

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "B", BANGALORE**

Before Shri George George K, JM & Ms.Padmavathy S, AM

ITA No.101/Bang/2020 : Asst.Year 2011-2012

Sri.Thayappa Balakrishna No.987, 1 st Block, 3 rd Stage 11 th Main, Basaveshwaranagar Bengaluru - 560 079. PAN : ABDPB4839N.	v.	The Assistant Commissioner of Income-tax, Circle 8(1) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.Ravi Shankar, Advocate
Respondent by : Sri.K.R.Narayan, Addl.CIT-DR

Date of Hearing : 21.11.2022	Date of Pronouncement : 22.11.2022
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ORDER

Per George George K, JM :

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 10.10.2019. The relevant assessment year is 2011-2012.

2. The grounds raised read as follows:-

“1. The order of the learned Commissioner of Income-tax (Appeals) - 6 passed under section 250 of the Income Tax Act for A Y 2011- 12 in so far as it is against the Appellant is opposed to law, weight of evidence, natural justice, probabilities, facts and circumstances of the Appellant's case.

2. The appellant denies itself liable to be assessed to total income of Rs.88,23,835/- as against returned income Rs.57,16,109/- on the facts and circumstances of the case.

3. The assessment order passed by the learned Commissioner of Income-tax is without jurisdiction and consequently the assessment order passed is bad in law on

the facts and circumstances of the case.

4. *The learned Commissioner of Income-tax (Appeals) was not justified in law in confirming the addition made by the learned Assessing Officer under the head short term capital gain a sum of Rs.31 ,07,726/ - on the facts and circumstances of the case.*

5. *The learned Commissioner of Income-tax (Appeals) erred in holding that the learned Assessing officer rightly brought to tax the difference between the amount received and the amount spent on building materials and fixtures as the appellants short term capital gain on the facts and circumstances of the case.*

6. *The learned Commissioner of Income-tax (Appeals) failed to appreciate that the learned Assessing Officer was not justified in law in computing the capital gains under two different heads of capital gains as long term and short term on the premise that the appellant has himself offered an alternate computation in respect of capital gains as consent cannot confer jurisdiction and the learned Assessing Officer ought to have assessed the total sale receipts under the head long term capital gains only on the facts and circumstances of the case.*

7. *The learned Commissioner of Income-tax (Appeals) failed to appreciate that the learned Assessing officer was not justified in law in considering the cost of improvement made to land by way of construction of building and the resulting sale proceeds under the head short term capital gains, rather the learned Assessing officer ought to have adopted both the receipts as the sale consideration of the said property as a composite unit in the hands of the appellant till date of sale as the said sale was made to the same purchaser on the facts and circumstances of the case.*

8. *The learned Commissioner of Income-tax (Appeals) was not justified in law not allowing the claim of the appellant a sum of Rs.14, 15,840/ - as deduction being labour wages paid to building under construction as part of the cost of improvement of capital assets on the facts and circumstances of the case.*

9. *The appellant denies himself liable to pay interest under section 234B and 234C of the Act on the facts and circumstances of the case.*

10. *The appellant craves leave of this Hon'ble Tribunal, to add, alter, delete, amend or substitute any or all of the above grounds of appeal as may be necessary at the time of hearing.*

11. *For these and other grounds that may be urged at the time of hearing of appeal, the appellant prays that the appeal may be allowed for the advancement of substantial cause of justice and equity."*

3. The brief facts of the case are as follows:

The assessee is an individual. For the assessment year 2011-2012, the return of income was filed on 28.03.2012 declaring total income of Rs.57,16,109. In the said return of income, the assessee had computed long term capital loss on sale of immovable property at No.5, 17th Cross, Sadashivanagar, Bangalore. The details of computation of long term capital loss in the return of income filed by the assessee are as under:-

Sale consideration	Rs.5,28,04,899
Purchased in the year 2006-2008	Rs.7,52,23,208
Less : Index cost of acquisition 54,909,768 x 711/519	
Less : Cost of Improvement	Rs.89,00,751
Building under construction 64,97,173 x 711/519	
Less : Borrowing Cost	Rs.1,64,88,500
	Rs.10,06,12,460
Long term capital loss on sale of property	Rs.4,78,07,560

4. The return was selected for scrutiny and notices u/s 143(2) and 142(1) of the I.T.Act were issued to the assessee and duly served. During the course of assessment proceedings, the details of the sale transaction were called for.

The AR, in the course of hearing, explained (vide letter dated 27.03.2014) that the property was sold for Rs.4,32,00,000 only as the assessee was in need of finance. It was further stated that there is a mistake in indexation of cost of improvement. It was stated that investment in the building under construction was made during the previous year relevant to the assessment year 2010-2011, and therefore, no indexation is available. In the said letter, the capital loss was re-computed. The content of the letter reads as follows:-

“We further submit that, since the building was only partially constructed, no profit can be attributed to the same. Considering this fact, and also considering the fact that, no indexation is available for the investment on the building, the long term capital loss and short term capital gain are computed as under:-

(A) Long term capital Loss

Sale consideration from sale of land	Rs.4,32,00,000
Less : Indexed cost of acquisition of land (Purchased in the year 2006-2007)	
$\frac{54,909,766 \times 711}{519}$	7,52,23,208
Interest on borrowing cost capitalized	1,64,88,500

	Rs.9,17,11,708

Long Term capital loss from sale of property	(-) Rs.4,85,11,708
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(B) Short term capital gain

Sale consideration from sale of building Materials	Rs.96,04,899
Less : Cost of building under construction	Rs.64,97,173

<i>Short term capital gain from sale of building Appurtenant to land</i>	<i>Rs.31,07,726</i>
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We request your goodself to kindly adopt above computation of long term capital loss and short term capital gain while passing the assessment order and oblige.”

5. The A.O. noted that the impugned property has been purchased by the assessee vide three sale agreements, one dated 30.05.2006 and two sales deed dated 28.07.2006. The A.O. was of the opinion that since the loan has been taken for construction of the building, the interest expenditure are not relatable to the acquisition of land, which was subject matter of computation of long term capital gains. The A.O., therefore, held that only the indexed cost of acquisition of land as per purchase deed (i.e., Rs.5,49,09,768) should be considered as deduction in computing long term capital gains. The A.O. accordingly re-computed the capital loss as under:-

Sale consideration from sale of land	Rs.4,32,00,000
Less : Indexed cost of acquisition of land (Purchased in the year 2006-07)	
<u>54,909,768,711</u>	
519	Rs.7,52,23,208
Long Term capital loss from sale of Property.	(-) Rs.3,20,23,208

6. Further, during the course of assessment proceedings, vide letter dated 13.11.2013, the assessee had submitted copy of sale receipt “sale receipt” dated 19.07.2010 and e-stamp paper of Rs.2 as per which Rs.96,04,899 was received by the assessee as total consideration for having sold the demolished

building materials of three-storeyed building bearing property No.281-5, PID No.9, 99-14-5 at Sadashivangar, Bangalore. It was further stated in the letter of the assessee that the land property had a building under construction, the value of which is shown in the balance sheet as on 31.03.2010 at Rs.64,97,173. In the return of income, this amount of Rs.64,97,173 was shown as cost of improvement and indexed in the computation of capital gains. However, in the revised computation given during the course of assessment, this mistake was noticed and was computed as short term capital gain. The incomplete building has been demolished and only the building materials salvaged from it were sold separately. This short term capital gains of Rs.31,07,726 (96,04,899 – 64,97,173) on sale of building material was brought to tax by the A.O.

7. Aggrieved, the assessee filed an appeal before the first appellate authority. The assessee filed a detailed written submission. The gist of the same is reproduced at para 4 of the impugned order of the CIT(A). The CIT(A) called for a remand report from the A.O. The A.O. submitted the remand report, which was received by the CIT(A) on 20.03.2019. To the remand report, the assessee had filed rejoinder, which was received by the CIT(A) on 25.09.2019. The CIT(A) partly decided the appeal in favour of the assessee by allowing the interest expenditure to be included in the cost of acquisition. However, the assessee's claim of amount of Rs.64,97,173 to be included in the cost of improvement was rejected by the

CIT(A). Further, the assessee's claim for granting additional expenses of Rs.14,15,840 was also rejected by the CIT(A) by stating that the assessee has not produced any supporting bills / invoices and hence no credence is to be given to the claim that these expenses should be included as cost of improvement. The relevant finding of the CIT(A) in this regard reads as follows:-

“However, the appellant's claim that the amount of Rs.64,97,173/- to be included as cost of improvement cannot be entertained for two reasons – the appellant had sold only a vacant site as seen from the schedule to the sale deed dated 19.07.2010 reproduced below:-

“All that piece and parcel of the immovable property, being a vacant site after demolition of the old building bearing ward No.99,PID No.99-16-5, New BBMP No.5, (old CITB No.281) situated at 17th Cross, Sadashivanagar (Formerly Upper Palace Orchard Extension), measuring.”

Further, the appellant had himself submitted a receipt on stamp paper showing receipt of Rs. 96,04,899/- for sale of building materials and fixtures from the demolished building. The appellant cannot now claim that this is part of the sale consideration of the land, since the asset that was transferred as discussed above, was the land alone. The appellant has further tried to claim Rs.64,97,173/- as the cost of Improvement and even claimed indexation on the same even though by his own admission, this amount was spent during the F.Y. 2009-10. There is no merit in this claim of the appellant as the amount of Rs. 96,04,899 is separate from the consideration received for the sale of the land and the AO has rightly brought to tax the difference between the amount received and the amount spent on these building materials and fixtures as the appellant's short term capital gains. The addition of Rs.31,07,726/- is therefore confirmed. The appellant's claim that he had incurred labour costs of Rs.14,15,840/- has been made belatedly during remand proceedings and apart from a ledger account, is not supported by any bills or invoices. Hence no credence needs to be given to the appellant's claim that this amount should be incurred as cost of improvement. The grounds of appeal raised are therefore partly allowed.”

8. Aggrieved by the CIT(A)'s order, the assessee has filed the present appeal before the Tribunal. The assessee has filed a paper book comprising of 113 pages enclosing therein audit report in Form 3CB and Form 3CD, the financial statement for the assessment year 2011-2012, the written submissions filed before the AO / CIT(A), copy of the ledger account for the relevant financial year, copy of the loan details received from GE Money Financial Services Limited and interest on such loan etc. Apart from the reiterating the submission before the A.O. and the CIT(A), the learned AR by relying on the judgment of the Hon'ble Apex Court in the case of Giridhar G. Yadalam v. CIT reported in (2016) 384 ITR 52 (SC) submitted that the unfinished building is not a asset and same cannot be assessed as short term capital loss. The learned AR submitted that the amount received on demolished building material is part of sale consideration of land and ought to be increased while arriving at the sale consideration. It was further submitted that the same needs to be reduced in computing capital gains.

9. The learned Departmental Representative by relying on section 2(14) of the I.T.Act, contended that any interest in property / unfinished building is also an asset and since it was sold within the period of three years, the same ought to be assessed as short term capital gains. Further, the learned DR submitted that the judgment of the Hon'ble Apex Court relied on by the learned AR is distinguishable, since that was

case pertaining to Wealth-tax Act, 1957, wherein the Lordship held that merely an unfinished building cannot be termed as an asset, which can be exempted as per section 2(e) of the Wealth-tax Act, 1957.

10. We have heard rival submissions and perused the material on record. As rightly pointed out by the first appellate authority, the claim of assessee to include a sum of Rs.64,97,173 (cost of unfinished building as on 31.03.2010 as per balance sheet) to cost of improvement cannot be accepted for two reasons. Firstly, the assessee had only sold vacant site and the same is evident from the sale deed dated 19.07.2010. Secondly, the assessee himself submitted a receipt on stamp paper showing a receipt of Rs.96,04,899 towards sale of building material and fixtures from demolished building. The assessee, therefore, cannot turn around now and say that the amount of Rs.96,04,899 is part of the sale consideration of land. Moreover, the assessee during the course of assessment proceedings, filed revised computation disclosing short term capital gains on receipts of demolished building.

10.1 The assessee's reliance on the judgment of the Hon'ble Apex Court in the case of Giridhar G. Yadalam v. CIT (supra) is also misplaced. In the case considered by the Hon'ble Apex Court, the assessee had sought to exclude from 'net taxable wealth' a land as productive asset by stating that it was occupied by a building (though unfinished building). The

Hon'ble Apex Court rejected the contention of the assessee by holding that the land should be occupied by a building, which has been constructed and not a unfinished building. It was held by the Hon'ble Apex Court that only in such a scenario, it can be termed as productive asset not coming within the term "urban land". The dictum laid down by the Hon'ble Apex Court cannot be applied in the facts of the instant case. The definition of capital asset as per section 2(14) of the I.T.Act is wide enough to include property of any kind held by an assessee (including an unfinished building) and the sale proceeds of the same would be liable for capital gains as long term capital gains or short term capital gains, depending upon the period of holding. Therefore, the contention of the learned AR is rejected.

10.2 The assessee had also raised a contention that he had incurred labour cost of Rs.14,15,840 over and above the value shown for the building in the balance sheet as on 31.03.2010 at Rs.64,97,173. We are of the view the claim of assessee is to be rejected, since it is not supported by any bills or vouchers. It is the claim of the learned AR that the cash withdrawal has been utilized for incurring the labour cost to the tune of Rs.14,15,840. We fail to understand, how cash withdrawal can help the case of the assessee, in absence of any evidence to show that the assessee has actually incurred labour expenses to the tune of Rs.14,15,840. Therefore, we uphold the addition of short term capital gain of Rs.31,07,726 with

respect to the sale of building material, which the A.O. has rightly brought to tax. It is ordered accordingly.

11. In the result, the appeal filed by the assessee is dismissed.

Order pronounced on this 22nd day of November, 2022.

Sd/-
(Padmavathy S)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 22nd November, 2022.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-6, Bangalore.
4. The Pr.CIT-6, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore