IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A': NEW DELHI
(Through Video Conferencing)

BEFORE,
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.3384/Del/2019
(ASSESSMENT YEAR: 2015-16)

Sh. Atul Gupta 556, Katra Ishwar Bhawan, Khari Baoli, Delhi PAN –AAIPG 4327Q	Vs.	Asst. CIT, Circle-47(1), New Delhi
(Appellant)		**(Respondent)**

Appellant By	**Sh. Salil Agarwal, Adv.** **Sh. Shailesh Gupta, CA**
Respondent by	**Sh. M. Barnwal, Sr. DR**
Date of Hearing	**18.06.2020**
Date of Pronouncement	**31.08.2020**

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

This appeal is preferred by the assessee against order dated 06.03.2019 passed by the Ld. Commissioner of Income Tax (Appeals)-16, New Delhi {CIT(A)} for Assessment year 2015-16.

2.0 The brief facts of the case are that the assessee is an individual deriving income from business, salary, income from other sources and also income from capital gains. The return of income

for the captioned year was filed declaring a net taxable income of Rs.44,94,880/-. The case was selected for limited scrutiny and the reasons for scrutiny selection under CASS were:

"i. unsecured loans from persons who have not filed their return of income.
ii. Sales consideration of property in ITR less than sales consideration reported in Form 26QB."

2.1 Subsequently, in the assessment order, the Assessing Officer (AO) did not make any addition on any of the two issues for which the case was selected for limited scrutiny. The AO, however, has not restricted himself to the above said specific issues for which made an addition of Rs. 2,51,75,501/- u/s 50C of the Act and also made another addition of Rs. 8,36,298/- by disallowing the total cost of acquisition of another land sold by the assessee.

2.2 Aggrieved, the assessee filed the first appeal before the Ld. CIT (A) wherein it was contended that provisions of Section 50C of the Act were not at all applicable as the assessee had not sold any asset being land or building or both but had sold a capital asset in the form of booking rights/right to allotment of flat only. The Ld. CIT (A) vide the impugned order deleted the addition of Rs.

8,36,298/- but sustained the addition of Rs. 2,51,75,501/-. Before the Ld. CIT (A), the assessee had also disputed the jurisdiction of the AO in making the addition of Rs.2,51,75,501 /- and it was contended that the AO had travelled beyond the scope of 'limited scrutiny' as he had acted without taking any approval from the Ld. Principal CIT /CIT as per the mandate of instructions issued by the CBDT u/s 119 of the Act vide instruction NO. 5 of 2016 dated 14 July 2016 and also instruction No. 20 0f 2015 dated 29 December 2015. The Ld. CIT (A), however, held that the AO had not exceeded his jurisdiction in any way and that he had confined his inquiry and addition to the issue of sale consideration of the property.

2.3 The assessee has now approached this Tribunal and has challenged the impugned order by raising the following grounds of appeal:

1) *That the learned CIT (Appeals) has erred in holding that the A.O. has not exceeded his jurisdiction under "Limited Scrutiny" in the instant case. That the learned CIT (Appeals) has failed to appreciate that the A.O. did not take any Administrative approval from the Pr. CIT before expanding the scope of "Limited Scrutiny" and has thus exceeded his*

jurisdiction under "Limited Scrutiny" by framing the impugned assessment.

b) That the learned CIT (Appeals) has erred in holding that the sale consideration declared by the assesse in his return of income was less than the sale consideration reflected in Form 26QB. That such finding is not borne out of any material on record.

2) That the learned CIT (Appeals) has erred in upholding an addition of Rs.2,51,75,550 made by the A.O. by wrongly invoking the provisions of section 50C of the Act to the transaction of sale of right to allotment of a residential flat in a project under construction by a builder .

b) That the learned CIT (Appeals) has erred in failing to appreciate that the transaction entered into by the assesse is not a case of sale of land or building but only sale of right to allotment of residential flat in a project which was still under construction and possession was not handed over to the assesse or anybody else by the Builder.

c) That the learned CIT (Appeals) has erred in holding that the construction of the property is complete. That such finding is not borne out of any material on record and the learned CIT (Appeals) has also erred in arbitrarily brushing aside the documentary evidence filed by the assesse to show that the construction of the Project by the builder was not complete even

till the date of hearing of the appeal by the learned CIT(Appeals).

d) That the learned CIT(Appeals) has erred in arbitrarily holding that the transaction of sale right to allotment by the assessee is the sale of land and building and has erred in upholding the invocation of section 50C by the Assessing Officer.

3) That the learned CIT(Appeals) has further erred in upholding the action of the Assessing Officer in assuming the role of DVO himself and in making the impugned addition without making any reference to the DVO by the Assessing officer.

