

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH: CHENNAI

श्री वी. दुर्गा राव, माननीय न्यायिक सदस्य एवं
श्री जी. मंजूनाथा, माननीय लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.959/Chny/2020
निर्धारण वर्ष /Assessment Year: 2014-15

The Dy. Commissioner-
of Income Tax,
Non-Corporate Circle-10(1),
Chennai.

v. Smt. T. Jeyachandra,
No.2/34, M.H.Road,
Red Hills,
Chennai.
[PAN: ACXPJ 4471 B]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

Department by : Ms.Helen Ruby Jesindha, JCIT
Assessee by : Mr.R. Sivaraman, Adv
सुनवाई की तारीख/Date of Hearing : 12.04.2022
घोषणा की तारीख /Date of Pronouncement : 28.04.2022

आदेश / ORDER

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the Revenue is directed against the order of the Commissioner of Income Tax (Appeals)-12, Chennai, dated 21.09.2020 and pertains to assessment year 2014-15.

2. The Revenue has raised the following grounds of appeal:

- 1. The order of the learned CIT(A) is erroneous in law and facts and opposed to the facts and circumstances of the case.*
- 2. The Ld.CIT(A) erred in directing the AO to adopt purchase cost of 26 flats @ Rs.2925 when the sale price recorded by the seller in its books of account is only @ Rs.739 per sq.ft.?*
- 3. The Ld.CIT(A) erred in giving undue weightage to the MOU dated 20.11.2008 when the conditions in such MOU were later on varied in the books of account of firm and the sale was accounted only in FY 2013-14 @ Rs.739 per sq.ft.*

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4. *The Ld.CIT(A) Ought to have noted that market value fixed by service tax authorities is notional value to determine Service tax liability whereas value shown as sale proceeds in the books of account of seller firm is determinative to decide the cost price in the hands of the purchaser assessee.*

5. *The Ld.CIT(A) erred in deleting the addition holding that transaction is genuine and at market value event though the sale price shown by the firm in which assessee is a partner for the very same asset was adopted by the AO as cost price in the hands of the buyer i.e. assessee.*

6. *For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer restored.*

3. The brief facts of the case are that the assessee is an individual filed her return of income for the AY 2014-15 on 02.09.2012 declaring total income at Rs.2,21,91,830/-. During the course of assessment proceedings, the AO noticed that the assessee has computed long term capital gains from sale of 16 flats. As per the AO, the assessee has sold 16 flats for consideration of Rs.6,78,15,805/-. The assessee had also claimed indexed cost of acquisition of Rs.5,95,56,815/- and arrived at long term capital gains of Rs.44,00,792/-. It was further noted that the assessee has computed indexed cost of acquisition of a property, which was received by her, from the partnership firm as her share of income. She had received 9 flats measuring 10,602 sq.ft. @ Rs.2,925/- per sq.ft. vide MoU dated 20.11.2008. The assessee had also received 7 flats measuring 8,674 sq.ft. @ Rs.739/- per sq.ft. vide MoU dated 08.10.2009. The assessee has computed indexed cost of acquisition by adopting benefit of indexation applicable to the year, in which, the flats were sold. The assessee claimed that the first batch of 9 flats were received by the assessee from the firm vide MoU dated 20.11.2018 @ Rs.2,925/- per sq.ft. was on the basis of prevailing market rate, at which, the firm was selling flats to outsider. It

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was further claimed that remaining 7 flats received vide MoU dated 08.10.2009 was allotted to the assessee by the firm on dissolution at book value, even though, the market value of the flats was higher when the transfer took place. The AO, however, was not convinced with the explanation offered by the assessee and according to the AO, the assessee could not satisfactorily explain the higher cost adopted for first batch of 9 flats received from the firm @ Rs.2,925/- per sq.ft. when the very same property has been transferred to the assessee by the firm in the subsequent financial year @ Rs.739/- per sq.ft. Therefore, rejected the arguments of the assessee and computed indexed cost of acquisition for 16 flats by adopting Rs.739/- per sq.ft. as per book value of the partnership firm and computed long term capital gains of Rs.4,56,66,009/-.

4. Being aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee reiterated her arguments taken before the AO and contended that when the assessee has demonstrated with evidences to prove that first batch of 9 flats were acquired @ Rs.2,925/- per sq.ft. from the firm, the AO should not have adopted the rate paid by the assessee for the second batch of 7 flats received from the partnership firm on dissolution without appreciating the fact that the two transactions are different and cannot be compared to each other. The Ld.CIT(A) after considering relevant submissions of the assessee and also taken note of various facts held that the AO is completely erred in adopting uniform cost of acquisition of Rs.739/- per sq.ft. for 16

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flats, ignoring the fact that the first batch of 9 flats were acquired by the assessee @ Rs.2,925/- per sq.ft., which is supported by the assessment completed by Service Tax Department, where the assessee has paid Service Tax on cost per sq.ft. Rs.2,925/-. The Ld.CIT(A) further observed that when the AO is doubting cost of acquisition of flat, he should have determined the correct cost of acquisition by referring the matter to the independent valuation, but instead he has adopted subsequent rate paid by the assessee for acquiring 7 flats @ Rs.739/- per sq.ft without appreciating the fact that the first batch of 9 flats were acquired by the assessee as a commercial transaction and the second batch of 7 flats has been acquired by the assessee on dissolution of partnership firm and both the transactions cannot be equated and compared to each other. Hence, directed the AO to delete the additions made towards computation of long term capital gains. The relevant findings of the Ld.CIT(A) are as under:

4.2.1 During the appellate proceedings, the assessee's representative, apart from reiterating her claims made before the AO, also submitted that the actual value at which the first 9 flats were sold by the firm to her in 2008 was Rs.2925/- per sq.ft. For this purpose, she also furnished the copy of MOU. The assessee also claimed that even the service tax was paid based on the value adopted in the MOU of Rs.2925/- per sq.ft. Therefore, since the flats were actually allowed to the partners by the firm at Rs.2925/- per sq.ft, the same has to be considered as the cost of acquisition in the hands of the assessee. The assessee further submitted that a subsequent transfer of 7 flats on 09.10.2009, which was purely at book value of Rs.739/- as specifically contained in the MOU dated 09.10.2009, cannot be considered as a cost of acquisition of the earlier purchase of 9 flats. The relevant portion of the assessee's submissions is as under:

1. Cost of Acquisition - Explanation

(a) The value of certain Flats available in Stock in Trade during the year 2008-09 in the hands of the Partnership Firm M/s Sri Lakshmi Bricks were revised by the Service Tax Department to the value of Rs.2,925 and the service tax was duly paid on the said flats. Thus, the same was adopted as the value of acquisition in the hands of the assessee as on the date of Memorandum of Understanding. The explanation made to the Service Tax Department by the Partnership Firm is enclosed for your reference.

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(b) The cost price of the 8,674 Sq.Ft as per the books of accounts of the partnership firm M/s Sri Lakshmi Bricks is Rs.739 for the year 2009-10. Thus, during the date of Memorandum of Understanding the same was mutually agreed to consider as the Value for Acquisition for the said 8,674 Sq.Ft.

(c) In connection with the above, the Memorandum of Understandings already been submitted to your good office.

4.2.2 As mentioned in the foregoing paras, the assessee, during the financial year 2013-14, has sold 16 flats to various persons. These flats were acquired by the assessee, from the firm M/s. Sri Lakshmi Brick Industries, in which she is a partner. These flats were acquired by the assessee on 20.11.2008 (9 flats vide MOU dated 20.11.2008; and on 08.10.2009 (7 flats), vide MOU dated 08.10.2009. As per the MOU dated 20.11.2008, the first batch of 9 flats (measuring 10,602 sq.ft, in total) was acquired at the rate of Rs.2925/- per sq.ft. While, the second batch of 7 flats (measuring 8,674 sq.ft, in total) was at the rate of Rs.739/- per sq.ft. Thus, the rate(s) at which these flats were transferred by the firm to its partners is clearly available in the MOUs. Each MOU is independent and entered with a gap of about 10 months. The style and method of conducting the business is the prerogative of the assessee. The AO cannot expect the assessee to undertake the transactions in a particular way. The assessee has the liberty to engage in the transactions as per the business exigencies. What is required to be seen by the AO, is whether such transactions are part of the regular business and during the ordinary course of business. If the transactions are prohibited by any law in force, or aimed at defrauding the revenue, etc, then the AO can examine the transactions and take necessary action to determine true profits of the business.

4.2.3 In the present case, during the periods 2007-08, 2008-09 etc, the firm M/s. Sri Lakshmi Brick Industries was selling the flats at the rate of about Rs.2900/-per sq.ft. Hence the firm decided to sell the flats at a price of Rs.2925/- per sq.ft. This price is at the prevailing rate during the period and the price at which the firm was selling the flats to outsiders. Hence the selling the 9 flats to the assessee (partner) at Rs.2925/- per sq.ft., on 20.11.2008, was as per the prevailing market rates and justified. This is a commercial transaction. These facts are clearly available in the MOU dated 20.11.2008. In fact, the firm had also paid service tax by reflecting the sale value at Rs.2925/- per sq.ft. only. Hence the transfer of 9 flats by the firm to the assessee, on 20.11.2008, at Rs.2925/- per sq.ft., cannot be considered as abnormal or unjustified.

4.2.4 The transfer of remaining 7 flats in October 2009 was a totally different transaction. This was not a commercial transaction. It was only a transfer some of the flats to partners at book value. A firm is not prevented from transferring any of its stock-in-trade to partners at cost price. An assessee, can even convert its stock-in-trade (immovable properties) in to fixed assets (investments) at cost. This is a permitted practice. Therefore, the transfer of 7 flats in October 2009, at book value, was a totally different transaction and cannot be considered as a commercial transaction. Nor such transfers of book values cannot compare with other commercial transactions, transacted during the regular course of business. It also should be noted that the second transfer was in contemplation of the dissolution of the firm itself. The dissolution would have happened but for attachment of properties by the Department. Hence, in view of peculiar circumstances attendant to the case, cost price was adopted.

4.2.5 It is also important to mention here that, the AO while completing the assessment of firm examined the sale/transfer of 26 flats partners (which includes 9 flats to the present assessee) at Rs.2925 per sq.ft, as a genuine transaction and allowed the transaction. This fact, coupled with the fact that even the service tax payment was also made considering the transfer cost at Rs.2925 per sq.ft, clearly shows that the actual sale/transfer value of 9 flats (transferred vide MOU dated 20.11.2008), is Rs.2925 per sq.ft. To adopt a lower value would be contradicting to valuation done by the service tax department and also the value accepted by the department itself in the hands of firm, during its assessment. To contradict the same, Assessing Officer ought to have arrived at an independent valuation of the flats. Instead he substituted the cost price adopted by the appellant for a later year. Without a fresh and independent valuation, Assessing Officer should not have rejected the value arrived at by the legal authority, namely the service tax department. The action of substituting cost price

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in place of commercial price is without a legal basis and contradicts department's own stand in the case of the firm.

4.2.6 In view of the above reasons, I am of the considered opinion that the acquisition of 9 flats, vide MOU dated 20.11.2008, measuring 10,602 sq.ft. @ Rs.2925/- per sq.ft., was purely a commercial transaction, transacted as per the prevailing market rates and hence justified. Therefore, the AO is not justified in comparing the 9 flats acquired on 20.11.2008 with those 7 flats acquired on 09.10,2009, which was at book value. Therefore, the AO is directed to adopt the cost of acquisition of 9 flats, measuring 10,602 sq.ft., acquired vide MOU dated 20.11.2008, @ Rs.2925/- per sq.ft., for the purpose of determining the capital gains. This ground of appeal is allowed.

5. The Ld.DR submitted that the Ld.CIT(A) erred in directing the AO to adopt purchase cost of 26 flats @ Rs.2,925/- per sq.ft., when the sale price recorded by the seller in his books of accounts is only at Rs.739/- per sq.ft. The Ld.DR further submitted that the Ld.CIT(A) erred in giving undue weightage to the MoU dated 20.11.2008, when the conditions in MoU were latter varied in the books of accounts of the firm and the sale was accounted only in the Financial Year 2013-14 @ Rs.739/- per sq.ft. The Ld.CIT(A) failed to appreciate the fact that how a property was sold at later stage in subsequent Financial Year, would cost higher price in the preceding Financial Year without any change in nature of the property.

6. The Ld.AR for the assessee, on the other hand, supporting the order of the Ld.CIT(A), submitted that the assessee has filed various details to substantiate cost of acquisition of first batch of 9 flats @ 2,925/- per sq.ft. which is supported by Service Tax paid by the partnership firm on sale value of flats. The Ld.AR further submitted that, the AO is erred in considering uniform cost price on the basis of subsequent cost paid by the assessee on 7 flats without appreciating the fact that subsequent transaction was done when the partnership firm got dissolved and assets of the firm has been

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distributed among the partners. The Ld.CIT(A) after appreciating the relevant facts has rightly directed the AO to adopt cost of acquisition as claimed by the assessee and hence, their orders should be upheld.

7. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The facts borne out from the record clearly indicate that the assessee has got property from a partnership firm where she was a partner. The partnership firm has allotted property to the assessee. The firm has allotted first batch of 9 flats to the assessee @ Rs.2,925/- per sq.ft. The firm had also allotted the second batch of 7 flats to the assessee @ Rs.739/- per sq.ft. The first batch of 9 flats were allotted in the FY 2008-09. The Second batch of 7 flats were allotted in the FY 2009-10. Admittedly, 16 flats allotted to the assessee are at similar in nature and probably from the very same layout. In fact, these details were not available either with the assessee or with the AO. The only basis for the assessee to adopt higher cost of acquisition for the first batch of 9 flats is an MoU between the assessee and the partnership firm dated 20.11.2008, as per which, the firm has allotted 9 flats @ Rs.2,925/- per sq.ft. The assessee claimed that said rate was prevailing market rate of the property and further, the firm was selling to outsiders @ Rs.2,925/- per sq.ft. The assessee further claimed that the partnership firm has paid Service Tax on sale value of flats @ Rs.2,925/- per sq.ft. The Ld.CIT(A) has accepted the explanation of the assessee without assigning any reason, as to how, a similar property, which has been transferred to

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the assessee in subsequent Financial Year at lesser rate would fetch or would cost higher rate in the previous Financial Year. Although, the assessee could not justify higher rate adopted for 9 flats taken during the FY 2008-09, but the Ld.CIT(A) on general comment has directed the AO to adopt cost of acquisition as claimed by the assessee without negating the observations made by the AO. The assessee could not produce any evidence to justify higher cost paid for 9 flats. Although, the assessee claims that the first batch of 9 flats were allotted as a commercial transaction between the assessee and the firm, but there is no evidence on record to suggest that those 9 flats were sold to the assessee as a commercial transaction and price paid by the assessee or fixed for those 9 flats is on par with prevailing market rate of the property as on the date. Moreover, when the Ld.CIT(A) has accepted higher cost of acquisition as claimed by the assessee by shifting onus to the AO to determine the Fair Market Value of the property as on the date of transfer, ought to have determined the Fair Market Value property by himself by referring the matter to Valuation Cell to find out the correct market value of the property. Therefore, we are of the considered view that the Ld.CIT(A) is completely erred in directing the AO to adopt cost of acquisition of 9 flats as claimed by the assessee ignoring the fact that very same property has been transferred to the assessee in the subsequent Financial Years at lesser rate. Hence, we set aside the order passed by the Ld.CIT(A) and restored the issue to the file of the AO and direct the AO to re-consider the issue afresh.

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The AO may, if so advised, refer the valuation of the property to the District Valuation Officer to determine correct market value of the property as on the date of transfer.

8. In the result, the appeal filed by the Revenue is allowed for statistical purposes

Order pronounced on the 28th day of April, 2022, in Chennai.

Sd/-

(वी. दुर्गा राव)

(V. DURGA RAO)

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 28th April, 2022.

TLN

Sd/-

(जी. मंजूनाथा)

(G. MANJUNATHA)

लेखा सदस्य/**ACCOUNTANT MEMBER**

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF