

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC" NEW DELHI**

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER

SA No. 833/Del/2018
(Arising out of ITA No.6269/DEL/2018)
Assessment Year: 2015-16

Shri Ashwani Sarpal, B-178, Naraina Vihar, New Delhi - 110 028	vs.	Miss Preeti Singh, Deputy Commissioner of Income Tax, Circle-62(1), New Delhi.
PAN: AAZPS5997H		
(Appellant)		(Respondent)

ITA No. 6269/DEL/2018
Assessment Year : 2015-16

Shri Ashwani Sarpal, B-178, Naraina Vihar, New Delhi - 110 028 PAN : AAZPS5997H	vs.	Miss Preeti Singh, Deputy Commissioner of Income Tax, Circle-62(1), New Delhi.
(Appellant)		(Respondent)

Appellant by:	Shri Vivek Bansal, Advocate		
Respondent by:	Shri S.L.Anuragi, Sr. DR		
Date of hearing:	16	11	2018
Date of pronouncement:	16	11	2018

ORDER

The aforesaid appeal has been filed by the assessee against impugned order dated 6.11.2018, passed by Ld. CIT (Appeals)20 New Delhi for the quantum of assessment passed u/s 143(3) for the assessment year 2015-16. In various ground of appeal assessee has challenged the addition of Rs. 7,62,230/- on account

of enhancement in short term capital gain as disposed by the assessee on sale of plots.

2. The facts in brief are that assessee is a Civil contractor and has purchased a plot at C-207 Mayfield Garden, Wazirabad, Gurgaon, Haryana along with other co-owner Shri Sumit Kapoor for sum of Rs. 58,43,526/-. Thereafter assessee constructed three floors, viz., Ground Floor, First floor and Second floor and the total cost of the plot and construction cost of all the three plots of the assessee were shown as under :-

a) Cost of plot	:	Rs. 58,43,526/-
b) Construction cost of Ground Floor	:	Rs. 31,22,825/-
c) Construction cost of First Floor	:	Rs. 24,10,810
d) Construction cost of Second Floor	:	Rs. 28,34,839/-

(The First Floor was sold in financial year 2013-14)

3. In the financial year 2013-14 relevant to assessment year 2014-15 assessee has sold Ground floor and second floor for sum of Rs. 1,25,00,000/- and 50% of the share of the assessee worked out to Rs. 56,50,000/-. The assessee has computed the short term capital gain in the following manner:-

Sale consideration	:	Rs. 62,50,000/-
Less construction cost:		Rs. 47,56,000/-
Short term capital gain:		Rs. 14,94,000/-

In the computation of short term capital gain, the assessee has taken pro-rata ownership of the entire plot which was assigned to the purchaser and no part of it was available to the assessee. That is, the entire plot area was sold alongwith the constructed floor

and no part was available with the assessee and was assigned to all the new owners of the Flat.

4. However, the Ld. AO held that the proportionate cost of the flat was wrongly taken in the working of the short term capital gain, because the constructed area sold was 91.576 square meter. The proportionate cost of construction was thus enhanced by sum of Rs. 7,62,230/- by the AO. The revised calculation done by the AO is as under:-

Proportionate cost of plot	Rs. 10,14,939/-
Construction cost of Ground Floor	Rs. 15,61,412/-
Construction cost of Second Floor	Rs. 14,17,419/-
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Total Cost of construction	Rs. 39,93,770/-

Accordingly, the amount of Rs. 7,52,000/- was enhanced and thereby tax was determined at Rs. 3,69,530/-.

5. Ld. CIT (A) too has confirmed the said addition by holding that AO was correct in taking the proportionate cost of construction of flat and not the entire plot in determining the short term capital gain. The land pertaining to the building was not transferred to the respective builder which he observed that was evident from the sale deed and only the land on which the construction took place is transferred. He referred to clause 3 of the Registered Sale Deed of Ground Floor which clearly mentions that the land underneath the said floor is constructed is transferred to the respective buyer by the assessee. Clause 4 of this deed also mentions that the owner of the ground floor is entitled to only use the front and rear lawn but the respective land

is not transferred and the area in and around the building outside and the front boundary wall can be used by the buyer to park 3 cars. Thus, he justified the action of the AO in taking the proportionate cost of the plot on which construction was made.

6. After hearing both the parties and on perusal of the relevant finding during the impugned orders, I find that it is not in dispute that cost of the plot and construction of all the three Floors was Rs. 1,42,12,000/-. The assessee has calculated the cost of plot for ground floor and second floor which was sold during the year in the following manner:-

a) 2/3 rd of the Cost of plot for ground floor and second floor	:	Rs.38,95,684/-
b) Net Construction cost of Ground Floor:		Rs. 27,81,477/-
c) Construction cost of Second Floor	:	<u>Rs. 28,34,839/-</u>
		Rs. 95,12,000/-
Half share of the appellant:		Rs. 47,56,000/-
Half share of the sale consideration:		Rs. 62,50,000/-
Short Term Capital Gain (Rs. 6250000 – 4756000)		Rs. 14,95,000/-

7. The case of the department is that while working out cost of the plot, proportionate allocation of the cost of the plot should have been allocated to the constructed area and not for the entire plot area. Such a contention of the department cannot be sustained under the facts for the reason that;

- *firstly*, when the assessee has sold the First Floor in the earlier assessment year the proportionate cost of the plot has been allowed; and
- *secondly*, as per sale deed entered in this year for the sale of the other two Flats, that is, Ground and Second Floor, clause

20 clearly provided that any area of the said property would be shared on pro rata basis to all the three owners of the Flat. The relevant clause is reproduced hereunder :-

“20. That the common area of the above said property includes the impartiable indivisible, pro-rata share of the land underneath and other common areas namely entry gate, underground water sources, passage from entry gate to stairs, stairs up-to top terrace shall remain common for all occupants. The Vendee will have the rights to use terrace which is common for all occupants. The maintenance expenses of these common area shall be shared proportionately by the all the occupants/owners.”

8. It is also undisputed fact that after the selling of the entire three floors, no part remained with the assessee and all the three owners of the flat enjoy the whole property including the common area for parking and other common usages. Ld. CIT(A) while interpreted the various clauses of the sale deed entered with the assessee with regard to the first floor in the earlier year stating that the only the plot of the land on which the plot is constructed is available to the owners has failed to appreciate that the other common facilities and parking areas is also proportionate allocated to the owners of the flats. It is also a common practice which quite prevalent in Delhi and NCR region builder's plots / flat are constructed on a plot that all the owners of the plot commonly own the common area apart from the constructed area. Thus, to restrict the cost of proportionate plot on the area where the plot is constructed is not tenable when admittedly it is no longer with the assessee after sale of all the flats and accordingly, the short term capital gain recomputed by the AO is directed to be deleted.

9. In the result, the appeal of the assessee is allowed.

10. As far as stay application is concerned, since the appeal preferred by the assessee has been disposed off, therefore, the present stay application has become infructuous and is dismissed as such.

Order pronounced in the open Court on 16th November, 2018.

sd/-
[AMIT SHUKLA]
JUDICIAL MEMBER

DATED: 16th November, 2018

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

Assistant Registrar