

**IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA**

**BEFORE SHRI S.S.GODARA, JM & DR. A.L.SAINI, AM**

**आयकरअपीलसं./ITA No.630/Kol/2019**

**(निर्धारणवर्ष / Assessment Year:2012-13)**

<b>Prabal Ganguly</b>	<b>Vs.</b>	<b>ITO, Ward-62(4), Kolkata</b>
<b>Bamboo Villa, 169 Acharya Jagdish Chandra Bose Road, Kolkata-700014</b>		
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ACXPG 5683 L</b>		
<b>(Appellant)</b>	<b>..</b>	<b>(Respondent)</b>

Appellant by : Shri Soumitra Choudhury Advocate & Shri Joydeep Chakraborty,  
Advocate

Respondent by : Smt. Ranu Biswas, Addl. CIT

सुनवाईकीतारीख/ Date of Hearing : 28/02/2020

घोषणाकीतारीख/Date of Pronouncement : 12/06/2020

**आदेश / ORDER**

**Per Bench:**

The captioned appeal filed by the assessee, pertaining to assessment year 2012-13, is directed against the order passed by the Commissioner of Income Tax (Appeal)-14, Kolkata, in appeal No. CIT(A)-14, Kolkata/40/2015-16, which in turn arises out of an assessment order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (in short the "Act") dated 27/03/2015.

2. The grounds of appeal raised by the assessee are as follows:

*1. For that in the facts and circumstances of the case the appellate order passed was in violation of principles of natural justice hence is bad in law and be quashed.*

2. For that the observations and findings made in the appellate order were perverse and hence the same be quashed and/or no cognizance of the same be taken.

3. The Hon'ble Appellate Commissioner in his impugned order confirmed the addition of a sum of Rs. 37,99,873/- which was added by the Assessing Officer as the business income during assessment which is bad in law as the appellant declared capital gains from the very inception of the joint development agreement.

4. For that the facts and circumstances the Appellate Commissioner erred in upholding addition made by ld. Assessing Officer of Rs. 37,99,873/- on account of business income. The addition is not called for and hence the same should be deleted.

5. The appellant craves leave to press new, additional grounds of appeal or modify, withdraw any of the above grounds at the time of hearing of the appeal.

3. Brief facts qua the issue, as stated in the assessment order, are as follows:

*“The assessee has declared income from Long Term Capital Gains and claimed exemption u/s. 54 of Rs.52,92,237.43/- for alleged investment in the property. In course of proceedings u/s. 142(1) and in compliance with requisition from time to time for furnishing the details of Capital gains, the assessee furnished Balance sheet for F.Y. 2010-11, 2011-12 & 2013-14 i.e. for three years. It is mentioned in this connection that assessee has main source of income as 'salary' from Vodafone Essr East Ltd. & Vodafone India Ltd. Assessee though maintain Balance Sheet for all years but kept no P/L Account or 'Income & Expenditure' account as such. Apart from salary Income he has declared Short Term Capital Gains on transfer of Mutual fund, Income from other sources. As to the claim of exemption u/s. 54 it is observed that the he made investment out of the sale of proceeds of Building in 'LAND' only and exemption claimed for construction of building to be made thereon future. On scrutiny of the Balance Sheet for different years, it is further observed that his nature of activity is investment in Land, construction building through contractor thereon and then selling of Flats to the customers and further investment thereafter in land and construction thereon. Assessee is not entitled to any exemption u/s. 54 as such as will be obvious from the affairs relating to land & property. The claim of income under Long term capital gain and so the exemption u/s 54 is thus, liable to be forfeited.”*

4. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the ld. CIT(A) who has confirmed the addition made by the Assessing Officer observing the following:

*“7.3. I have considered the submission of the appellant and perused the relevant assessment records. The Assessing Officer had disallowed the claims of income under LTCG and exemption u/s 54 of the Act on the grounds that the appellant had engaged in investment in land, construction of flats through contractors and*

*selling of flats to customers. On perusal of record it is found that the appellant had acquired land by way of gift from father Shri Prasnata Ganguly in F.Y. 1984-85. Copy of gift deed was submitted. The appellant had then entered into a Joint Development Agreement with M/s Maa Batai Chand Construction. On development of the land against the consideration of 38% of total constructed area the remaining 60% has to be invested with the developer. The copy of agreement was also submitted by the A/R of the appellant. These facts have not been denied by the AO in the assessment order. In a Joint Development Agreement (JDA) land owner contributes his land and enters into an agreement with the developer to develop and construct a real estate project at the developers cost. The key feature of JDA is that the land owner contributes land and developer undertakes the responsibility of obtaining approvals, property development, launching and marketing the project with his financial resources. The land owner may get consideration in the form of either:*

- i) lump sum consideration*
- ii) percentage of sales revenue*
- iii) certain percentage of constructed area in the project, depending upon the terms and conditions agreed upon between them. In this manner, the resources and efforts of land owner and developer are pooled together.*

*In such an arrangement execution of JDA between the owner of the immovable property and the developer gives the rise to capital gains tax liability in the year in which immovable property is handed over to the developer for development of project. The receipt of consideration (Share of Constructed area or Share revenue) in future does not affect the timing of the taxable event. However, with effect from 01.04.2018 in order to mitigate hardship to the assessee the Finance Act 2017 had inserted sub section (5A) which provide that in case assessee's being individual or HUF which enters into a specified agreement for development of project the capital gains shall be chargeable to income tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority. This beneficial amendment however would not apply to the appellant as JDA was entered on 01.01.2001. The records of the appellant were perused. The appellant had not declared any Capital Gain for the A.Y. 2001-02 in which the land was transferred under Joint Development Agreement (JDA). The appellant had declared Capital Gain only in the year 2012-13 on sale of flats receipt as per JDA. The provisions of Section 54 are very clear. The appellant to claim exemption u/s 54 or even section 54F has to within a period of one year or two years on the date after which the transfer has taken place purchase or constructive one residential house then a capital gains shall not be subject to tax provided that certain conditions as enumerated above. In the instant case, the appellant should have disclosed capital gains in the year 2001-02 i.e. the year of transfer of land to the builder under JDA. However, no capital gains were disclosed but capital gains was reflected and section 54 exemption claimed in A.Y. 2012-13 the date of which the appellant share of flats constructed under JDA were sold. The appellant had, therefore, not declared capital gains when it had arisen and accrued on transfer of property as per terms and conditions of the JDA and therefore could not adhere to the time lines laid down in the section 54. Since, no capital gains were declared in 2001-02 the appellant cannot claim benefit of capital gains in 2012-13. This ground of appeal fails and, therefore, is not allowed.”*

5. Aggrieved by the order of the Id. CIT(A), the assessee is in appeal before us.
6. The Id. Counsel for the assessee relied on the written submissions furnished during the proceedings before Id CIT(A). Apart from this, Id Counsel submitted before us, copy of income tax return of the assessee for assessment years 2005-06, 2006-07 and 2007-08, and argued that assessee had already paid capital gain tax in assessment years 2005-06, 2006-07 and 2007-08, on account of joint development agreement therefore on the same income the assessee cannot pay the tax in assessment year 2012-13. He also filed intimation u/s 143(1) of the Act received from the department for assessment years 2005-06, 2006-07 and 2007-08.
7. On the other hand, the Id. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer which we have already noted in our earlier para and the same is not being repeated for the sake of brevity.
8. We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id CIT(A) and other materials available on record.

We note that assessee had submitted the following written submissions before the Id CIT(A), which is relevant to adjudicate the issue raised by the assessee therefore, the same is reproduced below:

*“1. The assessee acquired the land situated at 702/4 Sarat Chatterjee Road, Shibpur, Howrah 711102 by way of gift from Father, Shri Prasanta Ganguly in financial year ended 31<sup>st</sup> March, 1985 (Gift tax was duly paid by the above donor in relation thereto). Copy of the gift deed already submitted.*

*2. The assessee entered into a development agreement with M/s Maa Batal Chandi Construction for the development of the land against a construction of 38% of total constructed area (measuring 12500 sq fit Approx) to be delivered in different phases. The remaining 62% area is vested is to belong to the Developer. ( Copy of the corresponding agreement already submitted)*

*3. Out of his total share of 12345 sq ft, he has kept 3938 sq fit for his own use i.e. 3<sup>rd</sup> floor Block A along with garden and garage at Gr floor, details attached in Annexure-A.*

*4. The possession of owners share was given by developer in phases in the year 2004-05, 2005-06, and 2006-07. The assessee has paid LTCG on the portion which was handed over to him by the developer in the year of possession.*

5. During the A.Y. 2012-13, the assessee has sold a part of his self occupied portion (2228 sq ft) and also other flats to various buyers. As the period of holding was more than 3 years there was a LTCG on transfer of these flats.

6. During the year the assessee purchased/booked other residential properties and has claimed exemption u/s 54 of the Income Tax Act on the capital gain arising out of the sale of the flats as mentioned in point No.3.

7. The flats were not in use during the period of sale and possession from developer.”

It is abundantly clear from the above written submissions that the possession of owners share were given by developer in phases in the subsequent years viz: 2004-05, 2005-06, and 2006-07. The assessee has paid long term capital gain(LTCG) on the portion which was handed over to him by the developer in the respective years of possession, as mentioned above. We note that Id CIT(A) did not comment on the contention of the assessee that he had already paid the long term capital gain(LTCG) in preceding years viz:2004-05, 2005-06, and 2006-07. That is, while adjudicating the issue, the Id CIT(A) ignored the important submission of the assessee that he had already paid the taxes on long term capital gain(LTCG) in preceding years viz:2004-05, 2005-06, and 2006-07, and therefore the assessee need not to pay the taxes on the same income again in assessment year 2012-13.

9. Before us, Id Counsel submitted the copy of the Income Tax Return for the previous year 2004-05 relevant to assessment year 2005-06 wherein the assessee had declared long term capital gain to the tune of Rs.16,85,405/-(paper book pg.No.1). The Income Tax Return for the assessment year 2005-06 was processed by the Income Tax Department under section 143(1) of the Act and the Department accepted the long term capital gain of Rs.16,85,405/- declared by the assessee.

The Id Counsel also submitted the copy of the Income Tax Return for the previous year 2005-06 relevant to assessment year 2006-07 wherein the assessee had declared long term capital gain to the tune of Rs.19,39,857/-(paper book pg.No.4). The Income Tax Return for the assessment year 2006-07 was processed by the Income Tax Department under section 143(1) of the Act and the Department accepted the long term capital gain of Rs.19,39,857/- declared by the assessee.

We noticed from the Income Tax Return filed by the assessee, as mentioned above, that the assessee had already declared capital gain in the preceding previous years on the basis of the Joint Development Agreement therefore the same should not be taxable again in the hands of the assessee, otherwise it would be tantamount to double taxation on the same income.

We note that during the A.Y. 2012-13, the assessee has sold a part of his self-occupied portion (2228 sq ft) and since the period of holding was more than three years therefore the assessee offered a LTCG on transfer of these flats. Since the assessee purchased/booked other residential properties therefore he had claimed exemption u/s 54 of the Income Tax Act, on the capital gain arising out of the sale of self-occupied portion. This is a different transaction in A.Y. 2012-13 therefore the assessing officer should allow the exemption u/s 54 of the Income Tax Act, provided the assessee fulfills the conditions mentioned in section 54 of the Act.

As we have already mentioned above that assessee had already paid the taxes on long term capital gain(LTCG) in preceding years viz:2004-05, 2005-06, and 2006-07, and therefore the assessee need not to pay the taxes on the same income again in assessment year 2012-13. The taxes should not be imposed except by authority of law, that is the Department does not have power to impose tax twice on the same income and therefore, based on the factual position narrated above, the addition made by the assessing officer of Rs.37,99,873/- under the head business income needs to be deleted, accordingly we delete the addition of Rs.37,99,873/-.

10. Before parting, it is noted that the order is being pronounced after 90 days of hearing. However, taking note of the extraordinary situation in the light of the Covid-19 pandemic and lockdown, the period of lockdown days need to be excluded. For coming to such a conclusion, we rely upon the decision of the Coordinate Bench of the Mumbai Tribunal in the case of DCIT vs. JCB Limited in ITA No. 6264/Mum/2018 and ITA No. 6103/Mum/2018 for A.Y. 2013-14 order dated 14.05.2020.

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

**Order pronounced in the Court on 12.06.2020**

**Sd/-**  
**(S.S.GODARA)**  
**न्यायिकसदस्य / JUDICIAL MEMBER**

**Sd/-**  
**(A.L.SAINI)**  
**लेखासदस्य / ACCOUNTANT MEMBER**

कोलकाता /Kolkata;

दिनांक/ Date: 12/06/2020

(SB, Sr.PS)

Copy of the order forwarded to:

1. Prabal Ganguly
2. ITO, Ward-62(4), Kolkata
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

True copy

By Order

Assistant Registrar  
ITAT, Kolkata Benches