

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : E : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.665/Del/2017
Assessment Year: 2012-13

Mala Kumar,
D-217, Defence Colony,
New Delhi.

Vs ACIT,
Circle-52(1),
Civic Centre,
New Delhi.

PAN: AAIPK8127G

(Appellant)

(Respondent)

Assessee by	:	Shri Ved Jain, Advocate & Shri Nischay Kantoor, CA
Revenue by	:	Ms Rakhi Vimal, Sr. DR
Date of Hearing	:	21.11.2019
Date of Pronouncement	:	18.02.2020

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 2nd November, 2016 of the CIT(A)-18, New Delhi, relating to A.Y. 2012-13.

2. Facts of the case, in brief, are that the assessee is an individual and derives income from salary, business, capital gain and other sources. She filed her return of income on 26th March, 2013 declaring the total income at Rs.96,98,920/- which included long-term capital gain of Rs.82,67,416/-. On being asked by the AO to

furnish the details of deduction claimed u/s 54 and computation of such long-term capital gain, the assessee filed the following details:-

Computation of long term capital gains

Assessee's share in sales consideration received from M/s Ramprastha Greens Pvt. Ltd. towards sale of house on killa No.22,23 & 24, Sec.52, village Wazirpur, Pataudi Road, Gurgaon vide sale deed registered on 14 th Oct, 2011 (see Note 2 below)	23,377,111
Less: Indexed cost of acquisition/Improvement (see Note 1 below)	<u>27,19,592</u>
Long Term Capital Gains	2,06,57,519
Less: Claim/Deduction u/s 54 (see Note 3 below)	
- Amount Already appropriated/utilize towards construction of new Residential unit	1,08,80,103
- Amounts invested in Capital Gains Accounts Scheme, 1988 with Corporation bank	<u>15,10,000</u> 12,39,01,03
	Capital Gains (taxable) <u>82,67,416</u>
	CII 785 A.Y 2012-13

Notes:

1. Indexed Cost of Acquisition/Improvements

Particulars	Amount	Financial Year	CII	Indexed Cost
Original Cost of Land	1,87,500	1991-92	199	7,39,636
Other Charges (Stamp Duty)	23,450	1991-92	199	92,504
Construction 1991-92	3,00,000	1991-92	199	11,83,417
Construction 1992-93	2,00,000	1992-93	223	7,04,036
Total	7,10,950			27,19,592

1. Division of Sales Consideration

Name	Gross Sales Consideration	Ratio	Paid to Shikhar Travels	New Consideration
Capt. Swadesh Kumar	2,79,95,491	45.33%	86,12,602	1,93,82,889
Mrs. Mala Kumar	3,37,64,509	54.67%	1,03,87,398	2,33,77,111
Total	6,17,60,000	100%	1,90,00,000	4,27,60,000

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3. From the various details furnished by the assessee, the AO noted that the assessee along with her husband had purchased the land in F.Y. 1991-92. The assessee had 54.67% share in the said land whereas her husband had 43.33% share. Subsequently, the land was given to M/s Shikhar Travels (India) Pvt. Ltd., for use in their business under the name and style of "A Village Retreat." The company was also allowed to erect structures including conference room, toilet block, dining hall, ten units of living tents, climbing wall and recreation hall. The AO noted that Smt. Mala Kumar and her husband Capt. Swadesh Kumar are directors and majority shareholders of the said company. He noted that before selling the land, the assessee along with her husband paid Rs.1.90 crore, vide agreement dated 29th March, 2011 to M/s Shikhar Travels (India) Pvt. Ltd., as compensation for the structures and fixtures which the company had erected on the said land. He noted that it has been clearly mentioned in para 7 of the said agreement dated 29th March, 2011 that an amount of Rs.1.90 crores had already been paid by the owners of the land to the company as on date of agreement. The assessee herself has said in her reply dated 09.01.2015 that payments to M/s Shikhar Travels (India) Pvt. Ltd., were made in the year 2010 itself. Subsequent to this agreement, the assessee, vide sale deed dated 14.10.2011 sold the above said land for total sale consideration of Rs.6,17,60,000/- out of which the share of the assessee comes to Rs.3,37,64,509/-. However, instead of declaring the total sale consideration of Rs.3,37,64,509/-, the assessee has shown net sale consideration of only Rs.2,33,77,111/- after deducting Rs.1,03,87,398/- which was paid to M/s

Shikhar Travels (India) Pvt. Ltd., as compensation of erected structure. According to the AO, the above payment cannot be reduced from the total sale consideration to arrive at net sale consideration value. According to him, at the best the assessee can claim this amount as cost of improvement u/s 48 of the IT Act as the assessee had paid this amount for erecting structures and fixtures on the said land but not without substantiating the genuineness of the claim. He, therefore, treated the sale consideration in the hands of the assessee at Rs.3,37,64,509/-. So far as the deduction of Rs.1,03,87,398/- on account of payment made to M/s Shikhar Travels (India) Pvt. Ltd. is concerned, the AO held that the agreement with M/s Shikhar Travels (India) Pvt. Ltd., is not a registered document or a notarized one and, therefore, it is only a self serving document made to serve the purpose of the assessee when the parties to the agreement are closely associated. Further, the assessee did not submit any valuation report to substantiate that the amount of Rs.1.9 crore was in proportion to the fair market value of such structure.

4. So far as the claim of deduction u/s 54 of the IT Act is concerned, the AO held that deduction u/s 54 of the Act is available to the assessee where capital gain assessed from transfer of a residential house, the income of which is chargeable under the head ~~Income from house property.~~ However, in the instant case, the assessee has sold only a piece of land. If any structures/fixtures were erected on the said land at all, the same cannot be said to be a residential house by any stretch of imagination. He further noted that the assessee, vide her reply dated 15th

October, 2014, has herself admitted that if the claim of the assessee u/s 54 of the Act is treated to be not available, the same should be allowed u/s 54F of the IT Act. The AO, therefore, considered the claim of the assessee u/s 54F of the IT Act and after allowing the deduction u/s 54F to the tune of Rs.1,13,92,131/- and after considering the amount of Rs.82,67,416/- already offered for taxation, the AO made addition of Rs.1,13,85,370/- to the total income of the assessee.

5. In appeal, the Id.CIT(A) gave part relief to the assessee. As regards the allowability of deduction of the proportionate share of the assessee of the total compensation paid of Rs.1.90 crores while computing the capital gain is concerned, the Id.CIT(A) estimated the cost of structure in the hands of M/s Shikhar Travels (India) Pvt. Ltd., at Rs.38,50,000/- and allowed the benefit of deduction of the proportionate share of the assessee in respect of the same from the sale consideration. As regards the remaining portion of the compensation paid of Rs.1,51,50,000/- is concerned, the Id.CIT(A) denied deduction of the same. While doing so, he held that the compensation amount paid by the assessee is nothing but to reduce the capital gain in the hands of the director of the assessee and tax the same in the hands of the company M/s Shikhar Travels (India) Pvt. Ltd. He noted that the said company has suffered losses and the intention is to set off the income transferred to the company against such losses, so that no tax is required to be paid by the company. He further held that the meager earning from the holiday resort does not justify the compensation of Rs.1.9 crore.

6. So far as the claim of deduction u/s 54 of the Act as against section 54F is concerned, no finding was given by the Id.CIT(A) in respect of the argument that the AO erred in denying the benefit u/s 54. He, however, directed the AO to recompute the capital gain and consider the claim of exemption u/s 54F.

7. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

1. The order passed by the Learned ACIT Circle 52(1), New Delhi to the extent sustained by CIT (Appeals) is bad in law, arbitrary and contrary to the facts of the case and therefore, deserves to be set aside.

2. The Learned CIT (Appeals) has erred on the facts and the circumstances of the case and in law in sustaining an addition to the extent of Rs. 93,46,616/- to the Long Term Capital Gains of Rs. 82,67,416/- returned by the assessee.

3. The Learned CIT (Appeals) has erred on the facts and the circumstances of the case and in law in sustaining an addition to the extent of Rs. 82,82,286/- to the assessee's share in sales consideration, though not belonging to the assessee resulting in double taxation of the same.

4. The Learned CIT (Appeals) has erred on the facts and the circumstances of the case and in law in computing the taxable Long Term Capital Gains u/s 54F of the Income Tax Act, 1961 as against section 54 of the Income Tax Act, 1961.

5. The Learned CIT (Appeals) erred on the facts and the circumstances of the case and in law in disregarding the remand report of the Assessing Officer.

6. The Assessee craves leave to add, amend, alter or forego any of the above grounds of appeal at any time hereafter.

8. The Id. Counsel for the assessee strongly challenged the order of the CIT(A). He submitted that though the company has incurred losses in the year under consideration and has not paid any taxes, however, the fact remains that the

company has considered the amount received as compensation as part of its total income under the Income-tax Act. Merely because the company has set off the same against losses does not mean that the transaction is a sham. He submitted that had the company not received any such amount, it would have increased losses to such extent to carry forward and to set off the same against the income of the subsequent years. However, in absence of such losses available for set off, the company has ended up paying tax @ 30% in respect of its income earned over the years. He submitted that as against tax rate of 20% on capital gain, the company has paid tax at the higher rate of 25%/30%. Therefore, the allegation of the Department that the compensation amount paid by the assessee is enhanced so as to reduce the capital gain in the hands of the Director is incorrect.

9. Referring to the computation of income for A.Y. 2012-13 in the hands of the spouse of the assessee, a copy of which is placed at pages 62-65 of the paper book, the Id. Counsel for the assessee submitted that the AO has accepted the same u/s 143(1) and no scrutiny assessment has taken place. Further, no action u/s 148 has been taken. Therefore, denial of deduction to the assessee in the instant case is unwarranted and not justified.

10. So far as the compensation paid to M/s Shikhar Travels (India) Pvt. Ltd., is concerned, he submitted that M/s Shikhar Travels (India) Pvt. Ltd., was allowed to use the property by the assessee and her spouse from time to time over a number of years. The said company had approached the Department of Tourism for running

the property as a farm house under the Farm House Tourism Scheme of Haryana Tourism vide its letter dated 14.12.2004, copy of which is placed at page 121 of the paper book. Referring to page 75 of the paper book, he submitted that the company also obtained permission, vide letter No.TM-06/AP-IV/2141 dated 07th April, 2006. Further, there is no dispute to the fact that the company was running a farm house under the name of -Village Retreatø over a number years in the occupation of a tenant of the said property. Since the payment of compensation was essentially in order to relinquish the interest of the company acquired by it under the tenancy agreement and to get effective title to the property and to subsequently transfer the same, such payment should be allowed as a deduction. In his alternative argument, he submitted that the expenditure incurred in the form of compensation paid to the company having direct nexus with the execution of transfer should be considered to be an expenditure incurred wholly and exclusively in connection with the transfer of the capital asset and should be allowed as a deduction u/s 48(1) of the Act. Referring to various decisions, he submitted that the amount of compensation paid to M/s Shikhar Travels (India) Pvt. Ltd., should be allowed as a deduction from the sale consideration to arrive at the correct capital gain.

11. The Id. Counsel for the assessee further submitted that the fact that the CIT(A) gave part relief and the Revenue is not in appeal before the Tribunal shows that there is need for some compensation to be paid to M/s Shikhar Travels (India)

Pvt. Ltd. However, the authorities cannot put themselves in the arm chair of the assessee to determine what is reasonable and what is not. For the above proposition, he relied on the decision of the Honøble Delhi High Court in the case of Kaushalya Devi (deceased) through legal representatives vs. CIT, vide ITA No.600/2004, order dated 20th April, 2018. He also relied on various other decisions and submitted that the words ÷wholly and exclusivelyø has been interpreted by the courts and held that the authorities cannot decide the commercial expediency by putting themselves in the arm chair of the assessee to examine and consider whether they would have or the assessee should have incurred the said expenditure including the quantum having regard to the circumstances. He submitted that the AO, in the instant case, has not invoked the provisions of section 40A(2) of the Act. He accordingly submitted that the amount paid to M/s Shikhar Travels (India) Pvt. Ltd. as compensation should be allowed as deduction while computing the long-term capital gain.

12. So far as the denial of claim of exemption u/s 54 is concerned, he submitted that no finding was given by the CIT(A) on this issue. The AO has denied the claim by holding that the property is merely a piece of land with some structure and it is not a residential property. Referring to copy of remand report, copy of which is placed at page 115 of the paper book, he submitted that the AO himself admits the presence of farm house on the land. He submitted that the CIT(A) has himself allowed deduction of Rs.38.50 lakhs while computing capital gain in

respect of the compensation paid to M/s Shikhar Travels (India) Pvt. Ltd., in respect of the building. Therefore, under these circumstances, the deduction u/s 54 cannot be denied. He submitted that what has been sold is not a mere piece of land, but, a farm house with residential dwellings. The sale deed dated 14th October, 2011 also mentions sale of house property situated at Killa No.22, 23 and 24, Sector 52, Village Wazirpur, Pataudi Road, Gurgaon and, therefore, it is not merely sale of a piece of land but, was for sale of a developed land along with building structure, furniture and fittings, etc. He accordingly submitted that there was a farm house on the said land with residential unit, therefore, denial of claim u/s 54 is bad in law.

13. The ld. DR, on the other hand, heavily relied on the order of the CIT(A). He submitted that how they have reached the figure of Rs.1.90 crore is not known. This is nothing, but a ploy to reduce the taxable long-term capital gain in the hands of the assessee and to set off the loss in the hands of the company where the assessee and her husband are substantial shareholders.

14. The ld. Counsel, in his rejoinder, drew the attention of the Bench to the Profit & Loss Account of M/s Shikhar Travels (India) Pvt. Ltd., for the year ending 31st March, 2010 and 31st March, 2011, copy of which is placed at page 112 of the paper book and submitted that the said company is not a loss making company.

15. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the

assessee. We have also gone through the various decisions cited before us. We find, the AO, in the instant case, denied the compensation of Rs.1,03,87,398/- being the share of the assessee out of the total amount of Rs.1,90,00,000/- paid to M/s Shikhar Travels (India) Pvt. Ltd. from the sale consideration on account of sale of house situated at Killa No.22, 23 and 24, Sector 52, Village Wazirpur, Pataudi Road, Gurgaon, which was sold to M/s Ramprastha Greens Private Ltd. The reason for such denial by the AO was that no valuation report was filed by the assessee to substantiate that the amount of Rs.1.9 crore was in proportion to the fair market value of such structures. Further, the agreement is not a registered document or a notarized one. It is also his allegation that all the three parties to the agreement are closely associated. He, therefore, held that the claim of the assessee of Rs.1,03,87,398/- as cost of improvement compensation paid to the said party cannot be allowed. We find, the Id.CIT(A) determined the cost of such structure in the hands of M/s Shikhar Travels (India) Pvt. Ltd., at Rs.38,50,000/- and allowed the benefit of deduction in the proportion of share of the assessee in respect of the same from the sale consideration for computation of the capital gain. While denying the balance amount, he held that the compensation so paid by the assessee was nothing, but, to reduce the capital gain in the hands of the directors and take the same in the hands of the company M/s Shikhar Travels (India) Pvt. Ltd. According to him, the said company has suffered losses and the intention was to set off the income transferred to the company against such losses, so that no tax is

required to be paid by the company. It is also his observation that the earning from Holiday Resort does not justify such huge compensation.

16. It is the submission of the Id. Counsel for the assessee that against the relief granted by the CIT(A) to the tune of Rs.38,50,000/- the Revenue is not in appeal before the Tribunal. Further, the provisions of section 40A(2) have not been applied. It is also his submission that the computation of long-term capital gain by deducting the compensation paid to M/s Shikhar Travels (India) Pvt. Ltd. from the sale consideration has been accepted in the hands of the husband of the assessee although u/s 143(1) and no proceedings u/s 148 has been initiated. It is also his submission that the AO cannot sit on the arm chair of the assessee and decide how much compensation is to be paid and in what manner.

17. We find some force in the above argument of the Id. Counsel for the assessee. There is no dispute to the fact that M/s Shikhar Travels (India) Pvt. Ltd., was running a Village Retreat in the said land and incurred certain expenditure from time to time. The payment of Rs.1.90 crore to M/s Shikhar Travels (India) Pvt. Ltd. is also not in dispute. Further, there is no dispute to the fact that M/s Shikhar Travels (India) Pvt. Ltd. has disclosed the amount in their Profit & Loss Account. A perusal of the Profit & Loss Account of M/s Shikhar Travels (India) Pvt. Ltd., for the year ending 31.03.2010 and 31.03.2011 shows that the company was not incurring any loss and was making profit. Only for the current year the company has incurred some losses. However, it is seen that the return of income

filed by the husband of the assessee has been accepted where such compensation was claimed as a deduction from the net sale consideration and no action u/s 147/148 has been initiated although such assessment has been completed u/s 143(1) of the Act. The provisions of section 40A(2) has also not been invoked by the AO. Therefore, we find merit in the argument of the Id. Counsel that the AO cannot sit in the arm chair of a businessman and decide how much compensation should be given for vacating the property and, thereafter, to sell the same to a third party. Since the transaction in the instant case is not doubted, therefore, merely because the parties are related or that the agreement was not registered or notarized, the same, in our opinion, cannot be a ground to deny the benefit of deduction of the compensation paid to M/s Shikhar Travels (India) Pvt. Ltd., from the net sale consideration for computing the long-term capital gain. In this view of the matter, we are of the considered opinion that the Id.CIT(A) was not justified in restricting the compensation paid to M/s Shikhar Travels (India) Pvt. Ltd. to Rs.38,50,000/- as against the payment of Rs.1.90 crores for the purpose of computing the long-term capital gain. The grounds raised by the assessee on this issue are accordingly allowed.

18. So far as the deduction u/s 54 of the Act is concerned, we find the AO denied the claim of deduction u/s 54 on the ground that the assessee sold a piece of land and not a residential house. According to him, the existence of any structure/fixtures on land cannot be said to be a residential house. He, however,

allowed the benefit of deduction u/s 54F of the Act. We find, although the assessee challenged the action of the AO in denying the benefit u/s 54, the CIT(A) has not adjudicated the same. We find from the various details that the assessee had filed various documents before the CIT(A) to substantiate that there was a residential unit on the farm house. However, he has not given any finding on this issue. We, therefore, deem it proper to restore this issue to the file of the CIT(A) with a direction to adjudicate the issue of deduction u/s 54 of the Act which was specifically challenged before him by the assessee. Needless to say, the Id.CIT(A) shall give due opportunity of being heard to the assessee and decide the issue as per fact and law. The second issue raised in the grounds of appeal is accordingly allowed for statistical purposes.

19. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 18.02.2020.

Sd/-

(K.NARASIMHA CHARY)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 18th February, 2020.

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Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi