

**IN THE INCOME TAX APPELLATE TRIBUNAL  
AMRITSAR BENCH, AMRITSAR**  
**BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER  
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER**

**I.T. A. Nos. 34 to 36/Asr/2022**  
Assessment Years: 2015-16 to 2017-18

Sh. Amar Nath Choudhary,  
Kothi No. 1, Akhnoor Road,  
Jammu (J&K)

[PAN: AAMPC 7872J]

**(Appellant)**

**V.** Dy. Commissioner of Income  
Tax, Central Circle, Jammu

**(Respondent)**

Appellant by : Sh. Joginder Singh, CA

Respondent by : Sh. Ravinder Mittal, Sr. DR

Date of Hearing : 22.02.2023  
Date of Pronouncement : 03.03.2023

**ORDER**

**Per Bench:**

All these appeals have been filed by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-5, Ludhiana even dated 12.11.2021 in respect of Assessment Years 2015-16 to 2017-18.

2. The assessee has raised the following grounds of appeal in ITA No. 34/Asr/2022:

- “1. That the Learned Commissioner of Income tax, (Appeals)-5, Ludhiana passed order Under section 250(6) of the Income tax Act, 1961 merely on assumptions, presumptions, surmises and conjectures, without appreciating the factual, legal and statutory position of the Law and facts of the case.
2. That on the facts and circumstances of the case, the Ld. CIT(A) has erred in confirming /10% of the total addition made by the Ld. AO in respect of sale of flats and the addition in respect of Commercial space has also been confirmed to 10% instead of 20% made by the Ld. AO without citing any reason for the same.
3. The appellant craves leave to add, amend, alter or otherwise raise any other ground of appeal.”

### 3. Grounds of appeal in ITA No. 35/Asr/2022

- “1. That the Learned Commissioner of Income tax, (Appeals)-5, Ludhiana passed order Under section 250(6) of the Income tax Act, 1961 merely on assumptions, presumptions, surmises and conjectures, without appreciating the factual, legal and statutory position of the Law and facts of the case.
2. That on the facts and circumstances of the case, the Ld. CIT(A) has erred in confirming 10% of the total addition made by the Ld. AO in respect of sale of flats without citing any reason for the same.
3. The appellant craves leave to add, amend, alter or otherwise raise any other ground of appeal.”

### 4. Grounds of appeal in ITA No. 36/Asr/2022

- “1. That the Learned Commissioner of Income tax, (Appeals)-5, Ludhiana passed order Under section 250(6) of the Income tax Act, 1961 merely on assumptions, presumptions, surmises and conjectures, without appreciating the factual, legal and statutory position of the Law and facts of the case.

2. *That on the facts and circumstances of the case, the Ld. CIT(A) has erred in confirming 10% of the total addition made by the Ld. AO in respect of sale of flats and the addition in respect of Commercial spaced has also been confirmed to 10% instead of 20% made by the Id. AO without citing any reason for the same.*
  3. *The appellant craves leave to add, amend, alter or otherwise raise any other ground of appeal.”*
5. There was a short delay of 34 days, in filing these appeals before the Tribunal. Considering the bonafide reason and no objection by the Ld. DR, the short delay is condoned and appeals are admitted on merits.
6. There is sole issue challenged by the appellant regarding confirmation of 10 % of the addition made by AO in respect of the sale of Flats and 10 % as against the 20% disallowance by AO in respect of the commercial open space on presumption and assumptions on identical facts in all the three years and hence, these appeals are adjudicated together for brevity.
7. Facts are discussed from ITA No. 34/Asr/2022 in respect of the Assessment Year 2015016 as a lead case. The case was selected for LIMITED SCRUTINY to examine the long term capital gain. The Ld. Assessing Officer vide order dated 27.12.2017 passed the order u/s 143(3) after examination of the issue and assessed the income at

Rs.6,42,74,781/- and raised additional demand of Rs.71,43,060/-. Against the said order, the assessee filed an appeal before the Ld. CIT(Appeals)-5, Ludhiana who vide his order passed Appeal No.10079/CIT(A)-5/ROT/132/Ldh/2018-19 dated 12.11.2021 allowed the appeal of the assessee partially and against the total addition of Rs.1,92,41,591/-made by the Ld. Assessing Officer allowed part relief to the extent of Rs.1,68,91,280/- and confirmed the balance addition of Rs.23,50,311/- by observing as under:

*“4.1 Grounds of Appeal Nos. 1 & 2 relate to addition made by the AO by enhancing the sale consideration of the property sold by the assessee during the year. The AO has mentioned that the assessee filed return on 31.10.2015 declaring total income of Rs. 4,50,33,190/- and the case was selected for limited scrutiny to examine the Long Term Capital Gain. In response to the notices, the AR attended the proceedings. It is further mentioned that as per the submission, the assessee derived income from sale & purchase of timber, rental income, income from other sources, besides income from capital gain. During the assessment, it was seen that the assessee entered into an agreement executed on 29<sup>th</sup> of January, 2008 between the family members on one hand known as 'owners and co-owners' and M/s. Ridhi Sidhi Infra Projects Pvt. Ltd. on other hand, known as 'Developer' and reproduced the relevant part & clauses of the agreement as per which, the land was to be provided by the assessee & his family members and the Developer agreed to develop the property into multistory commercial mall, office, residential flats etc. The cost of contribution as land by the assessee family was taken as 35% in respect of Portion-A and balance 65% by the developer and similarly, the cost of land for Portion B & C was 30% and the balance 70% by the developer and accordingly, the commercial project for Portion-A be shared in the ratio of 35: 65 with the owners and developers respectively and for Portion B & C, the residential flats will be shared in the ratio of 30:70. As per the AO, vide reply dated 21.08.2017, the assessee furnished the details of the parties to whom the flats have been sold along with the photocopy of the sale deeds and tabulated the details, Tower-wise number of flats sold, total*

amount and the share of the assessee as per agreement, at Rs. 3,22,91,579/-. Similarly, the share in sale of the Palm Island and multiplex cinema hall was also mentioned at Rs. 53,25,600/-. As per the AO, the assessee was required to furnish and produce the papers regarding the land on which the flats were constructed, revenue records, books of accounts, method adopted for valuation of each flat sold/commercial area along with the valuation report and variation in super area sold tower-wise/flat-wise. The reply filed by the assessee is reproduced in the assessment order and the AO mentioned that from the reply, it was revealed that the payments have been received as per the agreement. It is also mentioned that the query raised with regard to the valuation of the properties/valuation report, the variation in the selling price and the books of accounts were not produced and accordingly, further queries were raised which are also reproduced in the assessment order asking for valuation report in respect of each plot/flat sold and method adopted for its valuation, narration of the entries in the bank, ledger account of all the flats sold etc. As per the AO, the AR reiterated the earlier reply/submission, but did not produce the copy of the valuation report and method adopted for reaching a particular price in respect of the flats sold and therefore, a final show-cause notice was issued on 18.12.2017 which is also reproduced in the assessment order. Vide this show-cause, the assessee was intimated that the valuation report in respect of residential as well as commercial space has not been provided and it was seen that there is difference and variation in the cost of super area in each flat i.e. cost differs from floor to floor and flat to flat and accordingly, the assessee was asked as to why the highest selling price shown by the assessee through the sale deed may not be adopted in respect of residential & commercial space and addition made accordingly. As per the AO, the assessee again filed reply which was discussed with the AR but no new material was brought on record by the assessee to establish his version with respect to income shown by him as capital gains. The AO mentioned that in absence of plausible explanation and keeping in view the agreement entered by the assessee with the developer, the highest selling price shown by the assessee is being adopted in this case. It is also mentioned that it was a common practice by real-estate developers country-wide that they sell the space on per square feet rate basis which is missing in this case. It is further mentioned that from the document, it was seen that from the same super area flat, comprising same number of bed rooms, the registration have been done on varied amount which was an attempt on the part of the buyer/seller to suppress the actual value of the properties. It is also mentioned that in some cases, the cost of flat of similar dimensions has been shown to be just 40% of the cost of adjacent flat on the same floor which definitely create suspicion. Therefore, in the

*absence of any valuation of the flat (method of working of sale value adopted), provided by the assessee, the value of the highest amount registered for similar dimension flats, tower-wise was taken to arrive at per square feet value on the sale of flats. The AO gave examples of the cases where different values for same area were shown. The AO then tabulated the details of tower-wise flats sold and by adopting the highest value per square feet shown by the assessee as per the sale deed, the difference in respect of assessee's share has been calculated at Rs. 24,83,082.36 for Tower-A, Rs. 53,01,131.43 for Tower-B, Rs. 87,30,779/- for Tower-C and Rs. 16,61,219/- for Tower-M. The different for Palm Island was calculated by the AO by taking the value @120% (20% increase over the value taken by the assessee) which appeared reasonable keeping in mind the prevailing rate in the same area and the difference was calculated at Rs. 10,65,380/-. Accordingly, the income of the assessee for the year was assessed at Rs. 6,42,74,781/- as against returned income of Rs. 4,50,33,190/- by making addition of the above amounts.*

*The facts of the case, basis of addition by the AO and the arguments of the AR during the course of appellate proceedings have been considered. The AR has submitted that during the course of assessment, the appellant filed copies of sale agreements registered in the court of Sub-registrar and the AO prepared chart on this basis giving the details of buyers, flat number, super area, registration amount and share of the assessee. It is further submitted that the AO has worked out the sale consideration by applying higher rate of sale for flats ignoring the status of flats whether furnished or unfurnished. The AR further submitted that determination of price of flats depends upon various factors like location, furnished and unfurnished etc. As per the AR, the sale deeds are supported by valuation report of the Registered Valuer for the purpose of Stamp Duty Act. As per the AR, the AO failed to bring on record any evidence to prove that any extra consideration is received by the appellant over and above the agreement amount and adopted the rate of finished flat for unfinished flats also and made huge addition in sale consideration purely on surmises and conjectures. Further as per the AR, there is no provision in the Act permitting the AO to enhance the sale consideration except u/s 50C of the Income Tax Act, 1961 which provides that where the consideration declared is less than the value adopted or assessed by any authority of the state for stamp valuation for the purpose of stamp duty, then the valuation so adopted or assessed shall be deemed to be the full value of consideration. As per the AR, in the instant case, the full value of the ^consideration has been adopted by the stamp value authority as per the prevalent circle rate and sale deeds are registered on the basis of the same. It is also submitted that since the sale consideration has been*

*recorded by the appellant as per the rate prescribed u/s 50C, the AO cannot substitute any other value for the purpose of computing Capital Gain and circle rate would be deemed to be full value of consideration. It is also submitted that the price of finished/unfinished flats are determined by the developers M/s. Ridhi Sidhi Infra Projects Pvt. Ltd. and sale consideration were also received by the developer directly from the buyers and the assessee got his share from the developers as reimbursement, as specified in the agreement, from time to time.*

*Regarding the addition of Rs. 10,65,380/-, in respect of the commercial property, the AR submitted that the AO enhanced the value by 20% on estimated basis without citing any reason for the same. As per the AR, the assessee got the valuation done at the time of sale from the registered/Approved Valuer who determined the total value of the commercial property at Rs. 2,01,87,500/- vide valuation report dated 21.04.2014. The AR submitted that in the present case, the sale consideration of the commercial property was much more than the value determined by the Registered Valuer for the purpose of Stamp Duty Act and the stamp duty had been paid on the sale consideration of Rs. 9,51,00,000/- and filed the copies of the sale deed along with the valuation report. The AR argued that the assessee has taken the sale consideration at a higher value than the price fixed as per the Stamp Duty Act and hence, the AO arbitrarily enhanced the sale consideration without any basis.*

*There is some merit in the contention of the AR regarding the price of different flats and in the real life market situation, it is very uncommon that any two flats/properties, will have identical sale value even in the same location/locality/tower. It is more so in the case of the flats where the price depend upon the floor, size, facing of the flat, position of the lift/stairs and the surroundings and the location of the flats in the overall plan of the tower. The rate also varies apart from the size of the flat and the design of the rooms, on the basis of the parking space allocated to each flat. It is also a fact that the AO has not brought on record any direct evidence to prove that extra consideration has been received by the appellant over and above the sale agreement amount. The assessee has entered into an agreement which is also referred by the AO in the assessment order as per which, the assessee was to provide the land and all the developments were to be carried out by the developer M/s. Ridhi Sidhi Infra Projects Pvt. Ltd. who received the payments directly from the buyer and reimburse the share of the assessee as per the agreement. It is also true that there must be something concrete to show that the version given by the assessee is incorrect and the AO cannot make addition on hypothetical basis by presuming higher sale price by simply rejecting the assessee's explanation*

*without cogent reasons. The AR relied on the judgment of Hon'ble Supreme Court where it was held that the burden lies on the department that the actual consideration was higher than as declared by the assessee. As per the AR, in the present case, full value of the consideration has been adopted by the stamp value authorities as per prevalent rate and the assessee has also declared the same. Regarding the commercial mall, under the name & style of Palm Island, the AO mentioned that he has taken the value @120% (20% increase over the value taken by the assessee) stating it to be reasonable keeping in mind, the rates prevailing in the same area, without any instance of any property sold or the actual rate in the area. It is however also a reality of the market that in this type of transactions of sale of flats/commercial space, there is always an element of cash payment involved, which are not recorded as it suits to both the buyer and the seller, which is apparent in this case from the wide variation in the prices of flat of same size and similar locations. Minor variation can be due to the factors as discussed above but the wide variation points to the fact that some part of the consideration in respect of flat shown as sold on lower price, has not been recorded on papers and taken in cash. Although there is no direct proof of the same on record, but the circumstantial evidence in the shape of higher price for similar size flat at same floor and same locations/situations indicate that such things (i.e. the cash payment) were involved in this case. The evidence for higher price than the price shown by the assessee are the sale deeds of the flats of the assessee sold at higher rate in the same tower which are good evidence for comparing the rates of different flats sold by the assessee since all the flats are located in the same project having similar type of external facility like electricity, security, lift and other facility etc.*

*The AR made reference to the provisions of section 50C and here it is relevant to mention that as per the provision of section 50C, if the assessee shows less value than the stamp duty valuation, then the sale consideration/value has to be taken as per stamp duty valuation but there is no restriction on adopting a higher value than the stamp duty valuation. The AO has also referred to the clause in the agreement as per which, it was revealed that income derived from the facilities like electricity, water, lifts, and escalators, open spaces, parking places, space for advertisement and holding including any other vacant space in the Commercial Complex or residential flats shall be used jointly by the parties of the said agreement and shall be shared in the proportion of 35:65 ratio for the commercial flat and 30:70 for the residential flat by the assessee and the developers, but no income from such facilities have been disclosed by the assessee in the return of income. This income was required to be disclosed by the assessee but the appellant has not declared any such*

*income. Hence the ends of justice would be made, if the addition in this case is restricted to 10% of the total addition made by the AO in respect of sale of flats and the addition in respect of commercial space is also restricted to 10% instead of 20% made by the AO. Therefore, out of the total addition of Rs. 1,81,76,211/- (Rs. 24,83,082/-, Rs. 53,01,131/-, Rs. 87,30,779/- and Rs. 16,61,219/-) in respect of flats, the addition to the extent of Rs. 18,17,621/- is upheld and the appellant gets relief of the balance amount. In respect of commercial space of Palm Island, the addition of Rs. 5,32,690/- is upheld out of total addition of Rs. 10,65,380/-. To sum-up, out of total addition of Rs. 1,92,41,591/-, the addition to the extent of Rs. 23,50,311/- is upheld and appellants gets relief of the balance amount of Rs. 1,68,91,280/-.*

*Accordingly, these grounds of appeal are partly allowed.”*

8. The Ld. Counsel submitted that the Learned Commissioner of Income tax, (Appeals)-5, Ludhiana passed order Under section 250(6) of the Income tax Act, 1961 merely on assumptions, presumptions, surmises and conjectures, without appreciating the factual, legal and statutory position of the Law and facts of the case and that he has erred in confirming 10% of the total addition made by the Ld. AO in respect of sale of flats and 10% of 20% addition in respect of Commercial space made by the Ld. AO without appreciating the facts and citing any specific reasons. He argued that the appellants case was selected for limited scrutiny to examine the Long Term Capital Gain, however the AO has made addition estimating additional value over and above circle rate without referring to DVO u/s 50C of the Act, on estimated basis for the Flats on basis of floor etc and open commercial space which has been confirmed by The Ld.

CIT(A) on presumption and surmises without rebuttal to the contentions and clauses of agreement, the contention raised by the appellant assessee. He pleaded that such estimated additions may be deleted.

9. Per contra, the Ld DR although supported the impugned order, however, he has not filed any rebuttal to the contention raised by the counsel.

10. Heard rival contentions, perused the material on record, impugned order, written submissions and case law cited before us. Admittedly, the sale deeds were supported by valuation report of the Registered Valuer for the purpose of Stamp Duty Act. The AR argued that the AO failed to bring on record any evidence to prove that any extra consideration is received by the appellant over and above the agreement amount in support of adopting the rate of finished flat for unfinished flats also and thus, he made huge addition in sale consideration purely on surmises and conjectures. The AR further argued that there is no provision in the Act permitting the AO to enhance the sale consideration except u/s 50C of the Income Tax Act, 1961 which provides that where the consideration declared is less than the value adopted or assessed by any authority of the state for stamp valuation

for the purpose of stamp duty, then the valuation so adopted or assessed shall be deemed to be the full value of consideration.

11. It is seen that the price of finished/unfinished flats are determined by the developers M/s. Ridhi Sidhi Infra Projects Pvt. Ltd. and sale consideration were also received by the developer directly from the buyers and the assessee got his share from the developers as reimbursement, as specified in the agreement, from time to time. The AO made the addition of Rs. 10,65,380/-, in respect of the commercial property, being enhanced value by 20% on estimated basis without citing any reason and ignoring the fact that in the present case, the sale consideration of the commercial property was much more than the value determined by the Registered Valuer for the purpose of Stamp Duty Act and the stamp duty had been paid on the sale consideration of Rs. 9,51,00,000/- as evidence from the copies of the sale deed filed along with the valuation report. In our view, in the present case, since, the assessee has taken the sale consideration at a higher value than the price fixed as per the Stamp Duty Act and hence, the AO arbitrarily enhancement of the sale consideration without any basis is unwarranted and against the mandate.

12. The Ld. CIT(A) has misinterpreted the provision of section 50C, that there is no restriction on adopting a higher value than the stamp duty valuation, even there was no direct evidence or proof of the same on record, taking shelter of the circumstantial evidence in the shape of higher price for similar size flat at same floor and same locations/situations and that such things (i.e. the cash payment) were involved in this case merely on presumption and conjectures without bringing corroborative material documentary evidence on record to rebuttal of the submissions of the assessee appellant. Merely, estimating the income even without quoting a specific instance of circumstantial evidence, partly confirming the addition to meet the ends of justice in this case by restricting addition to 10% as against 20% of the total addition made by the AO in respect of sale of flats in respect of commercial space is held to be perverse to the fact on record.

13. Thus, it is evident from the above that neither the AO nor the Ld. CIT(A) have brought on record any direct evidence to prove that extra consideration has been received by the appellant over and above the consideration as per sale agreement. Further, the Ld. CIT(A) failed to rebut the contention of the Ld. AR on the issue of determination of value of sale consideration for the purpose of capital gains u/s 50C of the Act. Therefore,

the addition made on the basis of presumption, assumption and conjecture would not be sustained under the law.

14. In view of the above discussion we hold that the decision of the Ld. CIT(A) that the ends of justice would be made, if the addition in this case is restricted to 10% of the total addition made by the AO in respect of sale of flats and the addition in respect of commercial space is also restricted to 10% instead of 20% made by the AO is infirm and perverse to the facts on record and against the law. Accordingly, the estimated addition of Rs. 18,17,621/- in respect of flats, and Rs. 5,32,690/- respect of commercial space of Palm Island, (18,17,621/- + 5,32,690/- = 23,50,311/-) is deleted.

15. in view of identical facts, our observation and findings given in I.T.A. No.34/ASR/2022 in respect of the Assessment Year 1015-16 shall apply to the appeals in ITA No. 35 and 36/Asr/2022 in respect of Assessment Year 2016-17 and 2017-18 in *mutatis mutandis*.

16. In the result, the subject appeals of the assessee are allowed.

*Order pronounced in the open court on 03.03.2023*

**Sd/-**  
**(Anikesh Banerjee)**  
**Judicial Member**

**Sd/-**  
**(Dr. M. L. Meena)**  
**Accountant Member**

\*GP/Sr./P.S.\*

Copy of the order forwarded to:

- (1) The Appellant
- (2) The Respondent
- (3) The CIT
- (4) The CIT (Appeals)
- (5) The DR, I.T.A.T.

True Copy

By Order