आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद।

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER

ITA No.196/Ahd/2022
Assessment Year :2017-18

Rameshlal Bullchand Ambwani A-71, Gayatri Bhavan New Bunglow Area Patia Road, Kubernagar Ahmedabad. PAN : ABIPA 4517 D	Vs	Pr.CIT-3 Ahmedabad.

ITA No.234/Ahd/2023
Assessment Year :2017-18

Chanderlal Bulchand Ambwani B-120, Nr.Arya Samaj Mandir Kubernagar, Ahmedabad. PAN : AATPA 1376 J	Vs	Pr.CIT-3 Ahmedabad.

(Applicant)		(Responent)

Assesseeby	:	Shri S.N. Divatia, AR and Shri Samir Vora, AR
Revenue by	:	Shri Akhilendra Pratap Yadav, CIT-DR

सुनवाई की तारीख/**Date of Hearing : 16/01/2024**
घोषणा की तारीख /**Date of Pronouncement: 24/01/2024**

आदेश/O R D E R

PERANNAPURNA GUPTA, ACCOUNTANT MEMBER

These two appeals have been filed by different assessees against orders passed by the Ld.Pr.Commissioner of IncomeTax-3,Ahmedabad (hereinafter referred to as "ld.Pr.CIT) both of even

dated i.e. 24.3.2022 under section 263of the Income Tax Act, 1961 ("the Act" for short) pertaining to Assessment Year 2017-18.

2. At the outset, it was pointed out that both the assessees are brothers in whose cases the orders under section 263 have been passed finding the assessment order erroneous in identical facts and circumstances.It was therefore pleaded that both the appeals be heard together. The ld.DR agreed with the same, and therefore, both the appeals were taken up together for hearing.

Since facts and issues in both the cases before us are identical, we shall be dealing with the facts in the case of Shri Rameshlal B. Ambwani in ITA No.196/Ahd/2022 and our decision rendered therein will apply *paripassu* to other appeals in the case of Shri Chanderlal Bulchand Ambwani, in ITA No.234/Ahd/2023.

3. <u>ITA NO.196/Ahd/2022 A.Y 2017-18</u>

4. Perusal of the order of the Ld.PCIT reveals that the error noted by him in the assessment order was with respect to the AO accepting the terms of the revised Joint Development agreement entered into by the assessee with a company relating to consideration for transferring land to the company, which as per the Ld.PCIT was not inquired into by the AO before accepting the same.

5. The facts relating to the issue are outlined at para 2 & 3 of the order of the Ld.PCIT which reveal that on perusal of the assessment records he noted that the assessee along with his brother (other assessee before us) had entered into a joint development agreement ("JDA") with their own company viz. Gayari Infrastructure Ltd. ("GIL") wherein they were directors and which

was engaged in development of real estate project viz. Maitri Shiv Greens ("MSG") on their own land; that initially they had entered into a JDA dated 21.1.2014 which was subsequently rectified on 14.10.2014.The terms of the agreement stated the assessee to receive consideration for the land provided for development as and when sale deeds were executed. The ld.CIT noted that total consideration received during the year by the assessee was Rs.99,37,734/- on account of the JDA and out of the same the capital gain was worked out by the assessee at Rs.78,26,866/- and the entire gain was claimed as exempt under section 54F of the Act. He noted that this exemption was denied to the assessee by the AO. The ld.Pr.CIT noted that while the assessee had returned consideration of Rs.99.37 lakhs in accordance with his share of 5.5% (total being 11%) i.e 50% of the total share of the two brothers of 11% in all the sale deeds executed during the year, however, as per the original JDA, the share of two brothers was 15% and not 11%. According to the ld.Pr.CIT, the AO had made no inquiry vis-à-vis reasons for reduction in share of two brothers from 15% to 11% which had resulted in under-assessment of the income of both the brothers to the tune of 2% share (7.5% minus 5.5% of each brother) amounting to Rs.36,13,721/-. According to the ld.Pr.CIT, the assessment order was, therefore, erroneous causing prejudice to the Revenue on account of this under-assessment of income of the assessee, since the AO had failed to examine the issue of reduction in the share of each brother out of consideration received on account of JDA. Para 2 & 3 of the Ld.PCIT's order bringing out the above facts are as under:

2. On examination of assessment records, it was noted that the assessee (along with his brother) entered into original Joint Development Agreement (in short JDA)on 21.01.2014 with his own company namely Gayatri Infrastructure Ltd. (wherein he is one of the directors), engaged in the business of real estate project, namely **Maitri Shiv Greens (MSG)** on his own land bearing S.N. 160/1/1, 160/5, 160/6/1, 166/1/1. Thereaferr, both parties executed rectified JDA on 14.10.2014 whereby certain terms and conditions were modified. Thus, the assessee would receive consideration for the land provided for development as and when sale deeds are executed. No consideration was received by the assessee on or before entering into JDA. BU (Building Use) Permission for MSG was received on 02.05.2016. **Total consideration received during the year was Rs.99,37,734/- from which the capital gain was worked out at Rs.78,26,866/- and the entire gain was claimed exempt u/s. 54F**. In assessment order, this exemption was denied and added to the total income of the assessee. During FY 2016-17, the total consideration in accordance with 5.5% share (total 11%) in all the sale deeds executed in MSG comes to **Rs.99,37,734/-**. However, the assessee in lieu of this consideration, received flat in MSG 701 & 704 worth **Rs.1,02,00,000/-**by execution of sale deed on 14.03.2017. Against this, the assessee has claimed exemption u/s.54F by purchasing this property against the consideration of Rs.99,37,734/- received as consideration for transfer of land through JDA. As per assessment order and a working sheet submitted, the gain was calculated @ 5.5% of consideration of each flat (total 11% shares jointly with brother). However, on verification of case records, it is seen that original JAD was executed on **21.01.2014** wherein the consideration was decided to be 15% of the consideration of each flat to be sold which was to be shared equally between the assessee and his brother. Thus as per original JDA, it is agreed that 7.5% of consideration of each flat (15% shared with brother **Chanderlal B Ambwani**) was to be paid as per para 4 of JDA. This resulted in under assessment of **Rs.36,13,721/-** (reduction by 2% in share). Thus, there is no doubt that the impugned assessment order was erroneous in so far as it is prejudicial to the interest of revenue.

3. The above stated facts reveal that the A.O. had passed the assessment order without making any enquiry on this issue and also failed to make addition to the tune of **Rs.36,13,721/-**. It is thus, apparent that order passed by the then AO in this case for AY 2017-18 u/s. 143(3) of the Act dated 27.12.2019 was erroneous in so far as it is prejudicial to the interest of revenue to above extent which is required to be revised u/s.263 of the Act.

5. The ld.Pr.CIT accordingly issued show cause notice to the assessee in response to which the assessee contended that the JDA had been modified reducing the contribution of both the brothers from 15% to 11%, and accordingly sale consideration and capital gain earned therein was rightly returned by the assessee. The ld.Pr.CIT however found that in the absence of any reasons given by the assessee for reducing the share from 15% to 11% the issue ought to have been examined bythe AO, and on account of lack of due diligence on the part of the AO, the assessment order was held to be in error in having accepted the reduced shares of the assessee without any examination and inquiry. He accordingly held the assessment order to be erroneous causing prejudice to the Revenue having revenue implication to the tune of Rs.36,13,721/- in each case, on account of under-assessment of income of the assessees and set aside the assessment order with direction to the AO to make fresh assessment on the issue *de novo* after giving due opportunity of hearing to the assessee.

5. The contention of the ld.counsel for the assessee before us was that the assessee had demonstrated to the AO the existence of original development agreement, which was rectified subsequently reducing shares of the assessee therein from 15% to 11%, genuineness of which JDA was never questioned by the ld.Pr.CIT. There was no question therefore of the AO havingerred in accepting the terms of rectified JDA, he contended.

His contention was also to the effect that there was no prejudice to the Revenue on account of reduced shares of the assessees, since the reduced share was accounted for by the company, which was a party to the JDA which in turn had returned

the same to tax in itsreturn of income, and therefore, there was no prejudice caused to the Revenue.

The ld.DR however relied on the order of ld.Pr.CIT(Exemption).

6. We have heard boththe parties and we have also gone through the order of the ld.Pr.CIT. As per the ld.Pr.CIT the error in the order of the AO was in accepting the terms of consideration to be given to the assessee in lieu of revised JDA entered into with them with one of their companies, whereby the shares of the assessees had been reduced from 15% of the considerationin the original JDA to 11% in the revised JDA. As per the ld.Pr.CIT the AO should have examined the reasons for reducing the shares. Having not done, his assessment order was in error in accepting the consideration received by the assessee as per the terms of rectified JDA.

Having said so, what emanates from the order of the ld.Pr.CIT is that since the AO did not ask any question before accepting the terms of the rectified JDA, his assessment order was in error causing prejudice to the Revenue.

7. We are not in agreement with the ld.Pr.CIT. It is not the case of the Ld.PCIT that the JDA's, both original and rectified, are not genuine. The terms of the agreements have been agreed into by both the parties. In the first agreement, the two parties agreed to share the consideration received on sale in the ratio of 15:85 between the assessee and the company, which is party to JDA. In the rectified agreement, share of the sale consideration was agreed to in the ratio of 11:89. The case of the ld.Pr.CIT is that the AO should have examined the reasons for reduction in the shares of the assesseein the sale consideration,because it resulted in lesser consideration

returned by the assessee for computing capital gain, as comparedto the terms agreed in the original agreement. This cannot be the basis for holding the assessment order erroneous. All amendments to the JDA are validly done. There is no case made by the ld.Pr.CIT that any of the amendment was not validly done. In the light of the same, we fail tounderstand why any doubt or suspicion for that matter ought to have been created by virtue of rectification of the original JDA so as to call for further inquiry on the issue, more particularly, when the terms of agreement have only resulted in the shifting of the consideration from an individual assessee to the company, which is a party to the JDA; the company taking a larger share now and reflecting the same in its return of income. The ld.Pr.CIT has alleged that by virtue of this reduction in its share, the assessee has attempted to evade taxes to this extent, but he failed to take note of the fact that the excess consideration has been reflected in the hands of the other party to the JDA ,i.e the company and in the absence of any finding by the ld.Pr.CIT that the company also has, by some means, evaded paying taxes on the same, there could not be a case of alleging that the change in terms of JDA was only a colourable device resorted to the by assessee for avoiding taxes. We agree with the ld.counsel for the assessee that with no valid reason brought out by the ld.Pr.CIT for the AO to have accepted the terms of sharing consideration as per the original agreement only, the error noted by him in the assessment order in accepting the terms of rectified JDA are non-existent.

We, therefore, hold that there is no error in the assessment order in accepting terms of the rectified on the development agreement for the purpose of sharing the consideration received in

view of the joint development agreement. The order of the ld.Pr.CIT is held to be untenable, and therefore, quashed accordingly.

8. In effect, both the appeals of the assessee are allowed.

Order pronounced in the Court on 24th January, 2024 at Ahmedabad.

Sd/-	Sd/-
(T.R. SENTHIL KUMAR)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad,dated 24/01/2024