

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "H", MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.2836/M/2013
Assessment Year: 2003-04**

**ITA No.2514/M/2011
Assessment Year: 2004-05**

**ITA No.3923/M/2010
Assessment Year: 2006-07**

M/s. Kohinoor Textiles Printing Works, M/s. J.J. Mehra & Co., Chartered Accountant, 11 Laxmi Building, 2 nd Floor, Off. Turner Road, Bandra (West), Mumbai – 400 050 PAN: AA AFK2198P	Vs.	Asst. Commissioner of Income Tax, Ward-22(1), Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Kiran Kapadia, A.R.
Revenue by : Shri Tejinder Pal Singh, D.R.

Date of Hearing : 12 . 07 . 2022
Date of Pronouncement : 25 . 08 . 2022

ORDER

Per : Kuldip Singh, Judicial Member:

For the sake of brevity aforesaid appeals bearing common question of law and facts are being disposed of by way of composite order (facts of A.Y. 2003-04 are discussed to decide the issue in controversy).

2. Appellant M/s. Kohinoor Textiles Printing Works (hereinafter referred to as the assessee) by filing aforesaid appeals sought to set aside the impugned order dated 20.01.2012, 21.01.2011 & 25.01.2010 for A.Y. 2003-04, 2004-05 & 2006-07 respectively passed by Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] on the grounds inter alia that:

ITA No.2836/M/2013 for A.Y 2003-04

“1) The Learned Commissioner of Income Tax (Appeals) - 33, Mumbai and the Learned Asstt. Commissioner of Income Tax has erred in computing the revised Long Term Capital Gains on Sale of FSI of Land of Rs..3042240/- citing that there is conversation of the capital asset into stock in trade and the process of conversion amounts to transfer within the meaning of section 2 (47) of the Income Tax Act. The liability of capital gain arises in the year in which the asset is converted into stock in trade. The Learned Asstt. Commissioner of Income - tax has stated that the assessee by an agreement with Kallol Developers had converted the said asset into stock in trade on 23/10/2000. Though the agreement was subsequently cancelled and the said FSI was sold to M/s Raj Rajeshwai Associates and invoked the provisions of section 45 (2) of Income Tax Act, 1961 and have got a valuation done as on 01/04/1981 by a District Valuation Officer and subsequently a fair market value as on 23/10/2000 has been computed of Rs.15663600/- from which the cost of acquisition u/s 45 (2) of Rs.12621358/- has been reduced to arrive at the Long Term Capital Gain of Rs.3042242/-.

2) Your Appellant had entered into an agreement to sell part of the FSI of the land in their capital asset at Ghatkopar to M/s Kallol Developers. However the said agreement to sell did not materialize and it was cancelled. Our clients had received Rs.3500000/ (Rupees Thirty Five Lacs Only) as advance from M/s Kallol Developers which was refunded, so the transaction did not fruitify at all.

Without prejudice to the above, our clients have never converted nor have they the intention to convert their capital asset into Stock in Trade so the question of fair market value of the capital asset as on 23/10/2000 does not arise.

The Learned member of the Tribunal have agreed to your appellants contention by observing in para 5 on page 4 of their order:

We have considered the issue and facts as brought out of record. We are not in agreement with either A.O's action in considering the capital gain holding that assessee has converted the asset into stock in trade”.

Further the subsequent agreement dated 31/07/2002 with M/s Raj Rajeshwari Associates is again sale of part of their capital assets i.e. sale of part of the FSI of the land (Capital Asset). Again there is no conversion of their fixed asset into Stock in Trade and the Capital Gains on Sale of part of the fixed assets has been offered for taxation. Since the property has been acquired some time in 1947, for valuation of fair market value as on 01/04/1981 was done.

Your appellant got the property valued from an approved valuer M/s S.K. Godbole & Associates, as per their valuation report the cost of the land as computed and submitted to the Learned Income Tax Officer. However the Learned Asstt. Commissioner of Income — tax got the property valued from the department valuer, who has valued the property as on 01/04/1981 at a lower price as compared to the valuation report of your appellant government approved valuer. Your appellant request that the value of the property should be adopted at the rate given by your appellants valuer.

3) Being aggrieved with the order passed by the Learned Commissioner of Income Tax (Appeals) — 33, Mumbai, your appellant has preferred this appeal & requests your honour to kindly delete the additions made against your appellants.

Your Appellant craves leave to add, to delete, to alter any Grounds of Appeal.”

3. This is second round of litigation as in the first round the coordinate Bench of the Tribunal vide order dated 16.01.2009 held by returning following findings:

“5. We have considered the issue and facts as brought out of record. We are not in agreement with either AO's action in considering the capital gain holding that assessee has converted the asset into stock in trade nor the action of CITA) in deleting the same and directing the A.O to accept the valuation report holding that the same was filed alongwith the return. First of all the agreement with Ms. Kallol Developers happened on 28/10/200 relevant for AY 2001-02 and not in AY 2003-04 The transaction with M/s Raj Rajeshwari Associates did occur in the year under consideration. No where in the order the A.O discussed the revised working or computation or nature of income offered by the assessee and why he is differing from that stand. It is true that the assessee has not co-operated with the A.O as can be seen from the discussion in the order, but that does not mean that AO can unilaterally decide issues without considering the facts. The A.O. in our opinion has wrongly considered the capital gain business loss working. The Id. CIT(A) without going into the details has given the findings as under:-

“3.3 I have gone through the arguments and submissions of ld. A.R of the appellant as well as the contents of the impugned assessment order. I find force in the arguments of the ld. AR. of the appellant. The facts and circumstances are same as were in the same of M/s. Kajrani Vs. DCIT (9 ITD 429 Mumbai) to the extent that the valuation from a registered valuer as on 1/4/81 was furnished by the appellant before the Assessing Office along with return. Hence, the appellant's case is squarely covered by the ratio of Hon'ble ITAT (supra) and there is no justification in disturbing the valuation of the appellant as on 1/4/81. Accordingly, the ld. Assessing Officer is directed to re-compute the capital gains, if any, by adopting the valuation as on 1/4/81 in accordance with the appellant's registered valer's report and give consequential relief”

As can be seen from the above, in our view he wrongly considered that the assessee has enclosed the valuation report along with the return of income, whereas the same was filed only before completing the assessment In view of this, we are of the considered opinion to set aside the order of the AO and CIT(A) on this issue and restore the matter back to the AO to consider the facts afresh and redo the assessment according to the law. The assessee is directed to co-operate with the AO in furnishing the facts/clarification/details etc so as to substantiate the claim made. Needless to state that AO should give sufficient opportunity to the assessee and assessee should co-operate with the department in this regard. With the above directions, the matter is restored to the A.O.”

4. Briefly stated facts necessary for adjudication of the controversy at hand are: the assessee is into the business of providing its land and building on rental basis and has also been providing certain other services. The assessee is owner of a property bearing CTS No.4060, 4061, 4062 & 4064 of village Kirol admeasuring 7349 sq. mts of 79113.03 sq.ft. and the factory buildings standing thereon at LBS Marg, Ghatkopar (W), Mumbai-86.

5. During the survey operation conducted under section 133A of the Income Tax Act, 1961 (for short the ‘Act’) on 02.03.2006 certain documents/papers were impounded including indenture dated 18.07.2001 executed between the assessee and M/s. Kallol Developers, which could not be materialized. Another agreement for development

dated 31.07.2002 between assessee and M/s. Rajrajeswari Associates qua 855.1 Sqr. Mtr. of developable land with the right to construct building consuming Floor Space Index (FSI) of 20610 sq. ft. has been transferred. Assessee has been offering rental income by letting out certain portion of the said building and by selling FSI related to the said land and building the assessee has converted its assets to the stock in trade and the process of conversion amounts to transfer within the meaning of section 2(47) of the Act. Assessing Officer (AO) also has taken the view that the liability of capital gain arises in the year in which the asset was converted into stock in trade. The assessee by an agreement with M/s. Kallol Developers had converted the said assets into stock in trade on 23.10.2000, however, the agreement was subsequently cancelled and the said FSI was sold to M/s. Raj Rrajeshwari Associates. The AO proceeded to hold that the profit arising from transfer by way of conversion of capital asset into the stock in trade is chargeable to tax in the year in which the stock in trade is sold and for computing the capital gain the fair market value of the capital assets on the date on which it was converted or treated as stock in trade shall be deemed to be the full value of the consideration receipt or accruing as a result of transfer of the capital assets. Accordingly, AO determined the long term capital gain to the tune of Rs.30,42,240/-, Rs.2,15,15,060/- & Rs.84,82,640/- in A.Y. 2003-04, 2004-05 & 2006-07 respectively.

6. Assessee carried the matter before the Ld. CIT(A) by way of filing appeals who has upheld the addition by dismissing the appeals. Feeling aggrieved with the impugned order the assessee has come up before the Tribunal by way of filing present appeals.

7. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

8. At the very outset, the Ld. A.R. for the assessee fairly conceded that the assessee could not putforth its case before AO as well as Ld. CIT(A) because of lack of some expert know how engaged by the assessee. When we examine the impugned order passed by the Ld. CIT(A) in the light of the aforesaid contentions made by the Ld. A.R. it has come on record that the issue raised by the assessee has not been decided by the Ld. CIT(A) in entirety. The simple issue was to be decided was, “as to whether assessee has converted his fixed assets being land into the stock in trade; and as to whether the assessee is liable to pay the long term capital gain on the sale of FSI”.

9. In order to decide the aforesaid issues the Ld. CIT(A) returned the following findings:

“3.2 However it is noted that A.O. has not assessed for conversion of asset into stock in trade though discussions are made in the order. In fact duly complying with the Hon'ble ITAT's decision, that the transaction with M/s.Raj Rajeshwari Associates did occur in the year under consideration, the A.O. has worked out capital gain on sale of 20610 sq.ft. of FSI made to M/S Raj Raj Rajeshawari which is reflected at Rs. 8,99,2650 by the appellant. For sale consideration as well as value as on 1.4.1981, the A.O. referred the matter was to the DVO vide his letter dated 26.12.2008 and in response to the same the DVO submitted his valuation report vide letter No. dated 07.12.2010 wherein he has determined the value of property @ Rs. 137/- per sq.ft. at Rs.28,23,570/- as on 01.04.1981. The AO accordingly has worked out the long term capital gain at Rs.30,42,242/- in view of this ground no.1 and part of ground no. 2 dealing with sale of FSI to M/s. Kallol Developers, both being infructuous are dismissed.

