

IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ‘ A ‘ Bench, Hyderabad
(Through Video Conferencing)
Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri D.Sunder Singh, Accountant Member

ITA Nos.711 AND 712/Hyd/2018		
Assessment Year:2009-10		
Shri P Ashok Kumar (HUF) Tirupati PAN:AAJHP7373J (Appellant)	Vs.	Dy. Commissioner of Income Tax, Central Circle, Tirupati (Respondent)
Assessee by:	Sri S.Rama Rao	
Revenue by:	Smt. N. Swapna, DR	
Date of hearing:	03/09/2020	
Date of pronouncement:	09/09/2020	

ORDER

Per D.S. Sunder Singh, A.M.

ITA/711/H/18

The assessee filed the return of income declaring the total income of Rs.52,10,443/- and agricultural income of Rs.1,50,000/-on 22/11/2010, subsequent to the search conducted in the residence of Dr. K. Ramachandra Rao and the assessee. The present Assessment year is the year of search. During the assessment proceedings, the AO observed that the assessee had entered into a joint development agreement(JDA) on 7.12.2005 with Shri P. Rajashekar Rao, S/o Late Padarthi Krishnama Naidu to develop 18666 sq. ft of the land owned by Sri Ashok Kumar (HUF) at Survey No.413 and 414, Ashok Nagar, Tirupati into a residential complex called “Ashok Enclave”. By virtue of this agreement, the land owned by the assessee was

converted to residential complex in which the ratio of division between the owner and the developer was fixed at 59:41 and the assessee to receive 24100 sq. ft of constructed area. During the post search enquiries, the assessee had admitted the undisclosed income of Rs.1.00 crore on the basis of information provided by Shri P.Rajasekhar Rao, the builder, but subsequently retracted from the statement and did not file the return of income as admitted in the statement dated 12/05/2009. The assessee filed return of income admitting capital gain of Rs.40,26,784/- on 22.11.2010 subsequent to the show cause notice issued by the AO on 15.11.2010. The assessee has computed the long-term capital gain as under:

Cost of Apartments received		1,26,50,000
Date of Purchase of land	17.4.1964	
The area of the land purchased	2080 sq.ft	
Land available after disposal in the past	1954.30 sq.yards	
Total land handed over to builder	1954.30 sq.yard	
Less:Land used for construction of owner's flat	797.57 sq.yards	
Land apportioned to builder (in sq.y)	1147.73 sq.yard	
Land apportioned to builder (in sq.ft)	10329.57 sq.ft	
Cost of the land considered as at 1.4.1981	Rs.100/-per. S.ft	
Value of the land as on 1.4.81	Rs.10,32,957	
Less:indexed cost of site	10,32,957*582/100	60,11,810
Long term capital gains		66,38,190
Less:Exemption under section 54F		26,11,406
Capital Gains liable for tax		40,26,784
Investment in residential building (414 @ 1200 per sq.ft)		49,76,400
Proportionate Exemption 4976400/12650000*6638190		26,11,406

2. The assessee has received 20 flats from the builder. As per the information collected from the builder by the AO, the cost of construction of constructed area received by the assessee was worked out to Rs.1,51,70,200/-. However, the assessee did not accept the value and worked out the same at Rs.1,26,50,000/- @ Rs.550/- per sq.ft, as per the quality of construction delivered by

the builder which was not accepted by the AO. The AO the computed capital gains as under:

Sale of consideration as per the venture agreement dt. 7.12.2005 (as per the value provided by the builder towards cost of construction of the area allocated to the owner of the land		1,48,40,450
Value of the property as on 1.4.1981 @ Rs.125/- per sq.yard as provided by the SRO		
$\frac{18667 \text{ sq.ft} \times \text{Rs.125}}{9}$	2,59,263	
Indexed cost of acquisition $\frac{2,59,263 \times 463}{100}$	12,00,388	
Since only 59% of the land is passed on to the builder, 59% of Rs.12,00,388 should alone be considered $\frac{12,00,388 \times 59}{100}$		$\frac{7,08,228}{1,41,32,222}$
Less: Expenditure on leveling as claimed by the assessee		2,00,000
Eligible long term capital gains		1,39,32,222
Less: Allowable deduction u/s 54F in respect of the value of one residential unit out of 20 units: $\frac{1,48,40,450}{20}$		7,42,022
Taxable long term capital gains		1,31,90,199

3. While determining the capitals gains, the AO adopted the value of the property at Rs.125/-sq. yards as on 1.4.1981 as against Rs.900/- per sq. ft claimed by the assessee. Similarly, the AO considered the sale of consideration received as per the Joint development agreement at Rs.1,48,40,450/- as against Rs.1,26,50,000/- admitted by the assessee. The assessee has claimed exemption u/s 54F which was not allowed by the AO.

3.1 Against the order of the AO, the assessee went on appeal before the CIT (A) and the learned CIT (A) upheld the sale consideration of Rs.1,48,40,450/-. The ld.CIT (A) declined to entertain the claim of the assessee with regard to allowing the indexed cost of existing building on the said land as on 1.4.1981

in the absence of any mention in the JDA and non-furnishing of any proof. The Ld.CIT(A) allowed the deduction u/s 54F to the extent of Rs.22,80,915/- as against the claim of the assessee for an amount of Rs.49.76 lakhs. Aggrieved by the order of the learned CIT(A) assessee the assessee is in appeal before this Tribunal and raised the following grounds of appeal:

“1) The order of the learned Commissioner of Income-tax (Appeals) is erroneous to the extent it is prejudicial to the appellant.

2) The learned Commissioner of Income-tax (Appeals) erred in holding that the capital gain arising on entering into the development agreement is taxable for the assessment year 2009-10.

3) The learned Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer in adopting the sale consideration at Rs.1,48,40,450/-

4) The learned Commissioner of Income Tax (Appeals) ought to have directed that the value of the property received is only Rs.1,26,50,000/- and not Rs.1,48,40,450/-.

5) The learned Commissioner of Income-tax (Appeals) erred in not considering the ground that there was a residential building on the said land as on 01.04.1981 and that the indexed cost of the said building should have been taken for the purpose of determining the capital gain.

6) The learned Commissioner of Income tax (Appeals) erred in limiting the claim for deduction u/s 54F to Rs.22,80,850/- without considering the cost on improvements to the constructed area.

7) Any other ground or grounds that may be urged at the time of hearing”.

4. Ground No.1 and 7 are general in nature which does not require specific adjudication.

5. Ground No.2 related to the dispute with regard to the taxability of income in the A.Y 2009-10 for which no argument was

advanced by the learned AR. Hence, the same is dismissed as not pressed.

6. Ground No.5 is related to existence of residential building on the said land as on 1.4.1981 and the claim for cost of acquisition which was not considered by the learned CIT (A) for the purpose of determining the capital gains. The Ld.CIT(A) dismissed the assessee's claim in the absence of any mention with regard to existence of the building and no material evidence placed by the assessee before the Ld.CIT(A). During the appeal hearing, the learned AR did not make any argument on this issue relating to ground No.5 and hence, the same is dismissed as not pressed.

7. Ground No.3 and 4 are related to adopting the sale consideration for transfer of land and the receipt of constructed area as per the JDA. During the appeal hearing, the learned AR argued that the sale consideration (cost of built up area from the builder) received by the assessee required to be worked out at Rs.550/- sq. ft but not the market value as computed by the AO. If the sale consideration is taken at Rs.550/- per sq. ft, the learned AR contended that only the net constructed area received by the assessee required to be considered proportionately. The sale consideration over and above built up area needs to be excluded, since, the same was common area and not received by the assessee. The learned AR argued that the assessee has received the built up area of 23000 sq. ft, the cost of which needs to be taken as sale consideration for computing the capital gains in the hands of the assessee, instead of 24,100 sq. ft as per JDA. Out of the total area of Rs.24,100 sq.ft, 1100 sq. ft was not actually received by the assessee. Therefore, submitted that both

the learned CIT (A) and the AO have erred in taking the market value for the entire constructed area as per JDA instead of the actually received by the assessee. On a query, from the Bench, the learned AR submitted that the sum of Rs.550/- per sq. ft was arrived on estimation basis in the absence of market information from the SRO.

8. On the other hand, the learned DR supported the orders of the lower authorities.

9. We have heard both the parties and perused the material placed on record. In this case the AO has taken the sale consideration as per the books of the developer of the project proportionately to the share of the assessee and excluded the administrative expenses and worked out the sum of Rs. 1,48,40,450/-. The contention of the assessee is to adopt the cost of construction at Rs.550/- per sq. ft for 23000 sq. feet against the proportionate cost to the builder. Secondly the assessee contended that only the actual built-up area to be taken as sale consideration for computing the capital gains. There was no material evidence furnished by the assessee to support the cost of construction (Sale consideration) to be at Rs.550/- per sq. ft. as claimed by the assessee. At the same time, the assessee claimed the deduction u/s 54F @ Rs.1200/- per sq. feet and there was apparent inconsistency in the claim of the assessee. The correctness of cost of construction stated to be incurred by the builder also needs verification and cannot be applied blindly. In the absence of proper information, it is obligation of the AO to refer the cost of construction to the valuation cell or to obtain the market information from the SRO to arrive at the sale

consideration for the constructed area received by the assessee towards his share. Therefore, we are of the view that this issue needs to be verified by the AO and hence we remit the matter back to the file of the AO with a direction to re-work the cost of construction on the basis of proper evidence or by referring to the valuation cell or obtaining the information from the SRO. Accordingly, we set aside the issue back to the file of the AO with a direction to re-estimate and determine the sale consideration to compute the capital gains. It is needless to say that the AO is required to give sufficient opportunity to the assessee. Accordingly, the appeal of the assessee on this ground is allowed for statistical purposes.

10. The next issue is the area for which the sale consideration to be taken for computing the capital gains. According to the AO as per the JDA 24100 square feet was received where, as per the assessee 23000 square ft. We find some inconsistency in this regard. During the appeal hearing the Ld.AR submitted that the balance 1100 sq ft represent the common area where, as per the Ld.CIT(A)'s order the assessee contended that he had not received the 1100 sq. ft. No evidence was placed before the Ld.CIT(A) or before us with regard to non-receipt of the area of 1100 sq ft from the builder. If the same represent the common area, we are of the view that common area also to be considered for sale consideration as per JDA. Therefore we, remit the matter back to the file of AO to examine the issue with regard to constructed area received by the assessee with the JDA and the builder and decided the issue on merits after giving opportunity to the assessee. The appeal of the assessee on this issue is allowed for statistical purposes.

11. Ground No.6 is related to deduction u/s 54F of the I.T. Act. The Ld.CIT (A) allowed the deduction of Rs. Rs.22,80,850/- against the claim of Rs.49,76,400/- by the assessee in Para 5.3.11 which reads as under:

“5.3.11. The third issue to be decided is the deduction u/s 54F of the Act. The appellant argued that he has retained 4147 sq.ft for his residence on 1st Floor. The appellant further argued that an amount of Rs.26,95,550/- was expended in further improving the property. further improving the property. Except arguing the case for expenditure, the Authorized Representative of the appellant has not furnished any material to support his claim. There is no dispute regarding the eligibility of claim u/s.54F. The only contention is the quantum of allowance. The Assessing Officer has allowed the value of Rs.7,42,022/- being one unit of house out of 20 units as against the total cost of project of Rs.1 ,48,40,450/- (1,48,40,450/20 = 7,42,02.2). There is no material before me to come to the conclusion that the appellant has been using the entire first floor of 4147 sq. ft. for residential purpose. What is available on record is that the housing project consists of 20 flats. It is the legal responsibility of the appellant to adduce material in support of his claim. The Assessing Officer has also not established as to what is the extent of each unit in the project. Instead, the Assessing Officer had adopted crude method to arrive the price of single unit by dividing the total built up area by number of units. Since the cost of construction of Rs.5501 - per sq. ft. was not disputed, the Assessing Officer would have adopted the same rate for single unit and would have allowed the deduction of claim u/s.54F of the Act. I have seen that the appellant had filed computation of capital gains before the ADIT (Inv.) on 19.05.2009 claiming the value of Rs.13,25,500/- u/s.54F as the value of two adjacent flats. Prior to this, the appellant has filed another statement on 15.05.2009 claiming deduction u/s.54F to an extent of Rs.36,00,000/-. Finally, on 22.11.2010 when the return of income was filed, the appellant had made a claim for 4147 sq. ft. at Cl cost of Rs.1,2001- per sq. ft. and the deduction was claimed at Rs.49,76,4001-. A proportionate claim of exemption was made at Rs.26, 11,406/ - (49,76,400/1,26,50,000 x 66,38,190). Thus, the appellant's claim u/s. 54F is similar to that of value of project where different claims were made at different points of time. It is not known why the cost of Rs.1 ,2001 - is adopted when the rate is Rs.5501 - per sq. ft.? If the claim of self self use of 4147 sq. ft. is agreed since filed in the return of income, the value could be

22,80,850/- (4147 x 550). Thus, the Assessing Officer is directed to work out the proportionate claim u/s.54F by allowing 4147 sq. ft instead of single unit. It is seen that there is no whisper of improvement of the flat in the calculations furnished by the appellant except mentioning the cost of improvement of Rs.26,95,5501-. In view of the above observations, the claim of expenditure of Rs.26,95,550/- is not considered”.

12. During the appeal hearing, since the learned AR did not make any argument or produce any evidence in support of the ground. Therefore, we do not find any infirmity in the order of the learned CIT (A). However, the learned CIT(A) allowed the deduction @Rs.550/- per sq feet for 4147 square feet as per the sale consideration claimed by the assessee. Since we have remitted the issue of sale consideration to the file of the AO, we direct the AO to allow the deduction as per the sale consideration determined by the AO in ground No.3&4 of this order.

ITA No.712/Hyd/2018

13. This is an appeal filed by the assessee against the order passed by the Ld.CIT (A) against the order of the AO passed u/s 143(3) r.w.s. 147 of the I.T. Act. In this assessee, the assessment was completed originally u/s 143(3) of the Act, by an order dated 24/12/ 2010 and determined the total income of Rs.1,43,78,358/-. Out of total income determined by the AO, the long term capital gain was determined by the AO at Rs. 1,31,90,199/-. The assessment was reopened subsequently for verification of capital gains to be assessed under short term or under long term capital gains. Therefore, the AO believed that the income had the escaped assessment and accordingly reopened the assessment and issued the notice u/s 148. However, at the end, the AO did not find any mistake in the assessment of long-term

capital gain and thus accepted the long-term capital gain originally assessed. The assessment u/s 143(3) r.w.s 147 was completed on total income of Rs.1,43,78,858/- by an order dated 30/03/2013, which was originally assessed. However, the AO did not allow the relief granted by the learned CIT (A).

14. The assessee went on appeal before the Ld.CIT (A) challenging the validity of the notice issued u/s 148 of the I.T. Act and the Ld. CIT (A) upheld the notice. Against which the assessee is in appeal before us.

15. The learned AR argued that since there was no change in the quantum of income or the tax payable by the assessee, as determined by the AO vide order dated 24.10.2010, there is no case for issue of notice u/s 148, hence requested to quash the re-assessment proceedings. The learned AR also alternatively submitted to allow the relief granted by the learned CIT (A) in original assessment. On the other hand, the learned DR supported the order of the lower authorities.

16. We have heard both the parties and perused the material placed on record. In the instant case the original assessment resulted in determining the total income of Rs.1,43,73,850/- and the re-assessment also resulted in same income. In Both the assessments i.e. original as well as re-assessment, the AO assessed the constructed area received under JDA as long-term capital gains. Though the assessment was reopened for computing the capital gains under the head short term or long-term capital gains, ultimately the AO did not find any mistake in his original order thus accepted the income originally

assessed. Since there was no escapement of income found by the AO, the reassessment becomes infructuous. Accordingly, the reassessment made u/s 143(3) r.w.s. 147 is treated as infructuous and the same is annulled.

17. In the result, appeals of the assessee in ITA No.711 are allowed for statistical purposes and appeal No.712 is allowed.

Order pronounced in the Open Court on 9th September, 2020.

Sd/-

Sd/-

(P. MADHAVI DEVI) JUDICIAL MEMBER	(D.S.SUNDER SINGH) ACCOUNTANT MEMBER
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Hyderabad, dated 9th September, 2020.

Vinodan/sps

Copy to:

- 1 Shri P. Ashok Kumar (HUF), D.No.18-2-107, Ashok Nagar, Tirupati
- 2 Dy. CIT, Central Circle, Aayakar Bhavan, KT Road, Tirupati
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- 4 Pr. CIT – Central, Visakhapatnam
- 5 The DR, ITAT Hyderabad
- 6 Guard File

By Order