

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE
(CONDUCTED THROUGH VIRTUAL COURT)**

**BEFORE SHRI MANISH BORAD, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

I.T.A. Nos.127/Ind/2020
(Assessment Years: 2012-13)

Smt. Alpana Verma 56, Phase-II, Amaltas, Chunna Bhatti, Kolar Road, Bhopal	Vs.	PCIT-1, Bhopal
PAN No.AAKPV1663J		
(Appellant)	..	(Respondent)

Appellant by :	Shri Ashish Goyal & Shri N. D. Patwa, Advocates
Respondent by :	Shri Harshit Bari, Sr. DR

Date of Hearing	17.08.2021
Date of Pronouncement	30.09.2021

ORDER

PER Ms. MADHUMITA ROY - JM:

The instant appeal filed by the assessee is directed against the order dated 31.01.2020 passed by the Ld. PCIT-1, Bhopal under Section 263 of the Income Tax, 1961 arising out of the order dated 15.12.2017 passed by the ITO-2(5), Bhopal under Section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for A.Y. 2012-13.

2. We have heard the respective parties and also perused the relevant materials available on record.

3. The brief facts leading to the case is this that the assessee has entered into a Joint Venture Agreement with M/s. Ample Builders, a partnership firm carrying business of builders and colonizers on 02.09.2011, for a land admeasuring 0.50 acres, situated at village Bawadia Kalan, Tehsil Huzur, Bhopal; the market value of the land under the said Joint Venture Agreement was of Rs. 1,26,90,000/-.

On the basis of the information that the assessee has sold an immovable property worth of Rs. 1,26,90,000/- without quoting PAN during the Financial Year 2011-12 for A.Y. 2012-13 the case was reopened under Section 147 of the Act; notice under Section 148 of the Act was issued to the assessee. The Sub-Registrar, under Section 133(6) of the Act was directed to provide a copy of registry of the property sold by the assessee to the Ld. AO. It appears from the said Joint Venture Agreement that the assessee has given the working rights to M/s. Ample Builders for the purpose of development of entire land and the said builder shall develop the said land and prepare residential apartments at his own cost. The assessee will not bare any expenses in the cost of development and construction. It further appears that the said builder was given the right of submission of application before all the competent authorities for getting the entire permission for such development and construction work including building permission, development permission, lay out plan of the said project etc. After getting the land developed and the residential apartment constructed the residue would be divided between both the parties; the assessee would retain 11 flats (Eleven Flats) out of the total constructed

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area. The reasons recorded for issuance of notice under Section 148 as appearing at Page 3 of the Paper Book filed before us reads as follows:-

“RESONS RECORDED FOR ISSUE OF NOTICE U/S 148.

1.	Name & Address of the Assessee	Smt. Alpana Verma 2, Chuna Bhatti Bhopal
2.	PAN	Non PAN
3.	Asst. Year	2012-13

As per the report of the ITO (I&CI), Bhopal, vide his office letter F. No. ITO(I&CI)/Bpl/Non PAN/2011-12/E-19204 dated 02.03.2016, Smt. Alpana Verma 2, Chuna Bhatti, Bhopal has sold immovable property worth Rs. 1,26,90,000/- without quoting PAN. It is seen from the report that escapement of long term capital gain in the case of the assessee comes to Rs. 1,26,90,000/-. The assessee has not filed return for the A.Yr. 2012-13.

In view of the above facts, I have a reason to believe that income to the tune of Rs. 1,26,90,000/- chargeable to tax has escaped assessment within the meaning of section 147 of the Income tax Act, 1961 by reason of the failure on the part of the assessee to file his return of income u/s 139 for the relevant assessment year 2012-13 and to disclose fully and truly all the material facts.”

4. The assessment under Section 143(3) r.w.s. 147 of the Act was finalized on 15.12.2017 accepting the return filed by the assessee to the tune of Rs. 4,16,050/- after considering the Joint Venture Agreement executed by and between the assessee and the M/s. Ample Builders.

5. Subsequently, a show-cause notice under Section 263 of the Act was issued on 01.01.2020 which is also available at Page 4 of the CIT’s order. The relevant portion whereof is as follows:-

“Please refer, to the. assessment order u/s 143(3) r.w.s. 147 of the Income Tax Act, 1961 dated 15.12.2017 passed by DCIT-1(l)f Bhopal for A.Y. 2012-13.

On perusal of the assessment order and case records, it is noticed that the assessee had entered into a Joint Venture Agreement with M/s Ample Builders on 02.09.2011. As per the agreement, the assessee has given land to the Joint Venture and in consideration of land the assessee will receive 11 flats. The market value was determined at Rs,1,26,90,000/- as per the Joint Venture Agreement, As per sec. 45(1)

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of the IT Act, LTCG has attracted in this case in the year in which transfer of land to the Joint. Venture took place and therefore assessee must have offered LTCG in. the A.Y. 2012-13. Therefore, assessee was liable to pay capital gains tax on entering into Joint Venture Development Agreement. However, from the records it is observed that the assessee did not offer capital gains to tax in return of income in A.Y. 2012-13. This omission resulted in under assessment of income.

Keeping in view of the above, the assessment order passed by the Assessing Officer is considered to be erroneous in so far as it is prejudicial to the interest of revenue, and therefore, I, Propose to invoke powers vested u/s 263 of the Income Tax Act, 1961 in respect of the order referred to above.”

6. It is the specific submission made before the Ld. PCIT that the Joint Venture Agreement was registered before the office of the Sub-Registrar on 02.09.2011 in which the estimated market value of the land for the purpose of paying stamp duty was at Rs. 1,26,90,000/- which was considered by the Ld. AO in the re-assessment proceeding under Section 143(3) r.w.s. 147 of the Act and the AO concluded the said proceeding opining that in the case of such Joint Venture Agreement capital gain tax does not arise. That all the details regarding such Joint Venture Agreement performed on 02.09.2011 were duly placed before the Ld. AO during the re-assessment proceeding under Section 143(3) r.w.s. 147 of the Act. The issue relating to capital gain on the Joint Venture agreement executed on 02.09.2011 with the land value was of Rs. 1,26,90,000/- has been well considered by the Ld. AO while passing order under Section 143(3) r.w.s. 147 of the Act. Further that the provision of Section 263 of the Act Explanation 2A clearly specifies that the order passed by the Ld. AO shall be deemed to be erroneous in so far as it is prejudicial to the interest of the Revenue if according to the Ld. PCIT the order of assessment is passed without making enquiries or verification which ought to have been made by the Ld. AO. In this regard, we need to re-consider the order passed by the Ld. AO under Section 143(3) r.w.s. 147 of the Act which reads as follows:-

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“ In the case information has been received that the assessee has sold an immovable property worth Rs. 1,26,90,000/- without quoting PAN during the financial year 2011-12 relevant to A.Y. 2012-13. Information has been called from Sub-registrar u/s 133(6) of the Act to provide a copy of registry of the property sold by the assessee. The sub-Registrar has give the details with regard to the immovable property involved in the case for the period 01.04.2011 to 31.03.2012. On perusal of the deed submitted by the Sub-Registrar it has been seen that the assessee has entered into a joint venture agreement with M/s Ample Builders (a partnership firm carrying out business of builders and colonizers) on 02.09.2011 for a land admeasuring 0.50 acres situated at village Bawadia Kalan, Tehsil Huzur, Bhopal (within municipal corporation limit). The market value of the land under joint venture agreement is Rs. 1,26,90,000/-.

In the Joint Venture Agreement it has been stated that "the assessee shall give the working rights to M/s Ample Builders for the purpose of development of the entire land and M/s Ample Builders shall develop the said land and prepare residential apartments.

M/s Ample Builders shall develop the land and construct the residential apartment. The cost of entire development and construction will be borne by M/s Ample Builders. The assessee will not bear any expenses on the cost of development and construction.

That for the purpose of development of the said land of the assessee, M/s Ample Builders shall have all the right of submission of application before all the competent authorities for getting the entire permission in respect of the said land.

That M/s Ample Builders shall obtain all necessary permission from the competent authority viz. the building permission, development permission and the lay out plan of the said project and the amount spent in obtaining the said permission shall be borne in by M/s Ample Builders.

That after getting the said land developed and residential apartment constructed, the residue will be divided between both the parties. The assessee will retain 11 flats (Eleven Flats) out of total flat constructed and M/s Ample Builders will retain balance flats. Flats will be earmarked by both the parties in building permission map which is approved from concern department vide building permission No. NC-5211-515-62011 dated 25.06.2011 and will be part of this agreement.

That both the assessee and M/s Ample Builders can sell their share of flats by themselves.

During the course of assessment proceedings the assessee has submitted a reply dated 06.12.2017. The relevant portion of the reply in reproduced as under:

“The assessee is an individual doing service with Barkatullah University, Bhopal as professor having income from salary, income from business and income from other

sources like bank interest etc. During the year under consideration, the assessee filed regular return of total income on 29/03/2013 showing total income of Rs.4,16,050/-.

The assessee has filed return of total income with ITO-I(l). Bhopal.

During the year under consideration, the assessee has not sold any property. However, the assessee is having 21834 sq. ft. land at Bawadia Kalan which was purchased in the year 2002 and 2005. The copy of registered sale deed of the above land is enclosed herewith. The working right of the above land was given to M/s Ample Builders and Colonisers under Joint venture Agreement which was executed on 02/09/2011. The copy of Joint Venture Agreement is enclosed herewith. This Joint Venture Agreement registered during the year only. Further it is submitted that against the Joint Venture Agreement the assessee will be received 11 flats as per this Joint Venture Agreement in the coming year.

It is submitted that during the year 2014-15 i.e. A.Y. 2015-16. The assessee has received possession of two flats against the Joint Venture Agreement and same was sold and long term capital gain duly shown in the return filed for A.Y. 2015-16. The copy of return acknowledgement with computation of total income for A.Y. 2015-16 is enclosed herewith. The assessment u/s 143(3) for A. Y.2015-16 was also completed and the copy of assessment order is enclosed herewith.”

The reply submitted by the assessee dated 06/12/2017 has been considered. The details submitted by the assessee have been examined with the details mentioned in the Joint Venture Agreement. After verification of the details and explanation offered by the assessee with reference to the immovable property under consideration, no adverse inference is drawn against the assessee.”

7. In fact, the Joint Venture Agreement itself clarifies that the working right has only been given to the builders by the assessee for the purpose of development of entire land and only upon completion of the project 11 flats to be retained by the assessee. This particular aspect has also been considered by the Ld. AO while concluding the proceeding under Section 143(3) r.w.s 147 of the Act as it appears from the said order. In fact merely because of registration of the agreement and for the purpose of ascertaining stamp duty the market value was ascertained and shown as Rs. 1,26,90,000/- as such there was no transfer took place on 02.09.2011 in respect of the land by the assessee to the builders. Further we find that the

assessee discharged its onus by submitting all the documents in connection with such Joint Venture Agreement. Under these circumstances no liabilities for capital gain could arise as has already been observed by the Ld. AO upon considering and/or verifying the facts as mentioned hereinabove.

8. On this issue we have further considered the judgment passed by the Hon'ble Delhi High Court in the case of CIT vs. Software Consultants in tax appeal No. (2012), 341 ITR 240 wherein it has been held that where the AO did not make any addition on the issue in respect of which reasons were recorded at the time of issuing notice under Section 148 of the Act SEQUITUR is that the AO could not have made an addition on account of the said issue and, thus, the Ld. CIT could not have exercised revisional jurisdiction valid under Section 263 of the Act. Apart from that we have considered the judgment passed by the Hon'ble High Court at Calcutta in the case of PCIT vs. Infinity Infotech Parks Ltd. in Tax Appeal No. [2018] 96 taxmann.com 272 (Calcutta), wherein it was held that transfer in terms of Sec. 2(47)(v) could not be made until construction comes up. In that case 39% of constructed land was given to the assessee in terms of the development agreement entered into by and between the assessee and the developer. The relevant portion whereof is as follows:-

“17. When the owner of a land enters into an agreement with a developer for the purpose of developing the land, the terms of the contract would indicate when the transfer would take place. There could be rare situations where the transfer may be simultaneous with the execution of the agreement, but where the owner retains any right in the constructed area that may come up in future, it would scarcely be a case of a transfer taking place at the time of the execution of the agreement. The matter may be viewed from another perspective. Merely because de facto possession of the land is made over to a mason or a civil engineer for the purpose of making a construction thereon, it would not imply that possession is made over to the mason or the civil engineer for their enjoyment of the property. Such persons would be in de

facto possession under the de jure possession of the owner and only for the purpose of undertaking the construction at the land in question.

18. In terms of the agreement of February 7, 2007, the developer was to get 61% of the land and the proportionate share in the constructed area whereas the assessee was to get the balance 39% of the land and the proportionate constructed area thereupon. Till such time that the construction came up and 39% of the constructed area was made over to the assessee, it could not be said that possession of the balance land, in the sense that the expression carries in Section 2(47)(v) of the Act, had been made over by the assessee to the developer.

19. It is the undeniable position that under the agreement of February 7, 2007, the land and the construction thereon were to be divided in a certain ratio as between the developer and the assessee. It was also the developer's obligation under the agreement to make the construction or cause such construction to be made on the land. The possession that was made over by the assessee to the developer was not of the developer's share as envisaged in the agreement, but of the entirety of the land for the construction to be made thereon. It is true that the developer could have retained possession of the land and declined to return possession thereof to the assessee since the developer was in physical control thereof. But such resistance of the developer would not have been protected under Section 53A of the Act of 1882. It was only after the apportionment of the areas upon the construction on the land being completed that the developer could have rightfully retained possession of the developer's 61% share and resisted dispossession by discharging his obligation under the agreement and seeking refuge in terms of Section 53A of the Act of 1882 despite the formal conveyance pertaining to the developer's entitlement not having been executed. In any view of the matter, the right of the developer to retain possession and protect such possession under Section 53A of the Act of 1882 could never have arisen prior to the construction being completed and the apportionment effected.

20. There is also a minor matter of the opening words of Section 45 of the Act of 1961 being given some effect while reading such provision. In terms of Section 45(1) of the Act, the expression "chargeable to income tax under the head 'Capital gains'", operates on "Any profits or gains arising from the transfer of a capital asset ...". There can be no tax payable unless there is any profit or gain that has arisen. It could never have been the Revenue's case that there was any monetary profit or gain that accrued to the assessee at the time of the execution of the agreement of February 7, 2007.

21. In the light of the discussion above, the first ground urged by the Revenue does not appeal and the order of the Appellate Tribunal does not call for any interference as it set aside the erroneous view taken by the Commissioner in the order passed under Section 263 of the Act."

8. It appears from the records that the reason for re-opening of assessment under Section 147 of the Act was this that the assessee has

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escaped the long term capital gain on sale of immovable property whereas the assessee only entered into Joint Venture Agreement with a developer. In response to the issue of sale of immovable property as raised by the Ld. AO the assessee replied the same appropriately. It was further clarified that the assessee has received 11 flats in the incoming year and capital gain arising out of the sale of flats was shown when the actual sale was made and the assessee received the sale proceeds. In fact, the assessee has offered the capital gain in A.Y. 2014-15 and 2015-16. The order passed by the Ld. AO under Section 143(3) r.w.s. 147 dated 15.12.2017 further mentions the declaration of long term capital gain in the return of income filed by the assessee for A.Y. 2015-16 and finally accepted the contention made by the assessee by accepting the return of income as filed on 29.03.2013 at Rs. 4,16,050/-. The entire set of documents relating to the Joint Venture Agreement, the copy of the return filed by the assessee for A.Y. 2015-16 wherein the long term capital gain was shown was duly examined by the Ld. AO. It further appears that on the same issue the proceedings under Section 263 was initiated by the Ld. PCIT and finalized the same with an observation that during the assessment proceeding the AO did not examine all the material facts of the case particularly regarding liability of the assessee for paying long term capital gain as per Sec. 45(1) of the Act in entering into a Joint Venture Agreement with M/s. Ample Builders during F.Y. 2011-12. The Ld. PCIT further directed the Ld. AO to make a Denovo proceeding after giving a reasonable opportunity of being heard to the assessee and after bringing all records, the relevant supporting materials and evidences in support of the action of the Ld. AO. We find that it is merely a Joint Venture Agreement executed by and between the assessee and the

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developers and only the working right has been conveyed by the assessee to the developer. The real ownership does not transfer at the time of execution of the agreement but it could only be transferred at the time of completion of project. Relevant to mention the assessee has only conveyed the working rights and not transfer the land. By way of a registered agreement the said transaction was done and only in order to get the instrument registered by the valuation of the property was determined by the Registrar at Rs. 1,26,90,000/- for the purpose of paying appropriate stamp duty by the party. Considering the entire aspect of the matter the Ld. AO in the reopening proceeding under Section 143(3) r.w.s. 147 concluded the proceeding on the premise that the long term capital gain does not arise in the year under consideration i.e. when the agreement was executed but it arose later on when the assessee took possession of two flats against Joint Venture Agreement and sold the same to the third party in A.Y. 2015-16. This particular fact was ascertained from the return of income filed by the assessee for A.Y. 2015-16. Therefore, when the issue has already been decided by the Ld. AO in the previous occasion upon making enquiry and/or verification of the relevant documents in support of the submissions made by the assessee as regards the benefit of long term capital gain the same cannot be reopened under the Explanation 2 of Section 263 declaring the order passed by the Ld. AO erroneous and prejudicial to the interest of the Revenue on the plea of no enquiry and/or verification done by the AO. We have further considered the said judgment passed in the case of PCIT vs. Infinity Infotech Parks Ltd. reported in, (2018) 96 taxmann.com 274 (Calcutta), the relevant portion whereof is as follows:-

“Section 2(47), read with sections 45 and 263, of the Income-tax Act, 1961 - Capital gains -Transfer (Joint development agreement) - Assessment year 2007-08 - Assessee

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entered into an agreement with a developer on 7-2-2000 for development of land owned by it - In terms of agreement, assessee had to retain 39 per cent of constructed area whereas balance 61 per cent area would be allotted to developer - Assessee filed its return wherein no capital gain was disclosed from aforesaid transaction - Assessing Officer completed assessment without raising any objection - Commissioner took a view that in view of section 2(47)(v) read with section 45, capital gains tax ought to have been paid in assessment year 2007-08 itself i.e. when joint development agreement was executed - He thus passed a revisional order under section 263 directing Assessing Officer to reframe assessment - Tribunal, however, set aside revisional order - Whether on facts, transfer in terms of section 2(47)(v) could not be made until construction came up and 39 per cent of constructed land was given to assessee - Held, yes - Whether even otherwise, since it was not revenue's case that there was any monitory profit or gain that accrued to assessee at time of execution of agreement, no tax was payable under section 45(1) in assessment year in question - Held, yes - Whether, therefore, impugned order passed by Tribunal did/not require any interference - Held, yes [Paras 18 and 20] [In favour of assessee] ”

We are fortified by the order passed by the Hon'ble High Court at Calcutta in the case of PCIT vs. Infinity Infotech Parks Ltd. (supra), on this issue that has already discussed hereinabove which further approves the order passed by the Ld. AO on the count that there can be no tax payable unless there is any profit or gain has arisen. Hence, we do not support the order passed by the Ld. PCIT under Section 263 of the Act for reopening of assessment for the reason already discussed hereinabove and, thus, the same is hereby quashed.

9. In the result, the appeal filed by the assessee is allowed.

This Order pronounced in Open Court on 30/09/2021

Sd/-

(MANISH BORAD)
ACCOUNTANT MEMBER
Ahmedabad; Dated 30/09/2021
TANMAY, Sr. PS

Sd/-

(MADHUMITA ROY)
JUDICIAL MEMBER

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आदेश की प्रतिलिपि अद्योषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Indore
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Indore

1. Date of dictation 16.09.2021 & 17.09.2021
2. Date on which the typed draft is placed before the Dictating Member 17.09.2021
3. Other Member.....
4. Date on which the approved draft comes to the Sr.P.S./P.S 29 .09.2021
5. Date on which the fair order is placed before the Dictating Member for pronouncement .09.2021
6. Date on which the fair order comes back to the Sr.P.S./P.S .09.2021
7. Date on which the file goes to the Bench Clerk .09.2021
8. Date on which the file goes to the Head Clerk.....
9. The date on which the file goes to the Assistant Registrar for signature on the order.....
10. Date of Despatch of the Order.....