

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

**BEFORE,  
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER  
AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.4237/Del/2017  
(ASSESSMENT YEAR 2011-12)**

M/s Global Health Private Limited E-18, Defence Colony, New Delhi-110 024 PAN -AACCG 2681C	Vs.	Dy. CIT, Circle-10(1), New Delhi.
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA No.4871/Del/2017  
(ASSESSMENT YEAR 2011-12)**

Addl. CIT, Special Range-4 New Delhi.	Vs.	M/s Global Health Private Limited E-18, Defence Colony, New Delhi-110 024 PAN -AACCG 2681C
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant By	<b>Sh. Rahul Khare, CA</b>
Respondent by	<b>Ms. Sunita Singh, CIT-DR</b>
Date of Hearing	<b>05.04.2021</b>
Date of Pronouncement	<b>30.06.2021</b>

**ORDER****PER SUDHANSHU SRIVASTAVA, JM:**

These cross appeals filed by the assessee and the revenue are against the order passed by the Ld. Commissioner of Income Tax (Appeals)-4, New Delhi {CIT (A)} vide order dated 22/05/2017 and are relating to Assessment Year (AY) 2011-12. The issue involved in these appeals is related to computation of long term capital gain arising from transaction of sale of rights as per Joint Development Agreement (JDA).

2.0 Brief facts of the case are that the assessee was the owner of 43 acres of land situated in sector 38, Gurgaon, Haryana allotted by HUDA. The assessee entered into a Joint Development Agreement dated 02/08/2007 with M/s. SAS Infoetech P. Ltd. for development of 5 acres of land of the aforesaid 43 acres of land. The said development was to be carried out wholly by M/s. SAS Infoetech P. Ltd from its own resources on or before the completion date of 1<sup>st</sup> September, 2010. It was further agreed in the agreement that upon the completion of the said development, the assessee will have the right to either take possession of 30,000 sq. ft. of built up

super areas or release the same in favour of the builder M/s. SAS Infoetech P. Ltd. for a consideration of Rs. 33 crores. As recorded by the Ld. CIT (A), the underlying land was given on lease for a period of 90 years. In the assessment year under reference, the project got completed and the assessee chose the option to take Rs. 33 crores in lieu of 30,000 sq. ft. built-up super area and offered the same as long term capital gain after adjusting the indexed cost of acquisition of proportionate cost of 5 acres of land. The Assessing Officer (AO) disallowed the claim of cost of acquisition on the ground that since the land was still appearing in the Balance sheet of the assessee, the benefit of cost cannot be given. Accordingly, addition of long term capital gain was made to the extent of Rs.12,24,33,236/-. The Ld. CIT (A) allowed the benefit of cost of acquisition. He, however, restricted the indexation till AY 2008-09 as against AY 2011-12 on the reasoning that indexation can only be allowed till the date of signing of the Joint Development Agreement. The Ld. CIT (A) further held that land was deemed to have been converted to stock-in-trade in AY 2008-09 at the market value of Rs. 33 crores as the Joint development agreement was adventure in the nature of business

and, accordingly, the indexation was to be allowed only till AY 2008-09.

2.1 Now, both the assessee as well as the Department, are in appeal before this Tribunal and have raised the following grounds of appeal respectively:

Grounds of appeal in ITA No.4237/Del/2017 (Assessee' Appeal):

*“The learned CIT (A) erred in fact and in law in allowing indexation cost of acquisition till A.Y.2008-09 instead of A.Y. 2011-12 as claimed in the return.”*

Grounds of appeal in ITA No.4871/Del/2017 (Department's Appeal):

*“1. In the facts and circumstances of the case, the Ld. CIT (A) has erred in directing to take the indexed cost of acquisition to be worked on proportionate basis while computing the capital gains by ignoring the fact that the assessee did not reduce the said proportionate cost from the cost of land in its books of accounts.*

*2. The appellant craves leave to add, alter or amend any ground of appeal raised above at the time of hearing.”*

3.0 On the issue of cost of acquisition, the Ld. Counsel appearing for the assessee supported the order of the Ld. CIT (A) and submitted that since there was transfer of rights in land on account of 90 years' lease, the proportionate cost of such land was eligible to be claimed as cost of acquisition while computing the long term capital gain. It was further argued that leasing of land for a substantial period results in transfer of rights in the land and as such the benefit of cost indexation was rightly available. In respect to the of action of the Ld. CIT (A) in treating the execution of Joint Development Agreement as conversion of capital asset to stock-in-trade in terms of section 45(2) of the Income Tax Act, 1961 (hereinafter called 'the Act') and thereby restricting the indexation benefit till AY 2008-09, it was submitted that execution of Joint Development Agreement cannot be treated as adventure in nature of business. It was further argued that the conversion of capital asset to stock was the prerogative of the assessee and it was not open for the Ld. CIT (A) to make a notional conversion. The Ld. Counsel vehemently argued that the land was continued to be shown as capital asset under the Fixed Asset Schedule of the

Balance Sheet and that there was no intent to enter into business or trade so as to invoke the provisions of section 45(2) of the Act. It was, accordingly, submitted that since the taxable event arose in AY 2011-12, the benefit of indexation was also to be made available till AY 2011-12, i.e. year under reference.

4.0 On the other hand, the Ld. CIT DR argued that benefit of cost of acquisition was not available as the assessee continued to be the owner of the land. Our attention was drawn to the Fixed Asset Schedule of the Balance Sheet and it was pointed out that there was no reduction in the value of the land appearing therein. The Ld. CIT DR, while placing reliance on the assessment order, argued that the entire amount of Rs. 33 crores was taxable as long term capital gain and that there was no question of any adjustment of cost or indexation of the same.

5.0 We have considered the rival submissions and perused the assessment order as well as the impugned appellate order. We have also gone through the Joint Development Agreement and computation of long term capital gain as returned by the assessee. The factual position as noted above has not been disputed by either

of the parties and the limited issue before us is regarding allowability of cost of acquisition and indexation thereon. In this regard, we note that the assessee is the owner of 5 acres of land which was subsequently leased in favour of M/s. SAS Infoetech P. Ltd. pursuant to the Joint Development Agreement. Further, the assessee has parted with the possession of the aforesaid 5 acres of land in favour of M/s. SAS Infoetech P. Ltd. on long term lease having a term of 90 years. The essence of a Joint Development Agreement is a barter where the person hands over the land and receives constructed portion in return. Further, the computation of gain arising from Joint Development Agreement is to be made after taking into account cost of land transferred to the builder under the agreement whereon the building is constructed. To put it simply, in the present case, the assessee has received consideration of Rs. 33 crores by assigning rights over 5 acres land in favour of the builder M/s. SAS Infoetech P. Ltd. and as such we find no justification in the action of the assessing officer in disallowing the claim of cost of acquisition. In any case, merely because the land is continued to be reflected in the Balance Sheet of the assessee would not have any

adverse implication on the computation of long term capital gain as the accounting treatment in the books of account cannot override the determination of real income under the provisions of Income Tax Act, 1961. In view of the above, we find no merit in the ground raised in the revenue's appeal and same is dismissed.

5.1 On the issue of indexation of cost, it is observed that the Ld. CIT (A) has restricted the indexation on the ground that there was conversion of capital asset into stock-in-trade in terms of section 45(2) of the Act in AY 2008-09 i.e. upon execution of the Joint Development Agreement and as such the benefit of indexation was allowed only till AY 2008-09. Firstly, we will deal with the observation of the Ld. CIT (A) while invoking provision of section 45(2) of the Act. We find that the assessee company is in the business of providing healthcare services. Further, the assessee was the owner of the subject land since the year 2004 and same has been continuously reflected/held as capital asset in the Balance Sheet. Further, on perusal of the Joint Development Agreement, there is no indication whatsoever that the same has been entered for exploiting the land on commercial lines. In fact, the assessee

company is already running Healthcare facilities in connected piece of land and deriving substantial revenue there from. We also find that the Ld. CIT (A) has not given any concrete reasoning for assuming conversion of capital asset to stock-in-trade in terms of section 45(2) of the Act and ostensibly the same has been done because the assessee opted for taking consideration of Rs. 33 crores in place of built-up structure upon completion of the project. We find it difficult to comprehend that merely because the Joint Development Agreement contained a clause giving option to the assessee to either take the built-up space or transfer the same to the builder for consideration, it would affect the principal nature of the transaction which was on capital account. Further, the option given to the assessee under the Joint Development Agreement was not subject to the market price of the final built-up area and as such, we are of the considered opinion that the Ld. CIT (A) was not justified in imputing a commercial angle to the whole transaction for the purpose of invoking section 45(2) of the Act.

5.2 At this juncture would be relevant to make a reference to the bare provision of section 45(2):

*“Section 45 - Capital gains*

*2) Notwithstanding anything contained in sub-section (1), the profits or gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business carried on by him shall be chargeable to income-tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him and, for the purposes of section 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset.”*

5.3 A plain reading of section 45(2) makes it amply clear that it is the prerogative of the assessee to covert the capital asset to stock. Further, the term ‘Business carried on by him’ necessarily means that the capital asset so converted must form part of stock-in-trade of the business carried on by the assessee. In the present case, the assessee company is in the healthcare business and not in business related to real estate and as such it cannot be said that assessee, by entering into the Joint Development Agreement, has converted the land into its stock-in-trade. Therefore, we have no hesitation in holding that there is no scope of applicability of section 45(2) of the Act to the facts of the present case. Therefore, we are unable to find any justification in the action of the Ld. CIT (A) in invoking provisions of section 45(2) of the Act. The upshot of

this discussion is that once we have denounced the application of Section 45(2), there remains no basis for restricting the indexation to AY 2008-09 particularly when the taxable event arose in AY 2011-12 when the construction got complete and the assessee opted to part with 5 acres of land for a consideration of Rs. 33 crores. Accordingly, in view of our reaching this considered opinion, the assessing officer is directed to allow the benefit of indexation of cost of acquisition till AY 2011-12 i.e. the year of assessment of capital gain.

6.0 In the final result, the appeal of the department is dismissed and the appeal of the assessee is allowed.

Order pronounced on 30<sup>th</sup> June, 2021.

Sd/-

**(N.K. BILLAIYA)**  
**ACCOUNTANT MEMBER**

Dated: 30/06/2021

*\*dragon\**

Sd/-

**(SUDHANSHU SRIVASTAVA)**  
**JUDICIAL MEMBER**

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT, NEW DELHI