3.0 The Ld. Authorised Representative (AR) submitted that this case was picked up for limited scrutiny only and no addition was made and no adverse inference was drawn by the AO in respect of either of the two issues on which the jurisdiction for limited scrutiny was vested in the AO. He further submitted that it was an undisputed fact that in the instant case, the AO had not obtained the requisite permission from the Ld. Principal CIT/CIT for expanding the scope of inquiry in a limited scrutiny case and, therefore, the assessment order passed by the AO, making

additions beyond the scope of reasons for which the limited scrutiny was initiated, was null and void *ab initio*. He relied on CBDT Instruction No.5 of 2016 dated 14th July, 2016 and Instruction No. 20 of 2015 dated 29th December, 2015. It was further contended by him that the Ld. CIT (A) is factually wrong in holding that the sale consideration of the Civil Lines property reflected in the ITR was less than the sale consideration reflected in Form 26QB. He drew our attention to the computation of income forming part of the ITR of the assessee to contend that as per 26AS of the assessee, TDS credit of Rs. 1,55,000/- was appearing in respect of the sale consideration of Rs. 1,55,00,000/- received by the assessee on sale of his rights to allotment of a flat in Civil Lines and that the same was claimed by the assessee and duly allowed to him by the AO. He further argued that even the AO has not disputed this fact and, therefore, the finding of the Ld. CIT (A) in this regard was wholly wrong and not borne out of any material on record. It is also submitted by the Ld. AR that the assessee has not sold any land or building but only rights to allotment of a flat under construction, of which possession was not given by the builder at

the time of purchase or sale by the assessee. The Ld. AR argued that the Ld. CIT (A) has erred in holding that the AO has not exceeded his jurisdiction. He relied on various case laws to submit that any such assessment order in a limited scrutiny case, where the additions are made beyond the scope on which the limited scrutiny was initiated, without taking the requisite permission from the Ld. Pr. CIT, is null and void *ab initio* and that such assessment order is liable to be quashed.

3.1 The Ld. AR further drew our attention to the provisions of Section 50C of the Act and submitted that the same were applicable only in respect of a *"capital asset, being land or building or both."* and that in this case the assessee has neither sold any land nor building nor both when he transferred his rights to allotment of residential flat. It was contended by him that the assessee had acquired the rights to allotment of flat which was in a project under construction and had sold such rights during the instant year on same basis when the project was still under construction. It was argued by him that the assessee never got possession of the flat as the same was under construction both at the time of purchase as

well as at the time of sale by him. The Ld. AR reiterated that the assessee had only purchased booking rights and had sold the same as it is and had earned an amount of Rs.5,00,000/- which was declared as capital gains income in the ITR. He assailed the findings of the Ld. CIT (A) and contended that the Ld. CIT (A) has erred in holding that the entire payment for the flat had been made and that as per the payment plan of the builder, the construction of the property was complete. The Ld. AR argued that such findings were *de hors* any material on record. It was further submitted that on the contrary, the Ld. CIT (A) had erred in ignoring substantial documentary evidences in the form of RERA orders dated 6-10-2017 wherein it was recorded that the construction was not complete and that the builder had quoted the expected date of completion of the project as December 2019. He further drew our attention to a press cutting from the newspaper 'Times of India' dated 14January 2019 to show that there was an inordinate delay in completing the construction of the project in which the rights to allotment had been purchased and sold by the assessee. He also submitted that the finding regarding complete payment was also

wrong as the Ld. CIT (A) had failed to appreciate that substantial amounts were still to be paid to the builder in respect of the flat. It was contended by him that the capital asset sold by the assessee was neither land nor building nor both and, therefore, provisions of Section 50C of the Act were wrongly applied by the AO in respect of the sale of rights to allotment of flat in an under construction project. He relied on various case laws including a judgement of the Hon'ble Bombay High Court in the case of Kalpana Hansraj reported in102 taxmann.com 228 to contend that where the construction of a flat was not complete and the assessee had sold only rights in booking or rights to allotment, then it cannot be said that the assessee had sold a residential property. He argued that the Ld. CIT (A) was not justified in holding that provisions of section 50C were applicable to the sale of rights by the assessee. He prayed for deletion of addition made by the AO by invoking provisions of Section 50C.

3.2 The Ld. AR further argued that the Ld. CIT (A) had erred in upholding the action of the AO in making an addition u/s 50C without making a reference to the DVO u/s 50C(2) of the Act. It

was submitted by him that the assessee had disputed the proposed addition before the AO in his letter dated 28/12/2019 in response to the notice of the AO dated 27/12/2019 when for the first time the AO had issued show cause to the assesse regarding adoption of circle rates and had proposed to adopt a circle rate of Rs.91,500/- per square meter. The Ld. AR contended that the assessee had immediately disputed this proposal and had submitted that the circle rates were in respect of completed property whereas the assessee had sold rights in an under construction project and, moreover, even the location of the project was in front of a slum area and, therefore, there was no justification to apply the proposed circle rates to an "incomplete and lying dead project". The Ld. AR drawing our attention to the letter dated 28/12/2019 contended that the Ld. CIT (A) had erred in holding that the assessee had not raised any dispute against the adoption of the circle rate before the AO and that the AO was not required to make any reference to the DVO u/s 50C(2) of the Act. He relied on various case laws to support his arguments that it was mandatory for the AO to have

made a reference to the DVO in this case before making any addition.

4.0 Per contra, the Ld. Departmental Representative (DR) supported the orders of the AO and the Ld. CIT (A) and submitted that the addition made by the AO were within the scope of issues on which the Limited Scrutiny was initiated in this case. According to the Ld. DR, the AO was fully justified in making the impugned addition of Rs.2,51,75,550/- as the verification of sale consideration formed part of the reasons for initiating the limited scrutiny. He referred to the notice u/s 142(1) dated 06/02/2017 issued to the assessee to contend that the assessee was asked to furnish details of immovable properties sold during Financial Year 2014-15 along with the documentary evidences and that it was in continuation of such inquiry that the addition was made and, thus, it cannot be said that it was outside the scope of limited scrutiny. He further supported the order of the Ld. CIT (A) to contend that the provisions of Section 50C were correctly invoked in this case .He further argued that there was no need to make a reference to the DVO as the assessee had not raised any dispute that the circle

rates were higher than the market price. He prayed for dismissing the appeal of the assessee.

5.0 We have heard the rival submissions and have also perused the material on record. It is an undisputed fact that the instant case was picked up for 'Limited Scrutiny' on two specific issues as reproduced in Para 2.0 above. It is also an undisputed fact that neither any permission was sought by the AO to expand the scope of limited scrutiny in the instant case nor such permission was ever granted by the Ld. Pr.CIT/CIT in this case to inquire into any other issue during assessment proceedings. The AO, while passing the assessment order, has not drawn any adverse inference against the assessee on either of the two issues on which the case was picked up for limited scrutiny under CASS. The assessee had claimed TDS credit of Rs.1,55,000/- u/s 194IA of the Act and had declared sales consideration of Rs.1,55,00,000/- in his ITR. The rate of TDS during this period was 1% under Section 194IA of the Act and the amount of TDS in this case is Rs. 1,55,000/- which fully corresponds to the amount of R.1,55,00,000/- declared by the assesse in his ITR. Thus, it cannot

be said that the sales consideration declared in ITR is less than the one reported in FORM 26Q filed by buyer. Even the AO has not disputed this fact in the assessment order. Likewise, no adverse inference has been drawn by him against the assessee on the issue of unsecured loans. In our considered opinion, the findings of the Ld. CIT (A) on this issue are not correct and there was no valid basis for the AO to inquire into other issues while conducting a limited scrutiny, without taking the mandatory permission from the Ld. Pr.CIT. On these facts, when the CBDT instructions did not permit the AO to travel beyond the issues which are authorised by the Board in this regard under CASS, it is held that the addition made by the AO is beyond his jurisdiction. The AO has travelled beyond his jurisdiction when he has invoked the provisions of Section 50C, whereas he only had the jurisdiction to verify as to whether the sales consideration declared by the assesse in his ITR was less than the amount reflected in FORM 26QB. Once he was satisfied on this aspect, he ought not have travelled beyond this without obtaining the mandatory permission from the Ld. Pr.CIT to do so in terms of the above referred CBDT Instructions. The finding

of the Ld. CIT (A) on this issue, therefore, cannot be upheld and the assessee's first ground of appeal is allowed.

5.1 Even otherwise, we find that the possession of the flat was not offered by the builder as the project was still under construction as proved from the order of RERA dated 6-10-2017 brought on record by the assessee both before the AO and the Ld. CIT (A). Thus, it is a case of transfer of only the booking rights of a residential flat in an under construction project. As the assessee did not have possession of any immovable property, there was no question of sale of any land or building or both. On these facts, in our considered opinion, the provisions of section 50C are not applicable as the assessee has neither sold any land nor any building or both.

5.2 Since it has been held by us that the provisions of Section 50C of the Act are not applicable to the transaction of selling booking rights/rights to allotment of a flat, as has been done by the assessee in the instant case, the issue of making reference or not to the DVO becomes academic and is not adjudicated here.

6.0 In the final result, the appeal of the assesse is allowed.

Order pronounced on 31/08/2020.

Sd/- Sd/-
(PRASHANT MAHARISHI) **(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Dated: 31/08/2020
*DRAGON
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI