

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
[Before Shri Rajpal Yadav, Vice-President & Shri Rajesh Kumar, Accountant Member]

I.T.A. No. 1330/Kol/2017
Assessment Year : 2011-12

Sri Hari Sadhan Konar, L/H Smt. Bondona Prova Konar (PAN: AERPK 5347 R)	Vs.	ITO, Ward-1(2), Burdwan
Appellant		Respondent

Date of Hearing	26.05.2022
Date of Pronouncement	27.06.2022
For the Appellant	Shri Soumitra Choudhury, Advocate
For the Respondent	Shri Sailen Samaddar, Addl. CIT

ORDER

Per Shri Rajesh Kumar, AM:

This is an appeal preferred by the assessee against the order of the Commissioner of Income Tax(Appeals)-Burdwan [hereinafter referred to as ‘CIT(A)’] dated 30.12.2016 for the assessment year 2011-12.

2. The issue raised in ground no.1 is general in nature and is not pressed at the time of hearing and accordingly dismissed as not pressed.
3. The issue raised in ground no. 2 is against the order of Ld. CIT(A) confirming the addition of Rs. 5,04,451/- as made by the AO on account of long term capital gain.
4. Facts in brief are that the assessee sold a plot measuring 52300.5 sq. ft. for a consideration of Rs. 17,00,000/- which was purchased by the assessee on 17.05.1978 at Rs. 20,000/-. The assessee’s share in the said the said plot was 1/4th. The AO computed the capital gain by applying the provisions of Section 50C of the Act by taking deemed sale consideration at Rs. 21,60,004/- in terms of stamp authority valuation and taking the fair market value at Rs. 21,000/-, the index cost was calculated at Rs. 1,42,200/-. Accordingly the long term capital gain was calculated at

Rs. 20,17,804/- after allowing the deduction of indexed cost as stated above and accordingly made an addition of Rs. 5,04,451/- being 1/4th of the total gain on the sale of the said plot in the hands of the assessee. Pertinent to note that AO has taken value as on 1.4.1981 as same as the purchase price as on 17.05.1978 without referring the matter to the DVO. It is noteworthy that the assessee has shown nil capital gain on the sale of said plot by taking the FMA as on 1.4.1981 without any basis. The order of the AO was confirmed by the Ld. CIT(A) by passing a very cryptic order.

5. After hearing the parties and perusing the material on record and also impugned order, we note that the AO has computed short term capital gain on sale of plot titled deed no. 1369 of 2011 which was sold for a consideration of Rs. 17 Lakhs having the stamp value of Rs. 21,60,004/- as per Stamp Valuation Authority. The assessee had 1/4th share in the said plot which was acquired on 17.05.1978 with a price of Rs. 20,000/-. The assessee computed long term capital gain at nil whereas the AO computed assessee's share being 1/4th of the long term capital gain of Rs. 5,04,451/- without any basis by taking fair market value as on 1.4.1981 without referring the valuation issue to the DVO and thus calculation as made by the AO is devoid of reasonable and cogent basis. Similarly the Ld. CIT(A) confirmed the order of AO without giving any reasoning and justification. The Ld. A.R. vehemently submitted before us that the AO should have referred the matter to the DVO for ascertaining the fair market value as on the date of sale as well as on 1.04.1981 and as the calculation made by the AO is just a guess work which is based on presumptions and assumptions without any reasonable and rationale basis and therefore the same may be sent back to the file of the AO for assessing the correct amount of capital gain after making necessary reference to the DVO for ascertaining the fair market value of the plot as on the date of sale as well as on 1.4.1981. We find merits in the contentions of the assessee that the addition made by the AO is just on the basis of presumptions and assumptions without any valid basis. Accordingly we set aside the issue to the file of the AO with the direction to refer the matter to DVO for ascertaining the fair market value of the plot as on the date of sale as well as on 1.4.1981 and compute the long

term capital on the basis of said report after affording reasonable opportunity of hearing to the assessee. Ground no. 2 is allowed for statistical purposes.

6. The issue raised in ground no. 3 is against the confirmation of addition of Rs. 1,29,329/- by Ld. CIT(A) as made by the AO on account of long term capital gain on sale of plot.

7. Since the issue raised by the assessee in ground no. 3 is similar to ground no. 2 wherein the AO has computed the capital gain on the basis of presumptions and assumptions by taking the value of plot measuring 16405.125 sq. ft on estimated basis. Consequently we restore the issue to the file of the AO as the same direction to ascertain the fair market value as on the date of sale as well as on 1.4.1981 by referring the matter to the DVO and accordingly assess the long term capital gain falling to the share of the assessee. Ground no. 3 is allowed for statistical purpose.

8. The issue raised in ground nos. 4 and 5 is against the confirmation of addition of Rs. 70,39,460/- by Ld. CIT(A) as computed and added by the AO on account of short term capital gain received upon retirement from the registered partnership firm.

