IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER
AND
Ms. MADHUMITA ROY, JUDICIAL MEMBER

ITA No.687/Bang/2023
Assessment year : 2014-15

Jayanti Vasishta, A-101, AVG Park Square, No.45, 2nd Cross, C.R. Layout, J.P. Nagar 1st Phase, Bangalore – 560 078. **PAN: ADWPV 8333Q**	Vs.	The Income Tax Officer, Ward 4(3)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Smt. Kavitha P. CA
Respondent by	:	Shri V. Parithivel, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	11.01.2024
Date of Pronouncement	:	19.01.2024

O R D E R

Per Laxmi Prasad Sahu, Accountant Member

This appeal by the assessee is against the DIN & Order No.ITBA/NFAC/S/250/2023-243/1054506398(1) dated 21.07.2023 of the CIT(Appeals)-1, National Faceless Appeal Centre, Delhi for the AY 2014-15 on the following grounds:-

> "1. That in any case and in view of the matter, the action of the Learned Officer in framing the impugned Assessment Order is bad in law and is opposed to the facts and circumstances of the case and thus liable to be set aside.

2. That the Learned CIT(A) erred in passing an Order u/s 250 of the Act without providing opportunity of personal hearing despite specific request by the Appellant and the same is against the principals of natural justice.

3. That the Learned CIT(A) ought to have provided another opportunity as the Appellant had submitted only partial response to the Notice in order to place further documents on records.

4. That the Learned Assessing Officer erred in re-opening the proceedings on mere change of opinion based on audit objection and material already available on records.

That the Learned CIT(A) grossly erred in contending that the rulings relied upon by the Appellant cannot be followed merely because they are not passed by the jurisdictional authorities.

6. That the Learned CIT(A) ought not have alleged that the Appellant colluded with the builder to construct illegal portion and that the gains are through deceit and illegality.

7. That the Revenue Authorities mis-construed the provisions of Section 48 of the Act which clearly provided that the cost to be considered is the cost at which the previous owner had incurred to purchase the asset and the indexation benefit to be considered is from the date of purchase of such asset.

8. That the Learned Revenue Authorities ought to have appreciated that indexed cost of acquisition as defined in Section 48 of the Act is referring to the "Asset" and not Capital Asset. Accordingly, the Appellant is eligible to consider indexation benefit even before the conversion of asset into Capital Asset.

9. That the Learned CIT(A) was not the competent authority to comment on the legality of the construction and the CIT(A) grossly erred in alleging that the penthouse was not arising out of residential land as the development potential was fully exhausted

10. That the Learned CIT(A) disregarded the contention of the Appellant wherein it was contended that the cost of construction

of penthouse was paid by foregoing one apartment of Appellant's share.

11. That the Appellant denies the liability to pay interest u/s 234A, 234B and 234C of the Act as the same has been levied erroneously and is required to be deleted,

12. The Appellant craves leave to add, alter, modify, amend substitute or delete all or any of the above Grounds of Appeal.

For these and other grounds that may be argued at the time of the personal hearing, the Appellant prays that the Order be set aside and relief be granted by deleting the additions made by the Revenue Authorities."

2. The brief facts of the case are that the assessee filed return of income u/s. 139 declaring income of Rs.33,23,480. The case was selected for scrutiny and assessment was completed u/s. 143(3) accepting the returned income. Later on, the case was reopened by issue of notice u/s. 148 dated 11.12.2017. Assessee was provided copy of reasons recorded on 03.07.2018 (which is placed at pages 33-34 of PB). In response, the assessee filed the return on 12.09.2018 declaring the same income of Rs.33,23,480 as in the original return, computing the long term capital gains as under:-

Consideration received on Sale of Flat Located at No.59-71/7-52, 7th Main Road Shakambarinagar, Municipal Ward No. 57, J.P. Nagar, Bangalore Date of Sale: 05.07.2013			71,55,0000
Less: Cost of Acquisition Purchase of Land price 1073 Sq.Ft. @84 per Sq.Ft in 1981 Date of purchase in 1960	90,132		
Cost Indexation Rate of 1981 is Rs. 100/Sq.Ft. Indexed Cost of Rs. 1073*84*939/100	8,46,339	8,46,339	
Cost of Construction: Year of Construction 2006 – 2505 Sq.Ft @750/Sq.Ft.	18,78,750		
Cost of Indexation Indexed Cost of Construction Rs. 2505*750*939/497	35,49,590	35,49,590	43,95,929
Long Term Capital Gain After Indexation			**27,59,071**

3. The AO observed that the assessee was gifted the residential land (converted from agricultural to residential purpose during 1988-89) in total measuring 2 acres 16 guntas bearing No.59 & 71/7, situated at Sarakki Village, Uttarahali Hobli, Bengaluru South Taluk during 2002-03. In 2003-04, the assessee entered into Joint Development Agreement (JDA) dated 27.12.2003 and one apartment built in that land has been sold during FY 2013-14 for a sale consideration of Rs.71,55,000. Capital gain of Rs.27,59,071 has been offered to tax after deducting the indexed cost of acquisition and indexed cost of construction and no proof of construction was submitted by the assessee.

