

IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND MS. PADMAVATHY S, AM

आयकर अपील सं/ I.T.A. No.733/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2018-19)

आयकर अपील सं/ I.T.A. No.734/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2017-18)

Finquest Financial Solutions Pvt. Ltd. 602, 6 th Floor, Boston House, Suren Road, Andheri (E), Mumbai-400 093	बनाम/ Vs.	Deputy Commissioner of Income Tax, CC-3(4), Room No.1915, 19 th Floor, Air India Building, Nariman Point, Mumbai-400 021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACF8117G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri V. G. Ginde & Kumar Kale
Revenue by:	Shri Ankush Kapoor, CIT-DR

सुनवाई की तारीख / Date of Hearing: 07/06/2023

घोषणा की तारीख /Date of Pronouncement: 28/06/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

These are appeals preferred by the assessee against the order of the Ld. Commissioner of Income Tax Appeals-51, Mumbai [hereinafter referred to as the “Ld. CIT(A)”] dated 16.01.2023, for AY. 2018-19 and AY. 2017-18 respectively.

2. As per the request of the Ld. Authorized Representative (AR) of the assessee, first of all, we will adjudicate the appeal for AY. 2018-19 first.

3. At the outset, the Ld. AR does not press ground no. 1 which is against the action of the Ld. CIT(A) confirming the addition of Rs.19,25,000/- made by the Assessing Officer (AO), being disallowance of fees paid to the ROC. Therefore, this ground of appeal of assessee stands dismissed.



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4. Ground no. 2 is against the action of the Ld. CIT(A) in confirming the rejection of the assessee's claim for deduction of enhanced indexed cost of acquisition of Rs.2,62,80,527/- instead of Rs.1,61,10,333/- in computing Long Term Capital Gain/Long Term Capital Loss ("LTCG/LTCL") on cancellation of the flat-purchase agreements, which claim assessee made by submitting a letter before the AO during the assessment proceedings.

5. The brief facts as noted by the AO is that search and seizure operation u/s 132 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") was conducted on the Finquest Group on 13.08.2019 (AY.2020-21); and consequently, the AO issued notice u/s 153A of the Act to the assessee and assessee filed return of income declaring total income of Rs.20,21,64,860/- in the relevant AY.2018-19. The AO noted that during the assessment proceedings, the assessee had taken a new plea without making a claim neither in the Return of Income nor Revised Return of Income. This new plea raised by the assessee by way of letter before him was regarding an addition made by the AO for the earlier Assessment Year i.e. AY.2015-16. The plea of the assessee was that since addition *inter-alia* made by the AO for AY. 2015-16 u/s 143(3) of the Act, of Rs.4,48,68,500/- u/s 69B of the Act (unexplained investment) in respect of purchase of immovable properties (forty 40 flats of "Srinivas Residency") has crystalized, enhanced cost of acquisition should be granted to assessee while computing the LTCG/LTCL on sale of eight (8) flats in AY. 2018-19 and twenty-three (23) flats in AY. 2017-18. To appreciate the plea raised by assessee, it is necessary to understand the contents of Assessment Order for AY. 2015-16 wherein, AO had taken note of the fact that



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assessee had shown to have purchased forty (40) flats of “Srinivas Residency” in books for Rs.7.10 Crores whereas, the sale-deed reflected the purchase consideration to be Rs.11.59 Crores. So, AO added the difference of Rs.4.48 Crores as unexplained investment in the hands of assessee. And thereafter it is noted that assessee accepted the action of AO and opted for the amnesty scheme under Vivad Se Vishwas Scheme and paid taxes on the addition made of Rs.4,48,68,500/- and Form No. 5 has been issued settling the issue. In the light of such a development on facts, the assessee pleaded before AO that cost of acquisition should be adopted as Rs.11.59 Crores (including stamp duty and registration) in place of Rs.7.10 Crores as shown in the books by assessee and accordingly, LTCG/LTCL be recomputed. In other words, the addition made (*in respect of flats purchased at “Srinivas Residency”*) should be included in the cost of the acquisition of the properties and corresponding relief should be provided on the capital gain/loss offered during the year of sale of properties. However, the AO rejected the claim of the assessee on the ground that the assessee can make a new claim only by filing a revised return and not by way of filing a letter. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to dismiss the ground of appeal by holding as under:

“9.2 The submissions of the appellant have been considered. While making the claim for revision of computation of income from capital gains on account of enhancement of cost of acquisition, the appellant has not furnished any detailed working of the capital gains so claimed with any documentary evidence. No documentary evidence has been furnished regarding either the Fair Market Value of the capital asset transferred or the cost of acquisition. Before accepting any claim of enhancement of cost of acquisition, the adjudicating authority would have to first see the cost of acquisition and how it has been derived. Similarly, for computing the capital gains, documentary evidence regarding the fair market value of



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the asset claimed to have been transferred would have to be looked into. Without any documentary evidence the claim of the appellant has no basis. This is particularly so as, while on the one hand the assessee claims that addition u/s 69B amounting to Rs.4,48,68,500/- was made on account of investment in 40 flats, in the present appeal it wants that benefit of enhanced cost of acquisition amounting to Rs.1,01,70,194/- (Rs.2,62,80,527/- minus Rs.1,61,10,333/-) be given in respect of 8 flats without explaining the basis of the same. In any case without appropriate documentary evidence, no such claim can be entertained.

9.3 In view of the above, it is held that the claim of assessee for enhanced cost of acquisition u/s 48(i) has no basis in the absence of any documentary evidence being furnished in support of the same. Accordingly, the claim is rejected and this ground of appeal is dismissed.”

6. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is before us.

7. We have heard both the parties and perused the records. We note that assessee in the relevant for AY. 2018-19 during assessment proceedings in respect to its claim of LTCG/LTCL on sale of eight (8) flats of “Srinivas Residency” has made a new plea for enhancing the cost of acquisition of the said eight (8) flats. The AO has rejected the plea on the ground that since, the assessee has not preferred a revised return, the same cannot be entertained by him. On appeal, the Ld. CIT(A) confirmed the action of AO by *inter-alia* holding that assessee failed to produce any documentary evidence to substantiate claim for revision of capital gain/loss due to enhancement of cost of acquisition by filing detailed working of capital gain/loss (supra); and also on the ground that assessee has sold only eight (8) flats in this relevany assessment year, whereas, the amount of addition u/s 69B of the Act for AY 2015-16 was to the tune of Rs.4,48,68,500/- which was on account of unexplained investment in forty (40) flats. Therefore, he



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rejected the plea of the assessee. Before us, the Ld. AR brought to our notice that in this relevant AY. 2018-19, the appellant had offered long term capital gain of Rs.38,89,667/- in respect of cancellation of 'Purchase Agreement' of eight (8) flats at "Srinivas Residency" and while computing the LTCG in the return of income, the appellant had claimed indexed cost of acquisition based on the investment recorded originally in the books of account i.e. Rs.7,10,75,000. However, in the light of subsequent development, viz, assessee opting for settlement as per Vivad Se Vishwas Scheme and pursuant thereto Form-5 being issued, the addition made in respect of investment in flats of Rs.4.48 Crores become final, assessee vide letter, dated 02.07.2021, requested the AO to allow enhanced indexed cost of acquisition u/s 48(i) of the Act after considering the crystallization of the addition u/s 69B of the Act of Rs.4,48,68,500/- on pro-rata basis. In other words, the assessee requested to allow deduction for the enhanced indexed cost of acquisition of the eight (8) flats at Rs.2,62,80,527/- as against Rs.1,61,10,333/- as per the return of income originally filed by assessee; and thereafter, to re-compute the LTCG/LTCL on the sale of eight (8) flats. In this regard, it is noted that the AO in the earlier assessment year (AY. 2015-16) while framing the assessment order u/s 143(3) of the Act, dated 29.12.2017 has *inter-alia* made an addition of Rs.4,48,68,500/- u/s 69B of the Act taking note that the assessee has recorded in its books of account purchase consideration of forty (40) flats of "Srinivas Residency" at Rs.7,10,75,000/-, whereas, consideration payable as per the sale-deed for the purchase of flats in "Srinivas Residency" was Rs.11 crores plus stamp duty and registration fee Rs.59,43,500/- totaling Rs.11,59,43,500/- According to



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the AO from a perusal of the agreement (Sample Agreement dated 21.04.2014), the entire purchase consideration in respect of purchase of flat has been paid and nothing remained as payable. And coming to such a conclusion, the AO referred to page no. 28 of the said agreement no.4307/2014, dated 21.04.2014, wherein, consideration value shown as Rs.1,13,00,000/- and the vendors have accepted the receipt of Rs.1,13,00,000/- which shows that no consideration was pending to be paid to the vendors/sellers of flat. Therefore, the AO held that since, the assessee has shown in its book this transaction only at Rs.7,10,75,000/- whereas, the cost of forty (40) flats at “Srinivas Residency” works out to be Rs.11,59,43,500/-, the difference of Rs.4,48,68,500/- (Rs.11,59,43,500/- - Rs.7,10,75,000/-) was added u/s 69B of the Act along with other addition and thereby computed total income of assessee to the tune of Rs.7,64,89,260/- for AY. 2015-16 by order dated 29.12.2017. And thus, AO made an addition of Rs.5,70,91,327/-. Aggrieved by the aforesaid action of the AO for AY 2015-16, the assessee preferred an appeal before the Ld. CIT(A) and when the appeal was pending before the Ld. CIT(A), the assessee opted for the Vivad Se Vishwas Scheme (as per section 4(5) of the Direct Tax Vivad Se Vishwas Act, 2020) and assessee offered tax on the total addition made including Rs.4,48,68,500/- u/s 69B of the Act which is discernable from a perusal of Form-1 found placed at page no.13 to 22 of PB, wherein, at page no. 13, it is noted that the assessee had filed declaration for settlement of tax dispute for AY.2015-16 in respect of the assessment order passed on 29.12.2017 wherein, the AO has computed the total income at Rs.7,64,89,260/- and made an addition of Rs.5,70,91,327/- and offered the tax on it after refund etc.



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finally at Rs.66,85,339/- which was accepted by the Competent Authority which is noted from Form No.3 placed at page no. 24 to 25 of the Paper Book; and it is noted that thereafter, the assessee deposited the amount on 19.06.2021 and filed Form No.4, dated 12.08.2021 which was accepted by the Designated Authority on 07.03.2022, which is seen from perusal of the Form No.5 found placed at page 28 of the Paper Book. Thus, we find that assessee has offered the tax on the addition made by the AO for AY.2015-16 wherein, *inter-alia* an addition of Rs.4,48,68,500/- was made u/s 69B of the Act in respect of unexplained investment made by the assessee in respect of forty (40) flats at “Srinivas Residency”. Therefore, we note the investment in the forty (40) flats at “Srinivas Residency” though shown by the assessee in its book at Rs.7,10,75,000/- should be now treated as Rs.11,59,49,500/- (including stamp duty and registration fee). Since, this issue regarding the cost of acquisition of forty (40) flats have crystallized only after issue of Form No.5 on 07.03.2022, and the assessee while claiming capital gain for cancellation of agreement/sale of eight (8) flats for AY 2018-19 [*as well as for AY. 2017-18 claimed STCG of Rs.42,47,500/- in respect of cancellation of purchase agreement of twenty-eight (28) flats at “Srinivas Residency”*] had offered long term capital gain of Rs.38,89,667/- computed the LTCG in the return of income by claiming indexed cost of acquisition based on the investment recorded in the books of account of Rs.7,10,75,000. In the light of subsequent development as noted supra, assessee’s request to AO to allow enhanced indexed cost of acquisition u/s 48(i) of the Act after considering the crystallization of addition u/s 69B of the Act of Rs.4,48,68,500/- on pro-rata basis by



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enhancing to indexed cost of acquisition of the eight (8) flats of Rs.2,62,80,527/- as against Rs.1,61,10,333/- as per the return of income; and re-compute the LTCG/LTCL was rejected by AO for not claiming it in the revised return of income. However, we do not countenance the action of both the Ld. CIT(A) as well as the AO. We note that even though assessee in the AY. 2015-16 had shown the transaction of purchase of forty (40) flats at “Srinivas Residency” at Rs.7,10,75,000 in its book, the AO taking note of the Sample Agreement of one (1) flat had made an addition of Rs.4,48,68,500/- taking the entire purchase consideration of flats Rs.11,59,43,500/-. And since, the assessee has accepted the addition made by the AO and offered the tax as per the Vivad Se Vishwas Act, 2020; and pursuant to that Form No.5 has been issued by the Competent/Designated Authority, therefore transaction value recorded in the books of assessee in respect of purchase of forty (40) flats need to be taken as Rs.11,59,43,500/- (including the stamp duty of Rs.59,43,500/-) in place of Rs.7,10,75,000/-. And since, the aforesaid development took place after the final issue of Form No.5 only on 07.03.2022, the assessee could not claim enhanced cost of acquisition while computing capital gain/loss on cancellation of the purchase agreements of eight (8) flats for AY. 2018-19 as well as of twenty-eight (28) flats for AY. 2017-18. Therefore, we admit this plea/ground of appeal and set aside the impugned order of the Ld. CIT(A) and restore this issue back to the file of AO with direction to re-compute the LTCG/LTCL by enhancing the indexed cost of acquisition of the flats which agreements of purchase has been cancelled by the assessee for respective AY. 2018-19 and AY. 2017-18. The assessee is directed to produce relevant



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material/agreements pertaining to the flats sold/cancelled for the adjudication/examination of the AO and the AO to re-compute LTCG/LTCL, in accordance with law for both AY. 2018-19 and AY. 2017-18.

8. In the result, this ground of appeal of the assessee is partly allowed for the statistical purpose for both the years.

9. Coming to ground no.1 for AY 2017-18 which is against the action of the Ld. CIT(A) confirming the action of the AO rejecting the assessee's additional claim of deduction of Rs.5 lakhs u/s 35AC of the Act.

10. Brief facts as noted by the AO is that the assessee had made claim of deduction of Rs.5 lakhs u/s 35AC of the Act which has not been claimed in return of income. According to the AO, since, the assessee has not filed revised return of income making such claim, the same cannot be considered and therefore, rejected the claim. According to assessee, during the year, the appellant had made donation of Rs.3,00,000/- to Shroffs Foundation, Rs.5,00,000/- to Shrimad Rajchandra Sarvamangal Trust and Rs.2,00,000/- to Srimad Rajchandra Adhyatmik Satsang Sandhna Kendra, eligible projects/schemes of which are notified u/s 35AC of the Act. The appellant, in its return of income, inadvertently claimed deduction u/s 35AC of the Act, only Rs.3,02,00,000/- instead of eligible deduction of Rs.3,07,00,000/-. Further, the appellant inadvertently claimed deduction u/s 80G of the Act of Rs.3,50,000/- instead of claiming deduction u/s 35AC of the Act. The appellant, therefore, requested the AO to allow entire deduction of Rs.3,07,00,000/- u/s 35AC of the Act instead of Rs.3,02,00,000/- claimed u/s 35AC and Rs.3,50,000/-



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claimed u/s 80 of the Act in its return of income. However, the AO allowed deduction u/s 35AC of the Act of Rs.3,02,00,000/- only and denied further deduction of Rs.5,00,000/- u/s 35AC of the Act for the reason that the same was not claimed by way of revised return and rejected the section 80G deduction. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who dismissed this ground of appeal of the assessee on the ground that the relevant assessment year (AY.2017-18) was an unabated assessment as per section 153A of the Act because the assessment was not pending before the AO on the date of search i.e. on 13.08.2019 since time period for issuing notice u/s 143(2) of the Act had already lapsed when the search took place. Therefore, according to the Ld. CIT(A), the assessee cannot make any new claim. Therefore, he dismissed this ground of appeal of the assessee. Aggrieved, the assessee is before us.

11. We have heard both the parties and perused the records. The aforesaid facts are not in dispute and for the sake of brevity the facts are not repeated again. The only issue is regarding the claim of deduction of Rs.5 lakhs u/s 35AC of the Act which the AO has not examined because assessee did not make any claim in the return of income. Whereas, the Ld. CIT(A) has found that the year under consideration was an unabated assessment as per section 153A of the Act. We do not countenance the action of the Ld. CIT(A), we note that the CIT(A) erred in finding that the AO did not issue any notice u/s 143(2) of the Act within the stipulated time i.e, before the search took place on 13.08.2019. However, it has been brought to our notice that the AO had in-fact issued notice u/s 143(2) for AY 2017-18 on 11.08.2018 (refer page no.2 of the PB). And we note that the



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assessment was framed for AY 2017-18 on 27.07.2021. Thus, we note that the Ld. CIT(A) erred in finding that the relevant assessment year under consideration (AY. 2017-18) was not pending before the AO on the date of search i.e. on 13.08.2019. And since, the assessment was pending before the AO on the date of search as noted (supra), the assessment pertaining to AY. 2017-18 got abated u/s 153A of the Act on the date of search. Therefore, the reason given by the Ld. CIT(A) for not considering this ground of appeal of the assessee is erroneous. Therefore, we set aside the impugned order of the Ld. CIT(A) and restore this issue back to the file of AO for *de novo* consideration of this ground i.e. assessee's claim of deduction of Rs.5 lakhs u/s 35AC of the Act. The AO is directed to examine this issue and pass order, in accordance with law. Assessee to file relevant documents to substantiate its claim before the AO.

12. In the result, both the appeals of the assessee for AY. 2017-18 and AY. 2018-19 are partly allowed for statistical purpose.

Order pronounced in the open court on this 28/06/2023.

Sd/-
(PADMAVATHY S)
ACCOUNTANT MEMBER

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai;
दिनांक Dated : 28/06/2023.
Mahesh



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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

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आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai