

SIN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ‘ B ‘ Bench, Hyderabad
(Through Video Conferencing)
Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri A. Mohan Alankamony, Accountant Member

ITA No.363/Hyd/2017		
Assessment Year: 2005-06		
M/s. HP Constructions Private Ltd, Hyderabad PAN:AAACH9910R	Vs.	Income Tax Officer Ward 2(2) Hyderabad
(Appellant)		(Respondent)
Assessee by:	Sri S. Rama Rao	
Revenue by:	Smt. Divya J. DR	
Date of hearing:	07/10/2020	
Date of pronouncement:	12/10/2020	

ORDER

Per Smt. P. Madhavi Devi, J.M.

This is assessee's appeal for the A.Y 2005-06 against the order of the CIT (A)-2, Hyderabad, dated 29.11.2016.

2. Brief facts of the case are that the assessee company, engaged in the business of construction, filed its return of income for the A.Y 2005-06 belatedly on 03/05/2006 admitting Rs.Nil income. The return was initially processed u/s 143(1) on 27.10.2006. Later on, to verify the taxability of Rs.60.00 lakhs received by the assessee company under post decretal agreement from M/s. Modi Estates in connection with land settlement, the AO reopened the assessment u/s 147 of the I.T. Act by issuance of a notice dated 1/3/2011. The assessee, vide a letter dated 7.4.2011, submitted that the return originally filed on 3.5.2006 be

treated as a return filed in response to the notice u/s 148 of the Act.

3. During the reassessment proceedings, the AO noticed that the assessee company was incorporated on 28/07/1992 with the main object of carrying on business in construction activity and that the assessee company had entered into an agreement of sale for purchase of land admeasuring 2,331 sq. yards situated at Karbala Maidhan, Ranigunj, Secunderabad on 18/12/1992 for Rs.70,85,000/- with vendor Shri Gurudev Siddha Peeth and Satish Modi (Consenting Party). He also observed that the assessee has paid a sum of Rs.12.00 lakhs towards advance and the balance, was to be paid later subject to the fulfilment of the conditions by the vendor, vendee and the consenting parties. Subsequently, the agreement could not be gone ahead due to non-fulfilment of the conditions by the vendor and the consenting party as well as the vendee and the vendor had approached the City Civil Court, by filing a suit which was disposed by the Addl. Chief Judge, City Civil Court, Secunderabad on 17.01.2005 directing the assessee company to vacate and deliver the vacant possession of the suit schedule property to the vendor. Thereafter, the parties entered into post decretal agreement on 19.03.2005 according to which, the assessee company will receive an amount of Rs.60.00 lakhs (including the advance of Rs.12.00 lakhs) paid by the company from the decree holders for vacating the premises. However, the assessee did not offer Rs.60.00 lakhs to tax.

4. When the assessee was required to explain, the assessee submitted that the agreement could not be gone ahead because of violation of the conditions by the vendors and the

consenting party and the amount of Rs.60.00 lakhs paid by the vendor was not only towards return of Rs.12.00 lakhs with indexation, but it was towards expenditure incurred by the assessee in excavation work and other developmental work and also towards legal expenses and the expenses incurred towards watch and ward of the property for a period of ten years. Therefore, the assessee had explained that the sum of Rs.60 lakhs is only reimbursement of the expenditure incurred by the assessee towards that property and is not compensation received and that since there was no asset accrued in favour of the assessee, it cannot be treated as capital gain and further that there was no capital gain arisen to the assessee therefrom.

5. However, the AO was not convinced with the assessee's contention that the assessee had not acquired any right in the property. He held that after the judgement of the City Civil Court, the assessee had every right to contest the judgment, but since the assessee chose to extinguish such right only, the assessee company has received Rs.60.00 lakhs and therefore, there is a capital asset and capital gain has arisen therefrom and arrived at the long term capital gains of Rs.22,36,712/- and computed the tax thereon @20% and arrived at Rs.4,47,342/-. Aggrieved, the assessee preferred an appeal before the CIT (A) who confirmed the order of the AO and the assessee is in second appeal before the Tribunal by raising the following grounds of appeal:

"1. The order of the learned CIT (A) is erroneous both on facts and in law.

2. The learned CIT (A) erred in confirming the action of the AO in initiating proceedings u/s 147 of the I.T. Act. The learned CIT (A) ought to have seen that the notice u/s 148 was issued after a period of four years and is not validly issued.

3. The learned CIT (A) in holding that there is any transfer of property and that capital gain arose to the appellatant during the year under consideration.

4. The learned CIT (A) erred in confirming the determination of capital gain by the AO at Rs.22,36,712/-.

5. Any other ground or grounds that may e urged at the time of hearing”.

6. At the time of hearing, the learned Counsel for the assessee submitted that the assessee is not interested to press Ground No.2 against validity of the re-assessment proceedings u/s 147 of the I. T. Act. Ground No.2 is accordingly rejected as not pressed.

7. As regards Grounds No.3 and 4, the learned Counsel for the assessee reiterated the submissions made by the assessee before the authorities below and submitted that the assessee had only entered into an agreement of sale but had not become the owner of the property nor has any right accrued to him thereon and therefore, there was no capital asset owned by the assessee which has been transferred resulting in capital gains. Further, he also submitted that the sum of Rs.60.00 lakhs received by the assessee is nothing but reimbursement of the expenditure incurred by the assessee towards the advances paid, excavation work, legal expenses and the watch and ward expenses over a period of ten years and hence there is no income embedded in sum of Rs.60 lakhs which can be brought to tax.

8. On the other hand, the learned DR supported the orders of the authorities below and submitted that by virtue of the registered agreement of sale and the assessee being put in possession of the property, there is accrual of a right/interest in

the property and by receiving the payment of Rs.60.00 lakhs, the assessee has relinquished the right/interest in the property in favour of the vendee. Therefore, according to the learned DR, there is a transfer of right in the property and hence capital gains has rightly been brought to tax by the authorities below.

9. Having regard to the rival contentions and the material on record, we find that undisputedly, the assessee had entered into an agreement of sale and also had received the possession of the property. In the suit before the City Civil Court, for cancellation of the agreement of sale, the assessee had pleaded that there was transfer of property. Therefore, the assessee had claimed to have a right in the property by virtue of the agreement of sale with possession. Whether such a right can be considered as a "capital asset" under the Income Tax Act is the question before us. Sub section 14 of section 2, of the I.T Act defines capital asset to means:

"(a) property of any kind held by an assessee, whether or not connected with his business or profession"

10. As regards the meaning of the property of any kind, the AO has brought out the assessment order, the decision of the Hon'ble Court wherein even the right in the property has been held to be a capital asset u/s 2(14) of the I.T. Act. Therefore, the AO treating the sum of Rs.60.00 lakhs as received for transfer of right in the capital asset cannot be faulted. As regard the computation of capital gains, we find that the AO has allowed indexation of only cost of acquisition of Rs.12.00 lakhs and also Rs.6.00 lakhs which is the sum incurred by the assessee for excavation work. However, the litigation between the assessee and the vendors before the City Civil Court, Secunderabad is not in dispute. Therefore, assessee's claim of legal expenses ought to

have been allowed. Further, the assessee's claim of expenditure towards watch and ward of the property over a period of 10 years also cannot be brushed aside. The assessee had been protecting the property from encroachers for a period of 10 years and therefore, it cannot be ruled that the assessee has not incurred any expenditure towards such work. Therefore, we are of the view that a sum of Rs.10.00 lakhs would be reasonable expenditure towards legal expenses and also towards watch and ward expenses which is to be allowed from the amount received by the assessee for computing the taxable capital gain. In view of the same, we deem it fit and proper to direct the AO to recompute the capital gain after allowing a sum of Rs.10.00 lakhs towards the above discussed expenses and the assessee's appeal is therefore, treated as partly allowed.

11. In the result, assessee's appeal is treated as partly allowed.

Order pronounced in the Open Court on 12th October, 2020.

Sd/-

Sd/-

(A. MOHAN ALANKAMONY) ACCOUNTANT MEMBER	(P. MADHAVI DEVI) JUDICIAL MEMBER
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Hyderabad, dated 12th October, 2020.

Vinodan/sps

Copy to:

- 1 HP Constructions (P) Ltd C/o Sri S. Rama Rao, Advocate, Flat No.102, Shriya's Elegance, 3-6-643 Street No.9 Himayatnagar, Hyderabad 500029
- 2 ITO Ward 2(2) Signature Towers, Kondapur, Hyderabad
- 3 CIT (A)-2 Hyderabad
- 4 Pr. CIT – 2 Hyderabad
- 5 The DR, ITAT Hyderabad
- 6 Guard File

By Order