4. The AO noted that property received by way of gift was not a capital asset within the meaning of section 2(14) of the Act and section

48 is applicable only to capital asset. Therefore indexed cost of acquisition has to be allowed from the previous year in which the land was converted to residential purpose. From the JDA, it was noted that the said apartment P2 Block I bearing municipal No. New 52/20 (old no.) located at 7th Main Road, Shakambi Nagar, Bengaluru, BBMP PID No.57-274-52/202 is not in the schedule of Apartments and thus it is outside the purview of JDA and the sanctioned plan. The confirmation received from the developer, M/s. BSR Developers is reproduced as under:-

> "The Joint venture between BSR Developers and Shri Vashishta Jayanti bearing registered document number BNC(U)-KNGR/32167/2003-04 for the project Jayanti Gardens Block 1 was completed in the year 2006. The Penthouse portion, P2 block 1 bearing Municipal No. 52/20 (old No.) located at 7th Main road Shakambi Nagar, Bengaluru, BBMP PID No.57-274-52/202. The said apartment was additional built and is outside the sanction plan. Therefore the land owner was require to pay basic cost of construction for the unit measuring 2505 sft super built area, at the rate of Rs.750 per sq.ft. The land owner has paid the same to M/s. BSR Developers and we acknowledge the receipt of this amount."

5. The AO issued show cause notice on 04.12.2018 in this regard. The assessee replied objecting to the imitating of reassessment proceedings and relying on B. N. Vyas v Commissioner of Income Tax held in Hon'ble High Court of Gujrat [1986] 25 Taxman 133 (Gujrat) submitted that cost has to be considered is the cost incurred by the previous owner and indexation benefit has to be from inception irrespective of whether the asset was capital asset or not. The AO

rejected the submissions of the assessee and observed that the assessee has not invested any amount from sale consideration on sale of flat and it was not an authorized construction. The AO disallowed the cost of acquisition and made addition of Rs.3,20,662. Further, the AO disallowed cost of construction amounting to Rs.35,49,590 claimed by the assessee for 2505 sq.ft. @ 750/sq.ft. Accordingly, the assessed income was Rs.69,73,065.

6. On appeal, the CIT(Appeals) after considering the written submissions of the assessee dismissed the appeal of the assessee. Aggrieved, the assessee is in appeal before the Income Tax Appellate Tribunal.

7. The ld. AR vehemently argued on the reopening of the assessment based on audit objection and submitted that the AO has already taken into account the material available during the course of assessment proceedings and merely not mentioning the details or reasons in the assessment order is not a criterion for reopening the case. She submitted that the audit objection cannot be considered as a tangible material for reopening the assessment.

8. She further submitted that the property was obtained by the assessee by way of gift and the said land was obtained before 01.04.1981 and therefore cost of acquisition of the land should be considered as on 01.04.1981. The property got converted from agricultural to residential purpose in the year 1988-89 and assessee

received the said property by way of gift in FY 2002-03. The assessee is eligible to get the cost of benefit of indexation from 01.04.1981. However, the AO has granted cost of acquisition with indexation only from the year 1988-89 since the property got the character of capital asset which is not correct. Further the AO has not granted the cost of construction benefit in respect of Penta house which was constructed beyond the sanctioned plan. M/s. BSR Developers has categorically accepted that the property was measuring 2505 sq.ft. and cost of construction is Rs.750/ sq.ft. which amount has been paid by the owner. Therefore, it cannot be said that the assessee has not paid the said amount to the Developer. She further submitted that the necessary facts have been disclosed and the said property was regularized in the municipal records and subsequently in the sale deed before the selling to the capital asset. Hence it satisfies all the conditions of becoming a capital asset and the AO has also assessed it under the head capital gain. Therefore, the assessee is eligible to claim cost of construction with indexation benefit. She relied on Vodafone West Ltd. vs ACIT 354 ITR 572 (Gujrat) and CIT v. M. Ramaiah Reddy [1986] 158 ITR 611 (Kar) and other judgments which are placed on the paper book filed by the AR of the assessee.

9. The ld. Dr relied on the order of the lower authorities. He submitted that the assessee is eligible for cost of acquisition when the property got converted from agriculture to non- agriculture purpose in 1988-89 and not from 01.04.1981 and in the in-between period the

assessee was out of purview of definition of capital asset as defined in section 2(14). Therefore, the AO rightly disallowed Rs.3,20,632.

10. He further submitted that the house sold by the assessee was illegal construction and it was not part of the Joint Development Agreement (JDA) and the sanctioned plan. He pointed out that at page 7 of the CIT(A)'s order, the assessee has categorically stated that the builder at the request of the appellant had agreed to construct the Penthouse in addition to the agreed number of apartments as per the terms of the JDA. Thus, the appellant's defense that one of the flats in JDA was sacrificed and instead Penthouse was constructed is factually incorrect. He further submitted that as per sanctioned plan, 18 flats were to be constructed (6 for Owner and 12 for Developer). Accordingly the capital asset stands exhausted. The 19th flat was illegal creation in collusion with the developer and is not emanating from the gifted land, but crystallised from thin air through deceit and illegality, posting potential danger to the lives of future inhabitants and cannot be a capital asset eligible for deduction u/s. 48. He also relied on the decision in the case of ITO v. Bhagwan T. Fatnani [2015] 58 taxmann.com 227 (Mumbai). The submissions made by the ld. DR is placed on recorded. He therefore requested the order of the CIT(Appeals) has to be upheld.

11. In the rejoinder, the ld. AR submitted written submissions dated 10.01.2024 as under:-

"Timeline of Events

Sl.No.	Particulars	Dates/Timeline
1	Conversion of agricultural land to residential land	1988-89
2	Gift of property	2002-03
3	Entering into JDA	27-12-2003
4	Date of completion of construction	2006-07
5	Completion of project & handing over possession	Oct-07
6	Property tax assessment for each individual flats in project	11-10-2007
7	Property tax paid & Khatha has been issued by BBMP in favour of Vasishta Jayanti	03-01-2008
8	Date of sale	05-07-2013

2. **Property Tax Assessment of individual flats** — Enclosed Annexure-2 The said document is the proof where the Local Municipal Authorities have assessed the tax payable by the owners of the building immediately after the completion of the construction and set that as the benchmark ()flax to he paid in the subsequent years. The said assessment was carried out on 11th October 2007 and for all the flats in the building which was constructed through JDA by the Appellant. The order was passed by the Joint Commissioner of BBMP and has been notified. Item No. 21 in the list refers to P2 flat and is assessed in the name of the Appellant. The Appellant seeks a week's time to submit the translated and notarized copy of the above document.

3. **Note on Legality of the property** — We would like to bring to your kind attention that the Appellant has submitted various documents which substantiate the legality of the building. The Revenue Authorities have framed their opinion based on the statement that the property was outside the sanction plan. The Revenue authorities have not brought any material evidence on records to state jute the constructed property is illegal and poses a threat to the lives of the inhabitants. On the other hand, the Appellant has submitted that it has obtained all the required

approvals from the competent authorities for all the units constructed including the penthouse under consideration. The ownership of the property was established right from 2007 when the construction was completed. The tax assessment order, Khatha, EC and the property tax paid receipts clearly establish the legal and clear titles of the Appellant over the property. The Appellant was issued an A-Khatha Certificate bearing PID number 57-274-52/20 dated 3rd January 2008 thereby establishing legal title in the name of the Appellant. Copy of the same is enclosed as Annexure. If the said property was illegal and did not appear in the records of the local authorities, the Sub Registrar could not have registered the sale which is the subject matter of appeal.

!t may be noted that the Learned Assessing Officer has not made any such observation or comments that the property constructed was illegal and thus not a capital asset. The above allegations are arising out of the order passed by the CIT(A) who has not even bothered to grant the Appellant an opportunity for a personal hearing despite specific request. The assumptions by the Learned CIT(A) are not supported by any material evidence nor did he offer any opportunity to the Appellant to offer his explanations for the allegation that the property was illegal.

Further, it is a well-settled fact that the municipal authorities issue an A-Khatha certificate only when the property under consideration is free from any illegal proceedings/actions thereby establishing the legal title of the Appellant. All the units constructed under JDA have received same approvals from the concerned authorities and therefore it shall not be appropriate to consider that only the Penthouse is not legal.

In light of the above submissions, it is amply clear that there does not exist any dispute over the legality of the property.

The contention of the Learned DR that the property held by the Appellant was not legalized and consequently not a "Capital Asset" is not tenable, as the same was occupied by the Appellant till the FY 2013-14, immediately on completion of construction of property in the year 2006-07. The same was later sold to 3rd

party via a registered sale deed. The property was successfully registered by the local authorities and the transfer was completed. If the property under consideration were to be illegal, the buyer would not have enjoyed clear undisputed title at the time of transfer. The asset under consideration was very much a capital asset at the time of construction and occupancy and continued to be a capital asset till the time of transfer by the Appellant.

As per the provisions of section 45 of the Act, at the time of transfer, the subject of transfer must be a capital asset and thereby assessed to capital gains taxation. The said view is also upheld by the Courts, and we would like to place reliance on the following-

The High Court of Madras in the case of M. Venkatesan v. Commissioner of Income-tax 119841 16 Taxman 240 (Madras) held that *'Under this charging section, the crucial requirements are that there must be a transfer and the transfer must be of a capital asset. The implication is that at the time of the transfer, the subject-of the transfer must be a capital asset. There is no further implication. The section does not say that the subject of the transfer must have been a capital asset at any other point of time'.*

Based on the above ruling and multiple documents submitted on records, by the Appellant. it should be held that the asset under consideration is legal and thus eligible for benefits of capital gains provisions of the Act.

4. **Rebuttal to the Case Law relied upon by the Learned DR. —** The Learned DR during the course of proceedings relied upon the ruling of the Mumbai Tribunal in the case of ITO vs Bhagwan Fatnani [2015] 58 taxmann.com 227 (Mumbai - Trib.) . The ruling relied on by the Learned DR is with respect to the illegal encroachment of the asset by the Assessee. On perusal of the ruling relied upon, it can be seen that the Assessee had illegally occupied they land which was meant for a school. The Assessee did not obtain any legal rights or title on the property and by virtue of it, the Tribunal had held that the property under consideration is not a capital asset. It was also pointed out that the Assessee had not submitted any document on records to prove

how title of property had passed upon. The plea of the Assessee was that the property was occupied for over 20 years and by virtue of occupancy, the same should be considered as a capital asset.

However, in the present case of the Appellant, the flat under question came into existence under the JDA on a land which was already owned by the Appellant. The flat did not appear just like that. It is in a way conversion of the land into a building and the ownership of the underlying asset i.e. the undivided share of land was already in the name of the Appellant. The constructed area came into existence post the completion of construction and the same has been established through numerous documents such as Property tax assessment order, Khatha, EC etc. The property has been duly registered and Khatha certificate and Encumbrance certificate has been placed on records. Further, the transfer has taken place via a registered sale deed and law applicable stamp duty was determined and paid. Property tax can be assessed only for the properties. which exist and not for the properties in air. The assessment can be carried out if and only if the property exists. Therefore, the case law relied upon by the Learned DR is not applicable."

12. Considering the rival submissions, we note that the case was reopened u/s.148 after recording reasons. The assessee filed return reiterating the original return. The assessee has raised a legal issue challenging the reopening of the case on the basis of audit objection and submitted that it is only change of opinion. Copy of the reasons record for reopening the assessment was given to assessee on 03.07.2018 which shows that the AO was in possession of information with respect to incorrect declaration of capital gain by the assessee. We have gone through the order of the AO u/s. 143(3) of the Act and the documents submitted as produced by the ld. AR and note that there was no specific query raised by the AO in the original assessment

proceedings and there was no submission on the part of assessee. The Hon'ble Allahabad High Court in the case of **Subodh Agarwal *v.* State of U.P. [2023] 149 taxmann.com 448 (Allahabad)** has held that Explanation 1, clause (ii) to second proviso of section 148 clearly provides that any audit objection to effect that assessment in case of assessee for relevant assessment year has not been made in accordance with provisions of Act is included in term 'information regarding escaped assessment'**.** Therefore, it cannot be said that the reopening was on the basis of audit objection only.

13. It is the belief of the AO on the basis of facts available before him leading to the reopening of the case. It was observed that the constructed property sold was different from the property received on gift in the opinion of the AO and the sale of the property did not arise out of the gifted property. The term reason to believe can be gathered and available from the information, leading the Assessing Officer to reopen the assessment. The term itself is suggestive of its *prima facie* characteristics and not established or conclusive facts or information. Meaning thereby, it is the Assessing Officer's *prima facie* belief, of course, derived from the some material/information, *etc*. leading him to reopen the assessment.. It is clear from the reasons recorded that the AO had the belief that there was escapement of income. Therefore, we reject the arguments advanced by the ld. AR on the legal issue and dismiss the same.

14. We note that the donor of the gift obtained the property in the year 1960 before 01.04.1981 which is not in dispute and it was gifted to the assessee in the FY 2002-03 after converting it from agricultural to residential purpose in the year 1988-89. The assessee has claimed cost of acquisition of the said land as on 01.04.1981 of 1,073 sq.ft. @ Rs.84 / sq.ft. and after cost indexation the value has been arrived at Rs.8,46,339 and claimed as cost of acquisition by the assessee.

15. Section 48 stipulates the mode of computation of capital gain as under:-

> "48. The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :—
>
> (i) expenditure incurred wholly and exclusively in connection with such transfer;
>
> (ii) the cost of acquisition of the asset and the cost of any improvement thereto:"

16. There is no dispute that before 1989 the property was not in the purview of definition of capital asset. It got the character of capital asset after conversion. As per section 48(ii), assessee is eligible for cost of acquisition and cost of improvement thereon.

17. Section 49 of the Act reads as under:-

"**49.** [16][(1)] Where the capital asset became the property of the assessee—

(*i*) on any distribution of assets on the total or partial partition of a Hindu undivided family;

(*ii*) under a gift or will;

(*iii*) (*a*) by succession, inheritance or devolution[17], or

[18][(*b*) on any distribution of assets on the dissolution of a firm, body of individuals, or other association of persons, where such dissolution had taken place at any time before the 1st day of April, 1987, or]

(*c*) on any distribution of assets on the liquidation of a company, or

(*d*) under a transfer to a revocable or an irrevocable trust, or

(*e*) under any such transfer as is referred to in clause (*iv*) [19][or clause (*v*)] [20][or clause (*vi*)] [21][or clause (*via*)] [22][or clause (*viaa*)] [23][or clause (*vica*) or [24][clause (*vicb*)] or [25][clause (*xiii*) or clause (*xiiib*) or clause (*xiv*) of section 47]];

[26][(*iv*) such assessee being a Hindu undivided family, by the mode referred to in sub-section (2) of section 64 at any time after the 31st day of December, 1969,]

the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be.

[27][*Explanation*.—In this [sub-section] the expression "previous owner of the property" in relation to any capital asset owned by an assessee means the last previous owner of the capital asset who acquired it by a mode of acquisition other than that referred to in clause (*i*) or clause (*ii*) or clause (*iii*) [29][or clause (*iv*)] of this [30][sub-section].]"

18. It is clear from the above section that the cost of acquisition of the asset shall be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee. Previous owner of the property has been explained in the Explanation. Accordingly, it is clear that the property was originally purchased before 01.04.1981 and the assessee is eligible to get the cost of acquisition of the land as on 01.04.1981 and cost of indexation shall also be considered from 01.04.1981. In support of our view, we rely on the judgment of the Hon'ble jurisdictional High Court in the case of

CIT v. Ramaiah Reddy, (1986) 158 ITR 611 / 24 Taxman 764 (Karnataka). Respectfully following the judgment of jurisdictional High Court, we delete the addition of Rs.3,20,662.

19. The AO has further disallowed indexed cost of construction of penthouse of Rs.35,49,490 for the reason that there was no proof of payment of cost of construction and the said apartment was outside the purview of sanctioned plan and holding that it is not a capital assets. However, as per the letter of M/s. BSR Developers which has been reproduced at para 4 above, which is part of the show cause notice issued by the AO. It is clear from the confirmation of the developer that the penthouse P2 construction was completed in the year 2006 and this portion was additionally built which was outside the sanctioned plan and the assessee was required to pay for 2505 sq.ft. @ 750/sq.ft and the owner has paid the same to the M/s. BSR Developers. The developer has acknowledged receipt of the same. Nowhere the lower authorities have disputed this confirmation from BSR Developers. Accordingly, the assessee has paid for construction of the pent house. We note that on the date of sale, it was a capital asset and the assessee completed all the formalities and regularised it with BBMP and produced all the documents . Therefore, it cannot be said that the property is illegal on the date of sale. Accordingly the assessee is eligible for indexed cost of construction as claimed in the computation of income. The case law relied by the ld. DR in the case of ITO vs. Bhagwan T. Fatnani (supra) is not applicable to the present facts of the

case since on the date of sale the property was regularised in the municipal/Govt. records and is covered under the definition of capital asset as defined in section 2(14) of the Act which is evident from the documents submitted by the ld. AR of the assessee. We therefore delete the disallowance of indexed cost of construction of Rs.35,49,590.

20. In the result, the appeal by the assessee is partly allowed.

Pronounced in the open court on this 19th day of January, 2024.

Sd/-	Sd/-
(MADHUMITA ROY)	(LAXMI PRASAD SAHU)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 19th January, 2024.

/*Desai S Murthy /*

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.