INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI

BEFORE
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No. 3761/Del/2009

ACIT, Circle-11(1) New Delhi.	Vs.	Isherdas Sahni & Bros (P) Ltd. G-7, 2nd Floor, Connaught Place New Delhi – 110 001
(Appellant)		**(Respondent)**

Asstt. Year: 2006-07

Department by:	Shri Raghunath, Sr. DR
Assessee by :	Shri Tarandeep Singh, Advocate
Date of Hearing	28/08/2019
Date of pronouncement	15/11/2019

O R D E R

PER SUDHANSHU SRIVASTAVA, JM:

Revenue has filed this appeal aggrieved against order dated 19thJune, 2009 passed by the Ld. CIT(A)-XV, New Delhi {CIT (A)} for assessment year 2006-07.

2.0 Briefly, the facts of the case are that the assessee is a company engaged in the business of entertainment. It had sold a property known as "Rivoli Cinema". During the year under

consideration, the assessee had offered to tax income from long term capital gain of Rs.94,01,878/- as under:

"Property Rivoli Cinema 31.03.06

Sale consideration		*Rs.6,25,00,000/-*
Less : Indexed Cost		
F.Y.1981-82	*70,00,000/100*497*	*Rs.3,47,90,000/-*
Work in progress		
F.Y.2004-05	*19,27,312/480*497*	*Rs 19,95,571/-*
Work in progress		
F.Y.2005-06	*1,63,12,551/497*497*	*Rs 1,63,12,551*
		Rs.5,30,98,122/-
		Rs. 94,01,878/-"

2.1 In the order of assessment, it was held by the Assessing Officer (AO) that in the block of assets, depreciation has been claimed by the assessee. Accordingly, during the course of assessment proceedings, the AO directed the assessee to justify why as to why the said capital gain not be subjected to tax as 'Income from Short Term Capital Gains' in accordance with provision of section 50(2) of the Income Tax Act, 1961 (hereinafter called 'the Act'). Moreover, the AO also directed the assessee to justify as to how it had arrived at the fair market value of the property as on 01st April 1981 at Rs.70 lakhs.

2.2 In reply before the AO, it was submitted by the assessee that the property in consideration was held by it as investment and not as fixed assets eligible for claim of depreciation allowance. In order to substantiate the fair market value of the property as on 01st April 1981, the assessee furnished copy of valuation report dated 16th December, 2008 from a registered valuer Shri Rajesh Bhatia. The AO, however, was unimpressed and in his order of assessment dated 26th December, 2008 passed u/s 143(3) of the Act he proceeded to tax the gains derived from sale of property as Income from Short Term Capital Gain as under :-

"Sale consideration received:	*Rs.6,25,00,000/-*
Less: WDV of the asset shown as per	
depreciation chart of earlier year	*Rs. 40,27,030/-*
Short term capital gain	*Rs.5,84,72,970/-"*

2.3 In this regard, in his order of assessment it has been held by the AO as under:-

> "*The assessee's arguments are considered but the same are not acceptable for the following reasons:*
>
> *(i) The assessee has not furnished the copy of purchase deed to substantiate that the building was actually*

purchased before 01.04.1981. The claim of assessee that value of land is Rs.3,30,000/- and that of building is Rs.37,50,000/- is also not substantiated by any evidence. Factually, the assessee is owning a building named "Rivoli Cinema' which has been shown in the block of assets in the balance sheet. Further from the sale deed it is observed that the description of the property is as below:

…. ….. …..

(ii) The assessee's argument that the property was shown as investment in books of account is factually incorrect as the property was shown in the block of assets and depreciation was being provided year after year. The fact is evident from the balance sheet filed along with return of income year after year. The assessee's claim is, therefore factually incorrect.

(iii) The assessee has claimed that the fair market value on as 01.04.1981 has rightly been taken, is also not correct because the assessee has not furnished any evidence to substantiate the claim that it was the owner of the building prior to said date. Moreover, in the computation of income, the value as on 01.04.1981 has been adopted at Rs.70 lacs. The assessee has not filed any evidence as to how the figure of Rs.70 lacs has been arrived at. The assessee has furnished the copy of Valuer's report dt.16.12.2008. That means, the Valuer's report was not available with the assessee as on the date of filing the return of income. It is also pertinent to point out here that the Registered Valuer has visited the property on 10.12.2008. The valuation adopted by the assessee in computation of 'income is, therefore, unfounded. Even otherwise there is no question of adopting the fair market value as on 01.04.1981 or claiming the indexation on the said property as it is part of the block of assets. The assessee's claim of adopting the fair market value as on 01.04.1981 and claim of indexation is, therefore, not allowed."

2.4 Being aggrieved, by the above addition / variation to its total income, the assessee filed an appeal before the Ld. CIT (A). Before the Ld. CIT (A), it was submitted by the assessee that for income tax purposes depreciation has never been claimed by it. It was also submitted that contrary to the claim made by the AO, the property under consideration was given on rent and the rental income received thereon has been offered to tax and has also been accepted to be taxable as income from "House Property". It was submitted that since the income had been assessed to tax under the head "Income from House Property" the question of claiming depreciation does not arise. The assessee further submitted before the Ld. CIT (A) that the fact that the property under consideration was acquired by it prior to 1st April, 1981 is clearly evident from the sale deed dated 28th October, 2005 executed by it in favour of M/s Super India Enterprises. As regards justification for valuation of property as on 1st April, 1981, it was submitted by the assessee that the valuation report dated 16th December, 2008 issued by the registered valuer is based upon the land rates applicable w.e.f. 1st April, 1981 to 1983 as per order of L & DO Government of India.

2.5 The Ld. CIT (A) found merit in the submissions made by the assessee and the appeal was allowed. In this regard, it has been concluded by the Ld. CIT (A) in the impugned order as under :-

> "*2.1 I have considered the submissions of the appellant, the finding of the AO and the facts on record. The fact that the impugned property fell in the hands of the appellants vide sale deed dated 21.09.71 registered as document No.6209 in Addl. Book No.1, volume 2728 on pages 1 to 67 on 22.9.71 in the office of the sub-registrar New Delhi, from one Sardar Daljit Singh, is available at page 12 of the sale deed effected by the appellant in favour of Super India Enterprises, the latter transaction being relevant for the year under appeal. The fact that the appellants are absolute owners of the impugned property (measuring 982 square yards in block No.127 Regal 1, known as Rivoli Cinema Building, Connaught Place, New Delhi) with effect from 22.9.71, and in whose favour the title of the property stood mutated in the records of the Land & Development Office, Nirmal Bhawan, New Delhi, is available at page 14 and 15 of the sale deed executed in favour of Super India Enterprises. Documents whose authenticity have not been proved doubtful, do not support any conclusion other than that the appellant became the owner of the impugned property w.e.f., 21.9.71.*
>
> *2.2 The issue as to whether the appellant at all claimed and / or the Revenue allowed depreciation on the impugned property, and the manner of recording the property in the books of accounts, audited accounts, schedule of depreciation under the I.T. Act is again to be adjudged in the light of available facts on record. The AO states that the property was part of a block of assets. Now, historically since the*

acquisition of the property, the appellant as per accounts has classified the property as part of investments (at cost). Income from the subject property has always been assessed under the head of income from house property and not as income from business. The ratio that rent from Rivoli Cinema is assessable as income from house property has been decided by the ITAT as early as 16.6.83 in ITA No.1253 to 1255/Del for AY 76-77 to 78-79. In the first appellate order for AY 97-98, it has been held, relying on ITAT's order dated 16.6.83 that earning of income by way of rentals from theatre given on hire is assessable as income from house property only. No where in the history of this case, and since acquisition of the subject property, that the appellant's income from Rivoli Cinema as assessed other than as income from house property. The appellant inter-alia has never claimed nor been allowed depreciation on Rivoli Cinema, as asset always clarified in the accounts as appellant's investments (at cost).

2.3 The AO has invoked section 50 in order to tax the excess of sale consideration over w.d.v. of the property. Now, section 50 is a special provision for computation of capital gains in case of depreciation assets. It refers to block of assets. Block of assets is defined in section 2(11), meaning thereby that assets must form part of a group, which fall within the same class and for the members of which group, depreciation prescribed is of the same percentage. Under the provision of section 50, the capital assets, subject matter of transfer, should be an asset forming part of a block of assets and in respect of which depreciation has been allowed under I.T. Act, 1961 or I.T. Act, 1922. Records in the case under appeal show that the subject property is not an asset forming part of a block of assets, and neither has any depreciation been claimed or allowed in respect of that property since the day the asset was acquired by the appellant. The cost of land (Rs.3,30,000) and cost of building (Rs.5,50,000) being

purchase cost of that property have been carried forth in the balance sheet as part of investment at historical cost, and no depreciation on the building has ever been claimed or allowed. The cost of improvement (being expenditure on the building) has been added to the cost, as in AY 04-05, without claiming any depreciation either on the original cost or on the cost of improvement. The fact that no depreciation on the cinema building has been claimed, apart from the accounts itself has been given in a note to the accounts for each year of account. For example in AY 01-02, it was stated "In respect of building held as investment by the company, the depreciation for the year amounting to Rs.8498/- (last year Rs.8945) has not been provided for in the Account. Arrear of depreciation not so provided for in the accounts up to 31.3.2001 amount to Rs.3,36,558/- (last year Rs.3,27,060/-) Similar notings for AY 03-04 (depreciation of Rs.8073/- not claimed), AY 04-05 (depreciation of Rs.68,600/- not claimed) AY 05-06 (depreciation of Rs.166880 not claimed have been made in the audited accounts of the relevant years.

These being the facts on record, the AO's view that the sale consideration of Rivoli Cinema building is taxable as short term capital gain since transfer of an asset on which depreciation has been claimed) militates against the facts available on record, in short unsupported by facts themselves. There would be, hence, no basis to invoke the provision of section 50 in the case under appeal.

2.4 The without prejudice argument of the AO is that the gross value of the property as on 1.4.81 could not have been Rs.70 lakhs, as the figure is not backed by evidence. That the valuation report is dated 16.12.08, meaning thereby that the figure of valuation was arrived at only after filing of the return, hence an after-thought. Now the provision of section 55(2)(b) would apply, if the appellant becomes the owner of the property become 1.4.81 and in that case the market value

of the asset as on 1.4.81 or the cost of acquisition, which ever of the two at the option of the appellant, becomes the cost of acquisition. The appellant has opted for fair market value of the property as on 1.4.81. The case of the AO that valuation report is subsequent to the riling of the return and hence a mode to rationalize its claim of fair market value, is to be seen in the context that the appellant has not even included the cost of the building as part of the cost of acquisition. Al that has been put up for valuation as on 1.4.81 is the portion of land of 982 sq. yards at Connaught place, whose valuation has been made on the basis of L&DO rates, applicable to land in that area. Land Development Office (L&DO) under the Ministry of Urban Development administers the determination of land rates in specified areas for residential and commercial purposes, and the L&DO's specific rate at a particular location is used for determining lease premium or stamp duty valuation for properties in that area. L&DO's land rates are public documents, reliance on which for ascertaining fair market value as on 1.4.81 by the appellant in order to compute long term capital gain ensuing on transfer of an immovable property could not have been faulted. The AO's contention that the valuation report is subsequent to the date of filing of the return does not dilute the fact that the fair market value in the first place has been ascertained on the basis of L&DO rates for that specific year. The without prejudice argument to ignore the L&DO rates on the basis of unsubstantiated suspicion as regards timing of the valuation report, does not have any merit hence."

2.6 Being aggrieved, the Revenue is now in appeal before us and has raised the following grounds of appeal:

"1. *The order of Ld. CIT (A) is wrong, perverse, illegal and against the provisions of law, liable to be set aside.*

2. On the facts and circumstances of the case and in law, the CIT (A) has erred in accepting the additional evidence in contravention to Rule 46A by relying on the sale deed dated 21.09.71.

3. The appellant craves leave to add, alter or amend any ground of appeal raised above at the time of hearing."

2.7 However, during the course of hearing before this Tribunal on 12thApril, 2010 the then Ld. CIT (DR) sought permission to amend the grounds of appeal. With the consent of assessee, the permission so sought was granted. However, thereafter, several adjournments were sought by the department and after two years a fresh appeal memo dated 16th March, 2017 was filed wherein the impugned order was challenged on the following grounds:

"1. *The order of Ld. CIT (A) is wrong, perverse, illegal and against the provisions of law, liable to be set aside.*

2. On the facts and circumstances of the case and in law, the CIT (A) has erred in accepting the additional evidence in contravention to Rule 46A by relying on the sale deed dated 21.09.71.

3. On the facts and circumstances of the case, the Ld. CIT(A) has erred in law in not verifying the authenticity, genuineness of "cost of improvement" claimed to have been

incurred in F.Y.2004-05 (Rs.19,95,571) and F.Y.2005-06 (Rs.1,63,12,551/-). He was duty bound to examine this aspect as the AO never looked into this issue as he held that asset to be "Short term Capital asset."

3. The appellant craves leave to add, alter or amend any ground of appeal raised above at the time of hearing."

2.8 Since in the amended appeal memo dated 16thMarch, 2012 a fresh claim was made as is apparent from ground no. 3, the revenue was directed to file an application supporting admission of additional ground as per Rule 11 of ITAT Rules. Thereafter, again several adjournments were taken by the department to furnish reasons for raising the additional ground of appeal at this belated stage.

2.9 Vide letter dated 13th February, 2017, the Revenue has merely prayed for admission of above additional ground as under:

"*In this connection it is submitted that vide letter F. No./DCIT/CIR-11 (1)/2010-11/1441 dated 08.11.2010, the additional grounds of appeal were filed (attested true copy enclosed again herewith). It appears that the additional grounds so filed have not been admitted for lack of application for admission of additional grounds.*

It is requested that additional grounds of appeal taken by the department as referred to above kindly be admitted."

3.0 During the course of hearing on 28thAugust, 2019 the Ld. DR submitted that in the additional ground of appeal, the revenue seeks a fresh opportunity for verification of cost of improvement of Rs.19,27,312/- and Rs.1,63,12,551/- claimed by the assessee in years 2004-05 and 2005-06.

3.1 On merits of the matter, the Ld. DR relied upon the order passed by the AO.

4.0 The Ld. AR, Shri Tarandeep Singh vehemently opposed the arguments raised by the Ld. DR. In this regard it was submitted by him that on merits, the department has not raised any objection/ground before the Tribunal except for claiming that there is an additional evidence considered by the Ld. CIT (A) in the form of sale deed dated 21stSeptember, 1971. In this regard it was submitted that the Ld. CIT (A), in the impugned order, has not relied upon or taken into consideration the sale deed dated 21stSeptember, 1971. It was submitted that in order to arrive at a conclusion that the property under consideration was purchased by the assessee prior to 1st April, 1981, the Ld. CIT (A) has merely taken into consideration the sale deed dated 28th October, 2005 executed between the assessee and M/s

Super India Enterprises. It was submitted that, undisputedly, the sale deed dated 28th October 2005 was filed during the assessment proceedings and is also taken into consideration by the AO in his order of assessment.

4.1 As regards the other objections raised by the AO in his order of assessment and negated by the Ld. CIT (A), it was submitted that there is no challenge raised before this Tribunal.

4.2 As regards the admission of additional ground of appeal, it was submitted by the Ld. AR that there is no cogent reason given by the department for admission of the additional ground at this belated stage. It was submitted that in the order of assessment, the AO has not doubted the cost of improvement claimed by the assessee.

5.0 We have heard the rival submissions, carefully considered the facts of the case and have also perused the material available on record. The basic contention of the Ld. DR before us is that in the impugned order the Ld. CIT (A) has considered additional evidence in contravention of provision of Rule 46A by relying upon sale deed dated 21stSeptember, 1971. It

is the contention of the department that cost of improvement has not been verified by the AO. To such extent, we are in agreement with the Ld. Sr. DR. Undisputedly, although the Ld. CIT (A) has accepted the assessee's claim, the cost of improvement was not open to verification by the AO. It is our considered opinion that the AO should have been given an opportunity to the AO the respond to the assessee's claim of cost of improvement. Therefore, 'the cost of improvement' necessarily needs to be verified/examined by the AO. Accordingly, we restore the issue to the file of the AO for the very limited purpose of only verifying the cost of improvement as claimed by the assessee. The AO shall give a proper opportunity to the assessee to present its case before him.

6.0 In the final result, the appeal filed by revenue is allowed for statistical purposes.

Order pronounced in open court on 15th November, 2019.

sd/-	sd/-
(O.P. KANT)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 15/11/2019

dragon

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi