. In such an event we doubt whether the Ld. AO can question the validity of the

agreements for want of stamp duty and Registration, as argued by Ld. DR. Fact admitted need not be enquired nor could be required to be proved. In the absence of any finding by Ld. AO that the amount set to have been paid to or received by M/s. Smart Estates had come back to the assessee in any other way or there is a denial by M/s Smart Estates to have received the amount, the enquiry by the Ld. Assessing Officer as to the genuineness of the transaction under the agreements is a misdirected one.

22. In a situation where the execution and existence of the agreements is not in question and very much admitted by the representative of M/s Smart Estates, now the question arises as to the coerce to be adopted by the Ld. AO. On a perusal of the agreements as well as the letter dated 25/02/2015 admitting the transaction before him, the balance sheet and the P & L Account of M/s Aeren R Enterprises Private Limited, Ld. AO directed the representative of the Smart Estates to reconcile the difference between the P & L Account computation of income with the return of income. However, according to the Ld. AO no one turned up subsequently on behalf of M/s Smart Estates. Assessing Officer noted that M/s. Smart Estates had not filed any return for the assessment year 2012-13.

23. In the circumstances, Ld. AO directed the assessee to produce the directors of M/s Smart Estates for examination, and on the failure of the assessee to produce the directors of M/s Smart Estates the Ld. AO having gone

through the record available before him, reached a conclusion that the agreements alleged to have been entered into between the assessee and M/s Smart Estates are not genuine ones. This approach of the Ld. AO does not seem to be correct. When an escapement of income had arisen out of non-filing of return by M/s the Smart Estates, Ld. AO should have considered the desirability of taking coercive steps against such an entity which failed to file the returns of income or failed to cooperate with the proceedings. Law empowers the Ld. AO to take coercive steps in that event of escapement of income arising out of non filing of return by M/s Smart Estates. Instead of catching a soft target the Ld. AO should have proceeded to take steps against M/s. the Smart Estates or for that that the matter M/s Aeren R Enterprises private limited with whom M/s Smart Estates was measured pursuant to the orders of the Hon'ble High Court. Ld. AO, however, penalized the assessee for not producing the director of M/s Smart Estates for examination, by bringing to tax such amount as has been admitted to have been received and appropriated by M/s Smart Estates, in the hands of the assessee. Further we are in agreement with the Ld. AR that the verification of the details of the account with Punjab national bank should have thrown some light on the aspect of the genuineness of the transaction pleaded by the assessee.

24. It is an admitted fact that all the details relating to measures Smart Estates or M/s Aeren R Enterprises

Private Limited including the pan card No are available before the Ld. AO. Record does not reveal that at any point of time the Ld. AO had issued any notice to M/s Aeren R Enterprises Private Limited, though the fact of M/s Smart Estates merging with M/s Aeren R Enterprises Private Limited was intimated to him. We find any amount of strength in the argument of the Council that the income has to be assessed in the hands of a proper person who has enjoyed the actual income in law and if M/s Aeren R Enterprises failed to disclose the income of SEPL in the returns of income for the assessment year 2012-13, Ld. AO should have realized that the escapement of income is in the hands of M/s Aeren R Enterprises but not the assessee, and in all fairness the Ld. AO should have taken steps under section 147/148 of the Act against M/s Aeren R Enterprises.

25. We are at a loss to understand as to how the assessee could be made responsible for the escapement of income in the hands of M/s Aeren Enterprises and to make the assessee answerable for the same. We understand that the things would have been different should M/s Smart Estates or for that matter M/s Aeren R Enterprises denied the execution or existence of the agreements of sale or M/s Smart Estate's receiving the amount. Such entities have never disputed the transaction or the receipt of amounts. In such an event nothing prevented the Ld. AO from making further enquiry by calling for the post merger financials of M/s

Aeren R Enterprises or to consider the possibility of taking appropriate steps against M/s Aeren R Enterprises. The process adopted by the Ld. AO in this fact-finding exercise is not satisfactory.

26. The next contention of the Ld. AR is that when once the assessee disputed the increase in the sale consideration to the value as per section 50C for the computation of capital gains is highly unjustified; the Ld. AO has to refer the matter to the DVO for the valuation of the property. Section 50C of the Act is a deeming provision and according to which where consideration received or accrued as a result of transfer of capital asset being land or building is less than the value adopted or assessed by the stamp authorities for the purpose of stamp valuation, the value so adopted or assessed shall for the purpose of section 48 of the Act be deemed to be the full value of the consideration received or accrued as a result of such transfer. Subsection 2 of section 50C of the Act, however, says that where the assessee claims before the Ld. AO that the value adopted or assessed by the stamp valuation authority under subsection (1) thereof exceeds the fair market value of the property as on the date of transfer, Ld. AO may refer the valuation of the capital asset to valuation officer.

27. In the instant case the sale consideration as per the sale dates as noted by the Ld. AO is Rs.21,74,05,935/-, and the stamp valuation authority valued the same at Rs.25,27,31,575/-. In the letter dated 25/03/2015

submitted before the Ld. AO proposing to increase the value as per section 50C of the Act for the purpose of computation of capital gains, the assessee disputed the same by saying that is not at all correct and highly unjustified to increase the sale consideration to the value as per section 50C for the purpose of computation of capital gain. The Ld. AO did not record any reasons as to why the matter need not or shall not be referred to the DVO. When it is pleaded that the actual amount received is a far less than the circle rates of the registration authority or that the value adopted or assessed by the stamp valuation authority under subsection (1) thereof exceeds the fair market value of the property as on the date of transfer, the Ld. AO does not seem to have taken cognizance of the same to refer the matter to the DVO for the determination of the actual value under subsection 2 of section 50C of the Act.

28. By placing reliance on the decisions reported in *Meghraj Baid vs. ITO* [2008] 23 SOT 25 (Jodhpur) (URO); *Sarwan Kumar vs. ITO*[2014] 45 taxmann.com 16 (Del); *Smt. TV Nagasena vs. ITO*[2012] 24 taxmann.com 30 (Bang); and *Anil Kr. Jain vs. ITO*[2013] 34 taxmann.com 258 (Del) Ld. AR submitted that if the assessee objects to the adoption of stamp valuation in terms of Section 50C of the Act, then the revenue authorities are bound to refer the matter to DVO in terms of Section 50C(2) of the Act. No decision contrary to the above proposition is placed before us to take a different view. In view of the decisions

relied upon by the assessee we are of the considered opinion that the Ld. AO should have referred the matter to DVO in terms of section 50 C (2) of the Act.

29. On an overall consideration of the matter what occurs to our mind is that the authorities below have not examined the issue from a proper perspective and in the manner in which the facts deserve to be investigated, to ensure that the assessment is made as accurately as possible consistent with the statutory provisions. We are, therefore, of the considered opinion that is a fit case to set aside the impugned order and to remand the matter to the file of the Learned assessing officer to decide the matter afresh in the light of our observations. We, accordingly, remand the matter to the file of the Ld. Assessing Officer to cause further enquiries in the light of our above observations, after giving an opportunity to the assessee of being heard.

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

Order pronounced in the open court on 25.07.2018

Sd/-

(G.D. AGRAWAL)
PRESIDENT

Sd/-

(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Dated: 25.07.2018

*Kavita Arora

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

TRUE COPY

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	10.07.2018
Date on which the typed draft is placed before the dictating Member	10.07.2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	26.7.18
Date on which the fair order is placed before the Dictating Member for pronouncement	25.7.18
Date on which the fair order comes back to the Sr. PS/PS	26.7.18
Date on which the final order is uploaded on the website of ITAT	26.7.18
Date on which the file goes to the Bench Clerk	26.7.18
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	