3.3. In the later part of ground no.2 of the instant appeal the appellant is challenging the valuation done by DVO. During the appellate proceedings the appellant has submitted that Id.AO has taken the figure by adopting the

value given by DVO @ Rs. 137/- per sq.ft. whereas the Government approved registered valuer of the appellant has given the value @ Rs.210/- per sq.ft. The appellant has provided a copy of this valuation report in form of Annexure-5. The appellant has prayed that the value taken by his registered valuer @ Rs.210/- per sq.ft. should be taken to work out the capital gain in place of the taken by DVO on reference made by the AO on the direction of the Hon'ble ITAT, Mumbai Rs.137/- per sq.ft.

3A. I have gone through the submissions and I find that the plea of the appellant is not tenable for one simple reason that the Hon'ble ITAT, Mumbai, has directed the A.O. to refer the matter to DVO. Since this is second round of litigation which is consequential to the direction given by the Hon'ble ITAT, Mumbai, and whose relevant portion i.e para 5 is reproduced above already clearly speaks about the direction Hon'ble ITAT have given i.e. restoring the matter and to be done a fresh at the level of A.O. The A.O. consequently has taken the value given by DVO for working of the capital gains. What appellant asking for now is actually to substitute the valuation done by DVO by the value given by his registered valuer for which he has got the only argument that his valuer is a government approved registered valuer.

3.5 I have also gone through the provisions of act and to rny understanding there is no sub-section which empower the CIT(A) to supersede the valuation as per the report given by DVO . As the same is a technical report given by duly qualified and skilled person empowered so by the provision of Income Tax Act itself, I am not inclined to accede to this request as hence the plea of appellant is not entertain able is rejected.

3.6. Appellant has also objected to A.O.'s action of taking rate of FSI as per ready reckoner, It is also noted that even though the appellant has not taken objection during the appellate proceedings, the A.O. has referred that also to the DVO . The DVO's report however was still awaited till the date of passing the order. The A.O. has clearly stated that on receipt of the same if there is any variation same will be taken cognizance there of and hence I do not have any reason to disturb the rate adopted by A.O. as per ready reckoner to calculate capital gain on sale of FSI made to M/S Raj Rajeshawari as same is well within provisions of law u/s 50C. Accordingly ground no.1 and 2 are dismissed.”

10. When we examine the aforesaid findings returned by the Ld. CIT(A) it apparently shows that the Ld. CIT(A) has not decided the issue in entirety rather returned the cryptic findings because in para 3.1 Ld. CIT(A) admitted that he is in agreement with assessee that the treatment of fixed assets reflected by the assessee but treated as converted into stock in trade by the AO was not required in view of the

remand order passed by the Tribunal but AO has not assessed for conversion of asset into stock in trade. We are of the considered view that when assessee has come up with certain facts on record and AO was directed to decide the case afresh and re-do the assessment according to law, the AO was to proceed as if he is doing fresh assessment.

11. The Ld. CIT(A) also failed to bring on record as to how the AO has not decided the issue if the assessee has converted his fixed assets into the stock in trade but called the report from DVO and proceeded to work out the long term capital gain. It is again surprising as to how the Ld. CIT(A) while dismissing the grounds No.1 & 2 qua the sale of FSI to M/s. Kalol Developer being infructuous without examining the findings returned by AO on this issue.

12. The Ld. CIT(A) has also not determined the issue as to whether capital gain under section 45(2) of the Act on conversion of fixed assets being land into stock in trade computing the business loss of Rs.66,63,600/- for assessment year 2003-04 rather upheld the order passed by the AO merely on the basis of report of DVO. The Ld. CIT(A) has also not decided the issue raised by the assessee if the AO has erred in not adjusting the business loss against the long term capital gain under the provisions contained under section 72 of the Act. The factual adjudication of all the aforesaid issues is required to be done.

13. At the same time when we examine the ground raised by the assessee before the Ld. CIT(A) as extracted in para 2 of the impugned order the same are very vague and ambiguous and argumentative one. Before the Ld. CIT(A) even assessee was not clear as to how and on what ground he is challenging the assessment order before the Ld.CIT(A).

In these circumstances, we are of the considered view that aforesaid appeals are required to be remanded back to Ld. CIT(A) to decide afresh without being influenced by findings returned by Tribunal in both the rounds of litigations after providing opportunity of being to the assessee. The Assessee is at liberty to file revised grounds if any before the Ld. CIT(A). Consequently, the aforesaid appeals filed by the assessee are allowed for statistical purposes.

Order pronounced in the open court on 25.08.2022.

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 25.08.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.