

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER

ITA No.967/Bang/2011
Assessment year: 2009-10

Shri Ashok Kumar Chouta, 14-2-104/15-16, Classic Colour Lab, City Light, Balmatta Road, Mangalore – 575 001. PAN: ABYPC 1840R	Vs.	The Deputy Commissioner of Income Tax, Central Circle, Mangalore.
APPELLANT		RESPONDENT

ITA No.1014/Bang/2011
Assessment year: 2009-10

The Deputy Commissioner of Income Tax, Central Circle, Mangalore.	Vs.	Shri Ashok Kumar Chouta, Mangalore – 575 001. PAN: ABYPC 1840R
APPELLANT		RESPONDENT

Appellant by	:	Shri V. Srinivasan, Advocate
Respondent by	:	Shri Dilip, Advocate – Standing Counsel for Dept.

Date of hearing	:	29.01.2020
Date of Pronouncement	:	28.04.2020

ORDER

Per B R Baskaran, Accountant Member

These cross appeals are directed against the order dated 29-08-2011 passed by Ld CIT(A)-6, Bangalore and they relate to the assessment year 2009-10.

2. The assessee is in appeal challenging the decision rendered by Ld CIT(A) on the following issues:-

- (a) Determination of Sale consideration relating to Kadri Kamble Property.
- (b) Disallowance of loss arising from Income from House Property.
- (c) Addition relating to unaccounted investment in the flats purchased in West Wind Project.

At the time of hearing, the Ld A.R did not press the issue no.2 cited above. The other grounds urged by the assessee are either general or consequential. Hence only two issues survive in the appeal of the assessee.

3. The revenue is in appeal challenging the decision rendered by Ld CIT(A) on the following issues:-

- (a) Whether the Ld CIT(A) was justified in directing the AO to assess the profit arising on sale of Kadri Kamble property as Income from Capital gains as against the decision of the AO to assess the same as Income from Business.
- (b) Whether the Ld CIT(A) was justified in directing the AO to allow deduction u/s 54F of the Act.

- (c) Whether the Ld CIT(A) was justified in reducing the addition relating to unaccounted investment in the flats purchased in West Wind Project.

All the issues urged by the revenue is interconnected with the issues urged by the assessee.

4. The facts relating to the above said additions are discussed in brief. The assessee is engaged in the business of property development. He is the proprietor of M/s Classic Promoters and Developers. The revenue carried out search and seizure operation u/s 132 of the Act on 13.02.2009 in the hands of the assessee. Subsequently, the assessee filed return of income for the year under consideration (AY 2009-10) declaring a total income of Rs.64,14,210/-. The AO completed the assessment determining the total income at Rs.4,07,03,080/- by making various additions. The Ld CIT(A) granted partial relief to the assessee. Hence both the parties are in appeal before us challenging the decision of Ld CIT(A) rendered on the above said issues.

5. The first issue relates to the assessment of profit arising on sale of Kadri Kamble land. The assessee had purchased this land having an extent of 42 cents in Kadri Kamble, Mangalore during the financial year 2005-06. After the search operations, the assessee has filed a revised balance sheet, wherein the cost of purchase of above land was shown at Rs.30,04,000/-. According to the assessee, this land was occupied by certain tenants and he has spent money to vacate them. The assessee has sold the land to a person named Mrs. A latha, w/o Sri K Ashoka residing in Bangalore during the year under consideration. Till the date of sale, the cost of land (including payment made to tenants) was shown at Rs.49,54,000/-.

6. The assessee has sold this land to Smt. A Latha through a sale deed dated 03.12.2008 for a consideration of Rs.1,07,00,000/-. However, the assessee did not declare the profit/capital gain arising on sale of this land in the return of income filed by him for AY 2009-10. However, a note was appended to the Computation of income stating therein under the head "Capital gains" that "gain on sale of property could not be computed due to inavailability of information".

7. During the course of search, the search officials found both the Sale agreement and sale deed relating to the above said land. The assessee had entered into a Sale Agreement with Smt. A Latha on 07-07-2008, wherein the sale consideration was shown at Rs.3,55,00,000/-. However, the sale deed was seen registered on 03-12-2008 for a consideration of Rs.1,07,00,000/- only. During the course of search, a statement was taken from the assessee u/s 132(4) of the Act. In response to the question no.5, the assessee admitted that the land was agreed to be sold for a sum of Rs.3,55,00,000/-. The relevant question and answer are extracted below, for the sake of convenience:-

"Q No.5 : You had sold a land situated at Kadri Kambla Road, Mangalore to some Bangalore Party. Please tell me what is the cost of the acquisition of the land? When was it acquired? When did you sell the land? Who is the buyer? And what is the total sale consideration received?"

Ans:- The land was purchased during the financial year 2005-06. It consists of 42 cents. I do not remember the consideration paid to the vendors. However, the purchase of this property is reflected in my balance sheet. This property is now sold to one Mrs. A Latha, w/o K Ashoka residing at SB

242, Vijaya Enclave, Bilhakahalli, SRS Nagar, Bannerghatta Road, Bangalore-76 during December, 2008. The total agreed consideration was Rs.3,55,00,000/-. I purchased the land from the land owners in the year 2006-07 with a understanding that I will settle the tenants demands. I entered into agreement with the tenants and offered them 8 flats out of the 24 flats that was proposed to be constructed in this land. I got the tenants vacated and they are living in rented premises. I am paying the rent for their residences now. In the meanwhile, I entered into agreement with the Bangalore Party for sale of the land. As per the agreement with the tenants, I was to complete the construction of the flat within a period of about 2 years. Since the construction was not started the tenants have approached the Court of Law and the matter is now pending in the Court. Now Bangalore Party who purchased the land has asked me to settle the issues with the tenants and handover the clear titles to them, failing which they have now stated that they will not pay the difference between the agreement value and the registered value. The buyers have issued a legal notice to me in this regard. The registered sale deed is yet to be handed over the buyers. The registered sale deed is kept in safe custody with Escrow, Sri Udayaprakash Muliya, Advocate. I will verify the liability to capital gains tax on this sale and come back to you shortly.”

8. The assessing officer sought explanations from the assessee with regard to the difference in sale consideration as mentioned in the Sale Agreement and Sale deed. It was explained that the buyer of the property came to know of the legal problems surrounding the property and hence

the sale consideration was finally agreed at Rs.1.07 crores as mentioned in the Sale deed. The assessee further submitted that he did not receive a sum of Rs.45 lakhs out of above said sale consideration also. The assessee accordingly submitted that the actual sale consideration should be taken as Rs.62 lakhs (Rs.107 (-) Rs.45) only for the purpose of computing capital gains. The assessee further submitted that he has invested a sum of Rs.4.00 crores in purchase of another residential property and hence deduction u/s 54F of the Act should be given against the long term capital gain arising on sale of Kadri Kamble property.

9. The AO did not accept the contentions put forth by the assessee. He noticed that the sale agreement as well as the sale deed did not mention anything about the tenancy rights in the land, vacating of tenants, settling the rights of tenants etc. As per sale deed, the possession has already been given to the buyer of the property. Accordingly, the AO took the view that the sale consideration should be taken as Rs.3,55,00,000/- only as mentioned in the Sale Agreement.

10. The AO also took the view that the profit arising on sale of the above said land is assessable as Income from business for the following reasons:-

- (a) The assessee is engaged in the business of property development.
- (b) The above said land was purchased for the purpose of construction of flats, which is a business activity of the assessee. He also entered into an agreement with the sellers of land to allot/sell flats in the proposed residential condominium.
- (c) This activity is in the nature of adventure in the nature of trade.
- (d) The assessee has shown this property also along with other business assets under the head "investments" in the Balance Sheet. Other lands shown under this head is treated as business assets by the assessee.

- (e) The assessee has not filed any Wealth tax returns declaring the above said land as capital asset taxable under the Wealth tax Act. Even if the assessee files wealth tax return subsequently, its character as business asset will not change.
- (f) The assessee has sold another land located at Kodical during the AY 2007-08 and disclosed the profit arising therefrom as his business income.

11. The assessee submitted before the AO that he purchased the impugned land for business purposes only. Since there was change in licensing policy prescribed by the City Corporation, it came to know that the built-up area originally planned could not be constructed. Hence the assessee converted his business asset into capital asset and sold the same after three years. The AO rejected the said contentions of the assessee by observing that the assessee is coming out with new explanation with the intention of avoiding the payment of tax on the profit earned from sale of this property. Accordingly, the AO computed the business profit on sale of this land as under:-

Sale consideration	-	3,55,00,000
Less:- Land cost and amount paid to tenants -		49,54,000

		3,05,46,000
		=====

12. Since the profit from sale of land was assessed as Business Income, the claim for deduction u/s 54F of the Act was rejected by the AO. The assessing officer also noticed that the new residential property was constructed in the joint name of assessee and his spouse. The concerned land was purchased by the wife of the assessee and the building permission was obtained in her name only. Further, in the loan taken from the bank, the assessee stood as co-obligant. In view of the above facts also, the AO held that the assessee is not eligible for deduction u/s 54F of the Act.

13. In the appellate proceedings, the Ld CIT(A) noticed that the assessee has filed a letter dated 15-09-2010 obtained from Smt. A Latha, the purchaser of property, wherein she had confirmed that she did not pay the amount of Rs.45.00 lakhs. The gist of submissions made Smt. A Latha is given below : -

- (a) The agreed consideration was Rs.3.55 crores.
- (b) Land was actually measuring 40 cents as against 42 cents.
- (c) For road widening, 4 cents of land was earmarked and this fact was not known to her earlier.
- (d) The tenants were not fully vacated.
- (e) The assessee has agreed to reduce the price to a considerable extent in view of shortage of size of land by 2 cents and earmarking of 4 cents for road widening purpose.
- (f) She has issued a legal notice to the assessee and the matter is pending for arbitration as per High Court Order.

In the above said letter, Smt Latha had also stated that she has given Rs.11.00 lakhs by way of cash to the assessee. Accordingly, the Ld CIT(A) took the view that the sale consideration should be considered as Rs.3,21,00,000/- as worked out below:-

Sale consideration shown in the agreement	-	3,55,00,000
Less:- Amount not given to the assessee	-	45,00,000

		3,10,00,000
Add:- Amount given in cash		11,00,000

		3,21,00,000
		=====

14. The Ld CIT(A) also took the view that the Kadri Kamble land should be considered as "Capital asset" in the hands of the assessee and hence the profit arising therefrom should be assessed as Capital gains. Based on the submissions made by the assessee before Ld CIT(A), the first appellate authority has given following reasoning in this regard:-

- (a) In the Balance Sheet, the assessee has shown both personal properties and business assets under the head "Investments".
- (b) The amount given to tenants towards compensation for rent for the alternative accommodation has not been claimed as expenditure, but the same has been capitalized.
- (c) In the statement taken u/s 132(4) of the Act, the assessee has stated that the capital gains shall be worked out and tax shall be paid. It shows that the intention of the assessee was to treat the land as capital asset, in view of the tenants' problem, licensing problem etc.
- (d) Since the assessee was collecting rent from tenants, the land has become income earning asset and hence the same was not shown under the Wealth tax Act.

15. Accordingly, the Ld CIT(A) held that the profit arising on sale of the Kadri Kamble land is assessable under the head Capital Gains by adopting the sale consideration as Rs.3,21,00,000/-. The Ld CIT(A) also noticed that the AO has not given deduction towards cost of purchase of land amounting to Rs.4,20,000/-, even though the same was mentioned at page 19 of the assessment order. Accordingly he directed the AO to allowed deduction of indexed amount of Rs.4,20,00,000/-. The Ld CIT(A) also held that the deduction u/s 54F is allowable against the Long term capital gains, as claimed by the assessee.

16. The assessee is challenging the decision of Ld CIT(A) in adopting the sale consideration at Rs.3,21,00,000/- less expenses incurred on

eviction of tenants Rs.49,54,000/- (net amount – Rs.2,71,46,000/-). The revenue is challenging the decision of Ld CIT(A) in holding that the profit arising on sale of land is assessable under the head Capital gains and not as business income. Further the revenue is assailing the decision of Ld CIT(A) in allowing deduction u/s 54F of the Act.

17. We heard the parties and perused the record. In our view, following questions need to be addressed to resolve the above said issues:-

- (a) Whether the impugned land is a Capital asset or Business asset?
- (b) What is the sale consideration?
- (c) Whether deduction u/s 54F is allowable to the assessee?

18. The first question that needs to be adjudicated is whether the impugned land is Capital asset or business asset. We notice that the assessee had purchased the land for the purpose of constructing flats on it. As per the submissions made by the assessee, 42 flats were proposed to be constructed on the land out of which 8 flats were proposed to be given to the tenants. The sellers of the land were also offered flats in the proposed building. There is no dispute with regard to the fact that the assessee is engaged in the business of property development. Hence the impugned property was held as Business Asset only by the assessee when it was purchased in the financial year 2005-06. There should not be any dispute that the entries made in the books of accounts are not deciding factor. In fact, the Ld CIT(A) has given a finding that the assessee has shown all assets, i.e., personal assets, business assets and capital assets under the same heading in the Balance Sheet.

19. It is the submission of the assessee that there was change in licensing policy of the Municipal Corporation and hence there was reduction in the built-up area, which made the project unviable. Further there were problems with tenants also. Accordingly, it was stated that the assessee has converted the business asset into Capital asset and accordingly sold the same as Capital asset only. We notice that the assessee has not brought any material to substantiate the above said contentions. This property was purchased on 10-10-2005 and sold on 03-12-2008. Thus the assessee has held the property for about 3 years and 2 months. The assessee has not explained as to when he has decided to convert the business asset into Capital asset. Without explaining the date-wise sequence of events which persuaded the assessee to abandon the project, it would be difficult to appreciate and accept the explanations of the assessee. Further, upon abandoning of project, the land can also continue to be held as business asset and sold as business asset. We notice that the assessing officer has pointed out that the assessee has sold another land located at Kodical during the AY 2007-08 and disclosed the profit as his business income. The assessee as well as the Ld CIT(A) has placed reliance on the statement given during the course of search. In our considered view, the statement given by the assessee u/s 132(4) of the Act and declaration/non-declaration of the land for wealth tax purposes are collateral facts and hence they cannot be considered as deciding factors in order to decide the character of land. The Ld CIT(A) has also observed that the amount paid to tenants has been capitalized and not claimed as deduction. In case of execution of project of construction of multistoried apartment, it is the trade practice to bear the rent paid by tenants who are going to be allotted flats in the proposed building and further, those expenses are usually claimed against the revenue generated from the said project only. Hence the question of claiming the rent so paid as deduction against other income of the assessee does not arise, since they are project

specific expenses. In view of the foregoing discussions, we are of the view that the various reasons given by Ld CIT(A) to treat the land as capital asset would fail. On the contrary, uncontroverted fact is that the intention of the assessee, at the time of purchase of the land, was to hold the same as business asset only, which is evident from the purpose for which the land was purchased. We have noticed that there is no material to show that the assessee has really converted the business asset into capital asset. Accordingly, we are of the view that the character of the impugned land is to be considered as "business asset" only and consequently, the profit arising on its sale is required to be assessed as business income only. Accordingly, we set aside the order passed by Ld CIT(A) on this point.

20. The next question to be adjudicated is the amount for which the impugned land was sold. The sale agreement seized during the course of search has revealed the land was proposed to be sold for Rs.3.55 crores. Though the assessee has given explanation with regard to non-settlement of tenant problem, legal problems etc., yet the same, in our view, would not justify the reduction of sale consideration from Rs.3.55 crores to Rs.1.07 crores. As observed by the assessing officer, such kind of huge reduction in the agreed consideration is against human probabilities. During the course of hearing, the Ld A.R invited our attention to the letter written by the buyer of land Smt Latha to the assessing officer. A perusal of the said letter would also show that no credible explanation was given as to why the sale consideration was reduced from Rs.3.55 crores to Rs.1.07 crores. The letter only narrates the sequence of payments made. Hence, we are of the view that the sale consideration cannot be taken as Rs.1.07 crores as contended by the assessee.

21. We notice that the Ld CIT(A) has given reduction of Rs.45.00 lakhs from the sale consideration, since the buyer of the land Smt Latha, has confirmed that she has not honoured the cheques given for Rs.45.00 lakhs. She has also given the reason as to why the said payments were not made, viz., difference in the size of plot, earmarking of four cents for road purposes, tenants problem etc. Hence we are of the view that the Ld CIT(A) was justified in giving reduction of Rs.45.00 lakhs. Since there is no dispute that the assessee has taken cash of Rs.11.00 lakhs, the Ld CIT(A) has added the same. Accordingly, we are of the view that the Ld CIT(A) was justified in adopting the sale consideration as Rs.3.21 crores. The parties are not also disputing the decision of Ld CIT(A) in allowing deduction of cost of purchase of land. We notice that the first appellate authority has allowed indexed cost of acquisition, since he has held that the profit is assessable under the head Capital Gains. The indexation benefit will not be available to the assessee, since we have held that the land is a business asset and consequently, the profit is assessable under the head Income from Business. The order of Ld CIT(A) is modified accordingly.

22. The next question is related to the deduction allowable u/s 54F of the Act. Since we have held that the profit arising on sale of land is assessable as Business income of the assessee, the question of allowing deduction u/s 54F of the Act does not arise. Accordingly, the order passed by Ld CIT(A) on this issue is reversed.

23. The next surviving issue relate to the unaccounted investment in purchase of flat in West wind project. The facts relating thereto are that the AO noticed that the assessee has advanced money for purchase of flats in West wind project promoted by M/s Mohti Sham Complexes P Ltd. As per the seized material, the amount paid by the assessee was Rs.68,86,000/-. However, the assessee has accounted for only Rs.40,28,494/- and hence

the AO assessed the difference amount of Rs.28,57,506/- as unexplained investment.

24. Before the Ld CIT(A), the assessee submitted that he has declared a sum of Rs.4.00 crores in their group concerns and accordingly the balance sheet of the assessee was revised. In the revised Balance Sheet, the investment in the above said flats was shown at Rs.61,23,225/-. Accordingly, it was contended that the AO was not justified in making addition of Rs.28,57,506/-. Considering the explanations of the assessee, the Ld CIT(A) reduced the addition to Rs.7,16,275/- with the following observations:-

“6.5.3 The appellant has furnished the balance sheet to the A.O. of M/s Classic Promoters and Developers, proprietary concern of the appellant for the period from 1.4.2008 to 12.2.2009. This has been worked out after incorporating the data found in the seized material and after making a declaration of Rs.4 crores in their group concerns. The declaration of Rs.4 crores is stated to have been honoured by the appellant. Considering the same and considering the fact that the appellant has worked out their assets and liabilities in the case of M/s Classic Promoters and Developers for the period from 01.04.2008 to 12.02.2009 which showed an investment of Rs.61,83,225/-, the unexplained investment is to be computed with reference to this figure, as per the seized document quoted by the A.O. in page 33 which has been taken by him for computation at Rs.68,86,000/-. Since the appellant has shown in their books a sum of Rs.61,83,225/-, the difference works out to Rs. 7,02,775/-. Out of this sum, in the same seized material, it is shown that Rs.3,29,415/- is paid and Rs.3,86,860/- (total comes to Rs. 7,16,275/- being the difference between Rs.68,66,500/- and Rs.61,50,225/-) is outstanding. Neither the paid amount of Rs.3,86,860/- is reflected in the accounts nor the balance outstanding of Rs.3,29,415/-. Even, the balance sheet prepared as on 31.03.2009 has not incorporated the payment of the first sum and the liability of the balance. In view of the same, it is held that a sum of Rs.3,86,860/- was paid outside the books and the liability of Rs.3,29,415/- as on

12.02.2009 was discharged before 31.03.2009 but has not been taken into the books. Hence, these two amounts are confirmed and the total disallowance works out to 7,16,275/- (there is an error to the extent of 13,500/- in their working sheet which has arisen in view of certain approximation and rounding offs which is ignored). Hence, out of the investment of Rs. 68,86,000/- since the appellant has accounted Rs. 61,83,225/-, the balance of Rs.7,02,775/- was to be confirmed but in view of certain arithmetical errors in this working sheet which is appearing in page 33 of the Assessment Order, a sum of Rs.7,16,275/- is confirmed. The A.O. is directed to reduce the unaccounted investment towards advance for purchase of West Wind flats from Rs.28,57,506/- to Rs.7,16,275/-.”

25. We have heard the parties on this issue. There is no dispute with regard to the fact that the group concerns of the assessee has surrendered a sum of Rs.4.00 crores and accordingly their Balance Sheets have been revised, apparently, for incorporating the amount so surrendered. The investment in West wind flats is disclosed by the assessee in his proprietary concern named M/s Classic Promoters & Developers. We also notice that, in the revised Balance Sheet of the above said concern, the investment made in the above said project was shown at Rs.61,83,225/-. Hence the different works out to Rs.7,02,775/- only. After referring to seized material and noticing certain discrepancies, the Id CIT(A) has confirmed addition to the extent of Rs.7,16,275/-. We notice that the first appellate authority has considered the available materials and has reached a reasonable conclusion on this issue. Accordingly we do not find any reason to interfere with his decision taken on this issue. Accordingly, we confirm the order passed by Ld CIT(A) on this issue.

26. In the result, the appeal of the assessee is dismissed and the appeal of the revenue is partly allowed.

Pronounced in the open court on this 28th day of April, 2020.

Sd/-

Sd/-

(N V VASUDEVAN)
VICE PRESIDENT

(B R BASKARAN)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 28th April, 2020.

/Desai S Murthy/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
ITAT, Bangalore.