9. Facts in brief are that the assessee was partner in a registered partnership firm M/s Damodar Cold Storage with 12.5% share in the profit. The assessee continued in the firm till 14.1.2011 and retired w.e.f. 15.1.2011. His share in the partnership firm as per the partner's capital account worked out to Rs. 30,11,251/-. The AO upon perusing these facts calculated the deemed capital gain on the properties owned by the firm in the following manner:-

i.	Building	:	Rs. 65,99,116/-
ii.	Electrical Installation	:	Rs. 2,31,102/-
iii.	Plant & Machinery	:	Rs. 4,89,397/-
iv.	Insulation	:	Rs. 2,29,001/-

v.	Furniture & Fixture	:	Rs. 47,788/-
vi.	Wooden Rack	:	Rs. 6,71,284/-
	Total	:	Rs. 82,67,688/-

The AO calculated the deemed sale consideration in terms of Section 50C of the Act at Rs. 6,45,83,358/- and the assessee's share @ 12.5% was calculated at Rs. 80,72,920/-. Similarly the value of assets attributable to the share of the assessee were calculated at Rs. 10,33,466/- by applying 12.5% to the total assets of the firm of Rs. 82,67,688/- and thus computed the short term capital gain at Rs. 70,39,460/- and added the same to the income of the assessee.

10. The Ld. CIT(A) confirmed the order of AO by passing a cryptic and non-speaking order as to how the assets of the firm could be subjected to taxation in the hands of the assessee partner who retired from the year by taking deemed sale consideration as per provision of Section 50C of the Act.

11. The Ld. A.R. vehemently submitted before us that the AO has grossly erred in making the addition on account of short term capital gain in the hands of the assessee who retired during the year w.e.f 15.1.2011 and was having a share of 12.5% in the profits of the firm. The Ld. A.R submitted that there was no provisions on the Statute providing for calculation of deemed capital upon retirement of partner and specifically referred to section 9B of the Act which was brought on the Statute book by Finance Act, 2021 w.e.f 1.4.2021 which is applicable from AY 2021-22. The ld. Counsel for the assessee submitted that this section provided for making the addition in the hands of partner of a firm where the said party receives any capital assets or stock in trade or both from the specified entity in connection with reconstitution of said entity, then the said entity shall be deemed to have transferred capital asset or stock in trade or both to the partner in the year in which such capital asset or stock in trade or both have received by the partner. The Ld. Counsel for the assessee submitted that since there was no provisions in the Act to assess the deemed capital gain in the hands of the

retiring partner upon reconstitution of the firm, therefore the addition as calculated by the AO of Rs. 70,39,460/- on account of short term capital gain in respect of various assets of the firm on hypothetical basis may kindly be deleted.

12. The Ld. D.R on the other hand relying on the order of the authorities below.

13. Having considered the rival contentions and perusing the material on record, we note that during the year the assessee has retired from the partnership firm w.e.f. 15.1.2011 in which the assessee was having 12.5% share in the profit. The Firm was having various assets as given above aggregating to Rs. 82,67,688/-. The AO calculated the short term capital gain by computing the deemed sale consideration at Rs. 6,45,83,358/- u/s 50C of the Act and assessee's share was calculated at Rs. 80,72,920/-. Similarly the proportionate asset cost which fall to the assessee's share was calculated at Rs. 10,38,460/- and thus calculated the short term capital gain at Rs. 70,30,31,460/- which was added to the income of the assessee. We have also perused the provisions of Section 9B and also analysed the arguments made before us by both the Parties and find that there was no provision in the Act to compute the deemed gain in respect of assets of the firm upon reconstitution retirement of a partner. We also note that a specific provision was inserted by Finance Act, 2021 w.e.f. 1.4.2021 providing for making such deemed addition on account of capital gain upon retirement of a person from the partnership firm which are applicable for AY 2021-22 and not to the year under consideration. Accordingly we set aside the order of Id CIT(A) and direct the AO to delete the addition. Ground nos. 4 and 5 are allowed.

14. Ground no. 6,7 and 8 are not pressed at the time of hearing and are dismissed as not pressed.

15. Ground no. 9 is general and consequential in nature and accordingly the ground is dismissed.

16. In the result, the appeal of the assessee is allowed statistical purposes.

Order is pronounced in the open court on 27th June, 2022

Sd/-

(Rajpal Yadav)
Vice-President

Sd/-

(Rajesh Kumar)
Accountant Member

Dated: 27th June, 2022

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- Sri Hari Sadhan Konar, L/H Smt. Bondona Prova Konar, 1/1/Ram Krishna Road, P.O & District-Burdwan
2. Respondent – ITO, Ward-1(2), Burdwan
3. The CIT(A)- Burdwan (Sent through e-mail)
4. Pr. CIT- Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata