

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH'SMD', CHANDIGARH**

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER AND
MS. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

ITA No.482/Chd/2018

Assessment Year: 2008-09

Shri. Het Ram Sharma
Vill & P.O. Tattapani
Tehsil Karsog
Mandi, H.P.

Vs.

The ITO
Sundernagar
Mandi, H.P.

PAN No. BIDPS3372R

&

ITA No.483/Chd/2018

Assessment Year: 2008-09

Sh. Dheerumal Sharma
Vill & P.O. Tattapani
Tehsil Karsog
Mandi, H.P.

The ITO
Sundernagar
Mandi, H.P.

PAN No. BTXPS3990Q

(Appellant)

(Respondent)

Assessee By : Sh. V.K. Gupta
Revenue By : Sh. Akhilesh Gupta
Date of hearing : 27/06/2018
Date of Pronouncement : 23/07/2018

ORDER

PER ANNAPURNA GUPTA, A.M.

Both the above appeals have been filed by different assessees against separate orders of Ld. CIT(A), Palampur, both dt. 04/01/2018.

2. It was common ground that the issues raised in both the appeals were identical. Therefore they were taken up together for hearing and are being disposed of by way of common order.

For the sake of convenience we shall be dealing with the assessee's appeal in ITA No. 482/Chd/2018 relating to A.Y. 2008-09 and the decision rendered therein will apply mutatis mutandis to the appeal of the assessee in ITA No. 483/Chd/2018.

3. Briefly stated the facts of the case are that during the impugned year the assessee was paid compensation of Rs. 30,11,938/- for acquisition of his property by the land acquisition officer. However no capital gain was declared in the

return of income. Accordingly notice under section 148 was issued to the assessee, in response to which the assessee filed return shown NIL capital gain as under:

Compensation received:	Rs. 30,11,938/-
Cost of construction	Rs. 5,96,980/-
Year of construction	1983-84
Indexed cost	596980 x 551/116
Capital Gain:	Rs. 28,35,655/-
Less: Funds invested in construction of New house (Exempt u/s 54)	Rs. 1,76,283/-
New Capital Gain	Rs. 15,35,000/-
	Rs. NIL

4. The AO, on collecting information from the Land Acquisition Officer, Bilaspur, found that the details of compensation received by the assessee on account of acquisition of its property was as under:

Type of Land	Year of Construction	Cost determined	Solarium @ 30% on cost	Addl. Amount @12% p.a. for 2629 days	Total payment
Hotel 1/6 th share	1998 & 1999	5,78,675	1,73,603/-	5,00,166/-	12,52,444/-
Residential 1/6 th share	1998 & 1999	8,12,952/-	2,43,885/-	7,02,657/-	17,59,494/-
Total		13,91,627/-	4,17,488/-	12,02,823/-	30,11,938/-

4.1 Taking note from the detail that one of the buildings acquired was a residential building on which Long Term Capital Gain (hereinafter referred to as "LTCG") arises and further taking the cost of the property from the said detail, the AO computed the Long Term Capital Gain (LTCG) on the same as under:

LONG TERM CAPITAL GAIN

Consideration received on 29/02/2008 against residential building (1/2 Share) : Rs. 17,59,494/-

Cost of property

Year of construction : 1998-99

Cost as valued by LAO : Rs. 8,12,952/-

Indexed cost : Rs. 812952 x 551/351 : Rs. 12,76,173/-

Long term Capital Gain : Rs. 4,83,321/-

No deduction u/s 54 was allowed as the assessee could not provide any proof of investment in purchase or construction of a new house before the due date of filing of return of income.

Further the AO noted that the other building acquired was a hotel /dhaba which was used for commercial purpose and hence was a business asset of the assessee and the capital gain earned from the sale thereof was Short Term Capital Gain (hereinafter referred to as "STCG") within the meaning of Section 45 of the Act r.w.s 50 of the Act. The AO calculated depreciation on written down value of the Dhaba / Hotel building as on 01/04/2007 i.e; the beginning of the year and reducing the same from the compensation received, calculated STCG earned by the assessee at Rs. 11,12,482/- as below.

SHORT TERM CAPITAL GAIN

Gross amount of compensation received	: Rs. 12,52,444/-
Less: W.D.V. of the building as on 01/04/2007	: Rs. 1,39,962/-
Net short term Capital Gain	: Rs. 11,12,482/-

5. Aggrieved by the order of the AO the matter was carried in appeal before the Ld. CIT(A) who allowed the assessee deduction u/s 54 on the long term capital gain assessed by the AO while the short term capital gain assessed was upheld as such.

