

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "D" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA.No.2798/Del./2015
Assessment Year 2010-2011

The DCIT, CC-08, Room No.333, ARA Centre, Jhandewalan Extn., New Delhi.	vs.	Shri Iqbal Chand Khurana through Legal Heir Ms. Anu Khurana, 40, Community Centre, Zamrudpur, New Delhi. PIN 110 048 PAN AAJPK0155B
(Appellant)		(Respondent)

For Revenue :	Shri J.K. Mishra, CIT-D.R.
For Assessee:	Shri Ashok Khurana, C.A.

Date of Hearing :	30.07.2019
Date of Pronouncement :	01.08.2019

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by Revenue has been directed against the Order of the Ld. CIT(A)-24, New Delhi, Dated 27.02.2015 for the A.Y. 2010-2011, challenging the deletion of addition of Rs.2,76,17,625/- made by A.O. on account of capital gain.

2. Briefly the facts of the case are that during the F.Y. 2009-2010 the assessee sold a house property (1/2 share) at 56 Golf Links, New Delhi for Rs. 21,75,00,000/- on 26.05.2009 which was purchased in F.Y. 1984-1985 of Rs.27,25,000/-. Further there was some improvement cost of Rs.4,90,640/- in F.Y. 1999-2000. Before this sale, the assessee was in negotiations with another party for its transfer and received Rs.5 crore as earnest money, thereafter, Rs.5 crore was received as part payment of negotiated amount as his share of 50% in this property. But this deal could not be materialized due to non-compliance of terms and conditions by the buyer. And the other party filed a suit in the Court of Law for recovery of money already paid by him. So, the matter of recovery of the amount received by the assessee as security and advance of Rs.10 Crores was subjudice on the date of filing the original return of income. As per order dated 10.04.2012 of Delhi High Court, assessee has retained Rs.4,62,50,000/- out of Rs.10 Crore which was received as earnest money and advance against this house property and paid back the balance of

Rs.5,37,50,000/- to the earlier party with whom the earlier negotiation could not be materialized. The assessee was allowed to retain Rs.4,62,50,000/- vide order dated 10.04.2012 of Delhi High Court only during the course of assessment proceeding for the A.Y. 2010-2011. Since this amount was retained by the assessee and the property in question was sold to another buyer during the previous year relevant to A.Y. 2010-2011 and the gain on sale was taxable during the previous year relevant to Assessment Year 2010-2011, the assessee revised his computation of income to give effect of this money retained by him in the previous negotiation vide Delhi High Court Order dated 10.04.2012 and the same has been accepted by the Assessing Officer. The assessee referred to Sections 51 and 48 of the Income Tax Act, 1961. It was submitted that indexed cost of acquisition and improvement is reduced to NIL (Deducted by the retained money). The balance excess money of Rs.3,16,75,268/- (Rs. 4,62,50,000/- - Rs. 1,45,74,732/-) is treated as a capital receipt not taxable in view of Judgment of Hon'ble Supreme Court in the case of Travancore Rubber

& Tea Co. Ltd., vs. CIT [2000] 243 ITR 158 (SC) in which it was held that “*where advance money forfeited is more than the cost of acquisition, in such a case, the excess of the advance money forfeited over the cost of acquisition of such asset shall be a capital receipt only*”. Accordingly the assessee in his computation of income has given effect of this money retained by him in the previous negotiation and accordingly reduced the indexed cost of acquisition and improvement by the amount retained by him of Rs.4,62,50,000/-. So the indexed cost reduced to NIL and the excess amount beyond this of Rs.3,16,75,268/- (Not 2,76,17,652/- as taken by the Assessing Officer) has been treated as a capital receipt not taxable in view Judgment of the Supreme Court case Travancore Rubber & Tea Co. Ltd. Vs. CIT (supra). However, the A.O. did not accept the contention of assessee and directed to charge capital gain on the impugned amount and directed that forfeited amount against the property has to be taxed as capital gain. One half share of the assessee was added for the purpose of capital gains.

3. The assessee reiterated the submissions made before the Ld. CIT(A) and submitted that as the amount retained by the assessee is more than the cost / indexed cost of capital asset, the excess amount remains as capital receipt and not taxable anywhere under the provisions of the Income Tax Act. It was, therefore, submitted that same should not be taxed under capital gains. The Ld. CIT(A) found that the issue is same as have been considered in the case of Shri Ashwani Khurana, New Delhi for the A.Y. 2010-2011 under appeal and the Ld. CIT(A) following the reasons for decision in the case of co-owner Shri Ashwani Khurana, deleted the addition of Rs.2,76,17,653/-.

4. Learned Counsel for the Assessee at the outset submitted that departmental appeal in the case of co-owner Shri Ashwani Khurana have been decided by ITAT in ITA.No.2799/Del./ 2015 for the A.Y. 2010-2011 vide Order Dated 26.02.2019. The findings of the Tribunal in paras 10 to 13 of the Order are reproduced as under :

“10. Ground no. 3 Undisputedly assessee had entered into an agreement to sell qua his property bearing no. 56 Golf Links, New Delhi with one Sanjay Pashi after accepting the earnest money of Rs. 4,62,50,000/-, which was subsequently forfeited as the prospective buyer Sanjay Pashi has failed to perform his part of the contract. It is also not in dispute that the property in question was ultimately sold by assessee to M/s. HAP apparel pvt. Ltd. for Rs. 21.75 crore, (assessee's share 50%). It is also not in dispute that the assessee has already offered capital gain on the sale proceed of Rs. 21.75 crore.

11. However assessee has deducted Rs.4,62,50,000/- the amount of sale proceeds forfeited from the cost of acquisition of the property in question u/s 51 of the Act and treated the excess of forfeited amount and cost of assets i.e. 2,76,17,652/- as capital receipts.

12. The Ld. CIT(A) has decided the issue by discussing section 51 of the Act and has also reached the conclusion that u/s 56(2) a new sub-section (IX) has been inserted with effect from 01.04.2015 to treat the forfeited sum as income from other sources, but it is not applicable to the year under assessment which is A.Y. 2010-11.

13. A co-ordinate bench of Tribunal in case cited as *Randhir Singh Kadan vs. Department of Income Tax* decided the identical issue by treating the earnest money received and forfeited by the assessee in respect of any negotiation for transfer of capital assets to be deducted from the cost of assets. Since in A.Y. 10-11 there was no provision under the Act for treating the forfeiture of earnest money received during the negotiation of a capital assets as income from other sources, the Ld. CIT(A) has rightly deleted the addition. The issue in controversy is also covered by decision rendered by Co-ordinate bench of Tribunal in case of

Vijay Singh (supra). Consequently ground no. 3 is determined against the revenue.”

4.1. Learned Counsel for the Assessee, therefore, submitted that since departmental appeal have been dismissed on identical facts in the case of the co-owner, therefore, departmental appeal may be dismissed. Copy of the above Order of the Tribunal is provided to the Ld. D.R. who have also stated that the issue is covered by the above Order of the ITAT Dated 26.02.2019 in the case of co-owner Shri Ashwani Khurana (supra).

5. After considering the submissions of both the parties, we find that the facts of the case are similar as have been considered by the ITAT in the case of co-owner Shri Ashwani Khurana (supra). The Ld. CIT(A) following his findings in the case of co-owner Shri Ashwani Khurana (supra), deleted the addition. The Order of the Ld. CIT(A) in the case of co-owner have been confirmed by the Tribunal. Therefore, no interference is called for in the matter. The

issue is covered in favour of the assessee. Therefore,
departmental appeal stands dismissed.

5. In the result, appeal of the Revenue dismissed.

Order pronounced in the open Court.

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 01st August, 2019

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'D' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.