

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : A : NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.355/Del/2020
Assessment Year: 2016-17

Arun Kumar Jain,
B-1, Green Park Extn.,
New Delhi – 110 016.

Vs ACIT,
Circle-61(1),
New Delhi.

PAN: AAFPJ7509J

(Appellant)

(Respondent)

Assessee by : Mrs. Prem Lata Bansal, Sr. Adv.,
Shri Shivang Bansal, Advocate

Revenue by : Shri Kanav Bali, Sr. DR

Date of Hearing : 21.02.2024

Date of Pronouncement : 20.05.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the assessee against the order dated 21.11.2019 of the Commissioner of Income Tax (Appeals)-20, Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in Appeal No.CIT(A), Delhi-20/10213/2018-19 arising out of the appeal before it against the order dated 07.12.2018 passed u/s 143(3) of the Income Tax Act,

1961 (hereinafter referred as 'the Act'), by the ACIT, Circle-61(1), Delhi (hereinafter referred to as the Ld. AO).

2. Heard and perused the record.

2.1 The relevant facts are that the assessee had filed return of income declaring the total income at Rs.49,91,060/- which included long-term capital gain at Rs.30,15,342/- earned by the assessee on the sale of the property which is the bone of contention between the assessee and the Revenue. The assessee had entered into a joint development collaboration agreement with the builder on 07.04.2014 in regard to a residential house measuring 333 sq. yards and, as per the agreement, the builder was to demolish the existing construction and raise a new building consisting of basement, ground floor stilt, first floor, second floor and third floor. The cost of construction was to be borne by the builder and against which the builder was to receive the possession of first floor of the new structure. Further, the builder was also supposed to pay Rs.97 lakhs to the assessee in terms of this agreement. On 30.10.2015, a tripartite agreement was entered between the assessee, builder and the purchaser of the first floor wherein this first floor was sold to the purchaser third party for Rs.2,80,00,000/.

2.2 At the time of filing of the return, the assessee declared long-term capital gain of Rs.30,15,342/- on the basis of the following calculation:-

11. That while filing the return, assessee declared the long term capital gain of ₹30,15,342- after claiming deduction u/s 54 of the Act as under:-

Long term capital gain on sale property			
Sale Consideration		2,81,64,000.00	
Cost of acquisition-1981	9,66,291-		
Cost of improvement-1987	5,00,000-		
Cost of improvement -1993	5,00,000-		
Cost of improvement -1997	6,00,000-		
Cost of improvement -2002	6,00,000-		
Cost of Indexation	1,99,94,633.61		
Sold ¼ share		<u>49,98,658.40</u>	
Long term capital gain		2,31,65,341.60	
Invest in construction of house		<u>2,01,50,000.00</u>	30,15,341.60
Date of construction-	31/08/2015		

12. That during the proceeding assessee explained the sale consideration of ₹2,81,64,000/- as under:-

a) The total land area is 278.43 sq yd. Since the building consist of four floors and the approximate circle rate at the time of preparation was ₹2L per sq mtr,

The land value will be ₹2,00,000 x 69.67 (278.43/4) = ₹1,39,34,000- (A)

b) The cost of construction for constructing one floor is approximately ₹20,000- per sq yd. Since the covered area of one floor is 226.50 sq yd

The cost of construction will be ₹226.50 x 20000 = ₹45,30,000- (B)

c) Assessee has also received an amount of ₹97,00,000/- through cheque so it would be included in

Sale consideration – ₹97,00,000- (C)

Total Sale Consideration – (A)+(B)+(C) = ₹2,81,64,000-

3. The AO, accepted the sale consideration at Rs.2,81,64,000/- stating that the assessee himself has shown this figure but concluded in para 4, “As per the above said agreement the first floor is deemed to be sold.”. AO thus concluded that 2,81,64,000/- is the sales consideration received towards the transfer of 1st floor by the assessee. The cost of whole of the construction by the builder was assumed to be at Rs.1,86,64,000/- (Rs. 2,81,64,000 less Rs. 97,00,000 given to assessee by the builder).

3.1 The CIT(A) however considered the sale consideration at Rs.3,78,64,000/- which was total of Rs.2,81,64,000/-, the sale consideration explained by the assessee plus Rs.97 lakhs cash received by the assessee.

4. Further, the AO has also accepted the cost of acquisition calculated by the assessee but only 50% of the cost of improvement incurred by the assessee was allowed.

4.1 The AO also allowed deduction u/s 54 of the Act, in respect of ground floor only, stating that benefit of deduction u/s 54 of the Act can be allowed only in respect of one residential house and the assessee is using only ground floor for residential purpose and the remaining floors acquired after the new construction were being rented.

4.2 The CIT(A) has confirmed the order of the AO in respect of cost of improvement at 50% only.

4.3 The CIT(A) accepted the claim of the assessee that the assessee is entitled to deduction u/s 54 of the Act for his portion of the constructed property which is fairly 77.5% of the construction.

5. The assessee is in appeal before us raising the following grounds of appeal:-

“1 THAT the impugned order passed by Ld. CIT(A) partly confirming the assessment order as passed by assessing officer is bad in law and on facts of the case.

2 THAT the Ld. Assessing Officer has grossly erred in disallowing 50% of amounts spent on additions, improvements and renovations of capital nature during a span of 48 years by a cryptic observation that bills and invoices have not been produced. Ld. CIT(A) equally erred in confirming the same. This resulted in reducing the indexed cost of acquisition of property.

3 *The Ld. Assessing Officer grossly erred in restricting exemption under section 54 of the Income Tax Act, 1961 to one floor as against claim of three floors as the amount of gain was invested in construction of three floors. Ld. CIT has held that appellant is eligible for set off of Capital Gain of 77.5% of construction cost of property but has erroneously adopted contradictory figures. This has result in confirming the addition partly. Entire addition deserves to be deleted.*

THAT the Ld. CIT(A) has grossly erred in adjudicating and confirming the eligible exemptions as made by Ld. Assessing Officer on contradicting figures vis-a-vis calculation of capital gain as against eligible exemption. The Ld. CIT having held the assessee eligible for exemption for total 77.5% of the entire cost of construction, all additions deserves to be deleted.

THAT the Appellant craves leave to add, alter, omit to/from the grounds of appeal at the time of hearing of this appeal or at any time before that as she may be advised. The appellant seeks to adduce further evidence and make oral arguments on facts and law at the time of hearing of this appeal.

5.1 On behalf of the assessee the following additional grounds have been raised:-

“a) That the Ld. CIT(A) has erred in law and on facts in taking the sale consideration at Rs.3,78,64,000/- ignoring the material fact that the assessee had not sold first floor of the property but had sold 22.5% of his land. Hence, the figure adopted by Assessing Officer as well as CIT(A) is contrary to law and facts and therefore, liable to be readjusted.

b) That the order passed by Assessing Officer and consequently the CIT(A) is perverse in law and on facts as the same is contrary to the law settled by various High Courts including the Jurisdictional High Court.”

6. The Id. AR has primarily stressed on the question of law that cost of construction of 77.5% of the total area is the sale consideration of 22.5% of the share in land transferred to the builder who had ultimately transferred it to the buyer third party being share acquired by virtue of purchase of first floor. Further, the cost of construction of the remaining floors and the basement is an investment of the assessee in the new property which is allowable as deduction

u/s 54 of the Act. It is further submitted that in any case, whatever is the sale consideration adopted, the same becomes investment in the new property for the purpose of deduction allowable u/s 54 of the Act.

7. Ld. AR has relied the judgment of the Hon'ble jurisdictional Delhi High Court in the case of *CIT vs. Vasavi Pratap Chand, 398 ITR 316 (Del)*, to support the contention that in case of Joint Development Agreement, the owner of the land parts with undivided interest over the land in favour of the builder and receives agreed portion of the built up area comprising not only the flat portion, but also the common area, parking space, basement, etc.

8. We have taken into consideration the facts before the Hon'ble jurisdictional Delhi High Court in the case of *CIT vs. Vasavi Pratap Chand, (supra)*, wherein it is held that in case of Joint Development Agreement, the owner of the land parts with undivided interest over the land in favour of the builder and receives agreed portion of the built up area comprising not only the flat portion, but also the common area, parking space, basement, etc. The Hon'ble High Court in that has considered the transfer of 44% of the land by the assessee to the builder and the transfer of 56% of the built up area by the builder to the assessee in terms of section 2(47) of the Act r.w.s. 53A of the Transfer of Property Act and held that the consideration for the transfer of 44% of the land was the cost of construction of 56% built up area which was to be incurred by the builder.

9. Based upon this proposition of law, the Id. AR of the assessee filed before us a fresh computation. We consider it appropriate to reproduce the fresh calculation below:-

<u>PROPOSED CALCULATION OF LONG TERM CAPITAL GAIN</u>		
A. <u>Sale Consideration</u>		
a) (Sale consideration of transfer of 22.5% of land would be cost of construction of 77.5% of land area ₹32,01,000 x 77.5/22.5 =	₹1,10,25,000-	
b) Amount of ₹97L received through Chq	₹97,00,000-	₹2,07,25,000-
B. <u>Cost of Acquisition & Improvement</u>		
a) Fair Market Value of property as on 01.04.1981 – ₹9,66,291- Indexed cost – 9,66,291x1081/100	₹1,04,45,605-	
b) Cost of improvement in various years – ₹22,00,000- Indexed cost – ₹92,29,018-		
If only 50% is allowed as per Assessing Officer and CIT(A)	₹46,14,509-	₹1,50,60,114-
C. <u>long term capital gain before deduction</u>		₹ 56,65,000/-
D. <u>Deduction u/s 54</u>		
a) Cost of Construction by the builder in 77.5% land area is the investment by the assessee	₹1,10,25,000-	
b) Assessee has also incurred expenditure on lift, marble, tiles etc over and above the builders expenditure (approx-₹30L) Even if it is not considered then it is	--	₹1,10,25,000-
E. <u>long term capital gain after deduction is loss to be carried forward</u>		

10. The Id. DR has, however, defended the order of the Id.CIT(A), but, could not dispute the proposition of law relied by the Id. AR. Thus we are of the considered view that based on the law cited, the additional grounds raised becomes a pure question of law and, accordingly, admitted.

11. Giving thoughtful consideration to the submissions before us, we are of the considered view that sale consideration of Rs.2,81,64,000/- adopted by the assessee has actually not been disturbed by the AO but the CIT(A) has somehow erred in adding Rs.97 lakhs which, in fact, was already included in the calculation of the assessee at Rs.2,81,64,000/-. Be that it may, same now becomes academic as a fresh calculation of the capital gains is filed by the Ld AR, which will require verification at the level of assessing officer only.

12. In the light of the aforesaid discussion, we set-side the assessment order to the files of assessing officer and accordingly the issue of calculation of capital gains is restored to the files of Assessing officer, who shall take into consideration the aforesaid findings of this Bench and the proposition of law laid by the Hon'ble Jurisdictional High Court in the case of *Vasavi Pratap Chand (supra)*, for verification of the proposed calculation filed by the ld. AR, and pass an order afresh. In consequence of the aforesaid, the appeal be considered allowed for statistical purposes only with consequences to follow as per the directions above.

Order pronounced in the open court on 20.05.2024.

Sd/-

(G.S. PANNU)
VICE PRESIDENT
Dated: 20th May, 2024.

Sd/-

(ANUBHAV SHARMA)
JUDICIAL MEMBER

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Copy forwarded to:

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

Asstt. Registrar, ITAT, New Delhi