6. Against the order passed by the Ld. CIT(A) the assessee has come up in appeal before us raising the following effective grounds of appeal:

2. *The Assessing Officer has, in view of the facts and circumstances of the case erred on facts and in law making an addition of Rs. 11,12,482/- as short term capital gains and the Ld. CIT(A) is not justified in upholding the same as short term capital gains. The same should have been held to be assessable as long term capital gains.*

3. *That the orders of the Ld. CIT(A) as well that of Income-tax Officer be quashed and income assessed under short term capital gain be assessed as long term capital gain and deduction u/s 54 be allowed.*

7. As is evident from the above the assessee has before us challenged the action of the Ld. CIT(A) in treating the capital gain earned on the sale of Hotel / Dhaba as STCG and also the denial of benefit of exemption u/s 54 of the Act, against the same thereof.

8. During the course of hearing before us, the Ld. Counsel for the assessee drew our attention to the contentions made before the Ld.CIT(A) in this regard para 7.1 of the order is reproduced hereunder:

7.1 During appeal, the assessee filed written submissions stating as under:-

The Ld. Income tax officer has calculated short term capital gain the calculation of which are as under:-

Gross amount of compensation received.	Rs. 12,52,443/-
W.D. V. of the building as on 01-04-2007	Rs. 1,39,962/-

Net short term capital gain.

Rs. 11,12,481/-

The Ld. Income-tax Officer has pointed out that the buildings which were acquired by the LAO was hotel/dhaba which was used for commercial purpose and hence that attracts short term capital gain within the meaning of section 45 of the Income tax Act. In this regard it is submitted that the Ld. Assessing Authority has wrongly calculated the short term capital gain because of the fact that in this case land as well as building has been compulsorily acquired by the authorities. Land is not a depreciable asset. Once the land forms part of the assets of the undertaking and the transfer was of the entire undertaking as whole, it was not possible to bifurcate the sale consideration to a particular asset. Section 50 applies when the depreciable assets alone are transferred. As the land and building has been acquired by the Kol Dam Authorities as such the gain earned by the assessee is long term capital gain and not short term capital gain. Reliance is placed on the judgment of Madras High Court (2010) 328 ITR 69 in the case of CIT V Coimbatore Lodge (page 18 & 19).

9. Referring to the same Ld.Counsel for the assessee stated that the asset acquired by the Government was land and building and not building only and land in any case was not a depreciable asset and the transfer being of the undertaking of the assessee with land forming part of the assets of the undertaking, it was a case of long term capital gain. Ld. Counsel for the assessee drew out attention to the decision of the Hon'ble High court of Madras in the case of CIT Vs. Coimbatore Lodge(2010) 328 ITR 69, in this regard. Copy of the order was placed before us. Ld. Counsel therefore stated that the Ld. CIT(A) had erred in treating the asset transferred by the assessee as depreciable asset and the capital gain earned there on as STCG as per the provisions of Section 50 of the Act.

10. Ld. DR at this juncture drew our attention to the order of Ld. CIT(A) pointing out there from that the Ld. CIT(A) had found that identical issue had been dealt with by the ITAT in the case of Smt. Radha Devi Vs. The ITO in ITA No. 1095/Chd/2014 dt. 13/10/2017 and in which it was held that the capital gain earned was in the nature of STCG. Ld. DR pointed out that the Ld. CIT(A) therefore followed the aforesaid order of the ITAT in deciding the present issue.

10.1 Ld. AR, at this juncture, rebutted by stating that the facts in the present case were not identical with that in the case of Smt. Radha Devi (supra). Ld. Counsel for the assessee stated that while in the present case the assessee had transferred both the land and building, in the case of Smt. Radha Devi the asset transferred was only building. Our attention was drawn to the fact as reproduced in the order of the ITAT in case of Smt. Radha Devi Vs. ITO at para 19 as under:

19. The facts which are not disputed are that the assessee was the owner of a property built on land taken on lease by her from her husband for a period of 20 years and was running a guest house on the same. The period of lease

remaining when the said property was acquired by the Government was 15 years. The assessee had been compensated for the acquisition of property to the tune of Rs.66,04,202 / - and thereafter the assessee had requested the LAO to compensate her further for goodwill on account of discontinuation of her business, in response to which the assessee had filed copies of her Balance Sheet to the LAO to prove that she had been running a guest house on the said property and earning income of approximately Rs.75,000/-per year. The LAO had accepted the contentions of the assessee and directed that the assessee be compensated for her loss of yearly income which amounted in all to Rs. 1 1,2 5,000 / -. The relevant application of the assessee and the order of the LAO formed part of the Paper Book placed at pages 36 to 38.

11. Ld. Counsel stated that in the case of Smt. Radha Devi the land was owned by her husband while the building had been constructed by the assessee and the compensation paid to the assessee was on account of the said building only which the ITAT had held ,being a business/depreciable asset, the capital gain earned thereon was STCG as per the provisions of Section 50 of the Act. In the present case,it was pointed out,that since both the land and building were transferred, the assessee had virtually transferred the business undertaking, which could not be treated as STCG under section 50 of the Act ,as held by the Hon'ble Madras High Court in the case of Coimbatore Lodge (supra).

12. We have heard the contention of both the parties and perused the orders of authorities below.

13. As stated earlier, the sole issue for consideration before us is whether the capital gain earned on the transfer by way of compulsory acquisition of the hotel/dhaba , to the extent owned by the assessee, is in the nature of Short Term Capital Gain as per section 50 of the Act or otherwise Long Term Capital Gain .

The fact that the asset acquired by the Land Acquisition Officer and for which the assessee was compensated to the extent of Rs. 12,52,444/- , was 1/6th share in a Hotel/ Dhaba,being thus a business asset of the assessee, has not been disputed by the assessee before us. Admittedly in a similar case,in the case of Radha Devi(supra), the ITAT had held capital gain earned on compulsory acquisition of a hotel building as being short term capital gain. But the Ld.Counsel for the assessee has sought to distinguish the said case pointing out that while only hotel building was acquired and compensated for in the case of Radha Devi(supra),in the present case both land and building had been acquired by the LAO. It was the contention of the Ld.Counsel for the assessee that in the facts of the case of Radha Devi the ITAT had held the transfer to be that of a depreciable asset and hence the capital gain earned thereon as STCG u/s 50 of the Act. In the facts of the present case ,it was

contended, that both land and building being acquired ,it tantamounted to transfer of business undertaking of the assessee and not of a business /depreciable asset and thus the decision in the case of Radha Devi was not applicable in the facts of the present case. The Ld.Counsel for the assessee has relied on the order of the Hon'ble Madras High Court in the case of Coimbatore Lodge(supra) in support of his contentions.

14. We have gone through the order of the Hon'ble Madras high court in the case of Coimbatore Lodge(supra). We are not in agreement with the contentions of the assessee that the issue in the present case is squarely covered by the decision of the Hon'ble Madras High Court in the case of Coimbatore Lodge (supra). In the facts of the case before the Hon'ble High court the assessee was running a lodge and had sold the land alongwith the superstructure i.e the building. The question of law before the Hon'ble High Court was whether though land and building being one composite asset and the assessee having claimed depreciation thereon , the profits earned on transfer of the same were to be bifurcated between land and building treating the first as long term capital gain and the other as short term capital gain. The Hon'ble High Court held the capital gain to be long term applying the ratio laid down in the decision of the Madras High court in the case of ACIT vs Raka Food Products 277 ITR 261 ,wherein it was held that where the transfer is of the entire undertaking as a whole and land forms part of the assets of the undertaking it is not possible to bifurcate the sale consideration in a particular asset and section 50 there cannot be said to apply since it deals with depreciable assets. In substance the Hon'ble High Court held that since the assessee had transferred an undertaking and the consolidated receipt could not be bifurcated between the land and building and therefore the asset transferred was not a depreciable asset and the capital gain earned thereon therefore could not be treated as STCG.

15. In the present case, even if we consider that the assets sold constituted both land and building, though the said fact is not emanating from the record before us, it cannot be said to be the sale of an undertaking as such. In fact, the Land & Building of the assessee was compulsorily acquired by the Government for the purpose of building a dam as is the undisputed fact before us emanating from the orders of the authorities below. Therefore, the asset transferred was not the

undertaking of the assessee as such and no benefit can be derived from the aforesaid decision of the Hon'ble Madras High Court.

15.1 Having said so, we find that the Ld. counsel for assessee has stated at Bar that it had received compensation for the transfer of both the land and building. In such a case, we hold, the compensation received has to be bifurcated between the land and building and it is only the compensation received on account of building which is to be treated as Short Term Capital Gain since undisputedly the building is a business asset of the assessee who is using it as a dhaba/hotel. The land, on the other hand, is a non depreciable asset and capital gain earned on account of transfer of the same tantamounts to Long Term Capital Gain. But since we find that the fact that the assessee was compensated to the extent of Rs.12,52,443/- for both the hotel/dhaba and the land on which it was built, does not emanate from the records before us, but has been stated so at bar by the Ld.Counsel for the assessee. Therefore, we consider it fit to restore the issue to the Assessing Officer to determine the facts regarding the compensation received of Rs.12,52,443/- as to quantum received on account of land and building separately and thereafter decide the issue in accordance with law. The claim of the assessee to deduction u/s 54 on the long term capital gains earned if any, being consequential to the determination of the any long term capital gain earned by the assessee, is also therefore being restored to the AO . We may add that the assessee be given due opportunity of hearing by the AO .

16. In view of the above, the ground of appeal No.2 &3 raised by the assessee are allowed for statistical purposes.

17. The appeal of the assessee is therefore allowed for statistical purposes.

18. In the result, both the above appeals are allowed for statistical purposes.

Order pronounced in the open court.

Sd/-
(DIVA SINGH)
JUDICIAL MEMBER
Dated : 23/07/2018
AG

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Copy to: The Appellant, The Respondent, The CIT, The CIT(A), The DR