***आयकर अपीलीय अधिकरण, हैदराबाद पीठ***
IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad

BEFORE SHRI LALIET KUMAR, JUDICIAL MEMBER AND
SHRI MADHUSUDAN SAWDIA, ACCOUNTANT MEMBER

**आ.अपी.सं** /ITA No.1133/Hyd/2018
(**निर्धारण वर्ष**/Assessment Year:2010-11)

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|---|---|---|
| Income Tax Officer,<br>Ward 1, Adoni. | Vs. | Sri T. Rama Subba Reddy,<br>D.No.16-54/7-B, Parvathapuram Road, Adoni-518 301<br>PAN ADSPT8833F |
| (Appellant) | | (Respondent) |
| | | |
| **निर्धारिती द्वारा**/Assessee by: | Shri S. Rama Rao, Advocate | |
| **राजस्व द्वारा**/Revenue by:: | Smt. Sheetal Sarin, DR | |
| | | |
| **सुनवाई की तारीख**/Date of hearing: | 10/06/2024 | |
| **घोषणा की तारीख**/Pronouncement: | 28/06/2024 | |

**आदेश**/ORDER

**PER SHRI LALIET KUMAR, J.M:**

The present appeal is filed by the Revenue, feeling aggrieved by the order passed by the Commissioner of Income Tax (Appeals), Kurnool Dt.09.03.2018 for the Assessment Year 2010-11.

2. The Revenue has raised the following grounds :

*" 1. The order of the Ld. CIT(A) is erroneous both on facts and in law.*

*2. Whether under the facts and circumstances of the case, the action of Ld. CIT(A) does not amount to reviewing and adjudicating the order passed u/s.263 by Ld.CIT when A.O. only gave effect to the findings or directions of the Ld. CIT in the order passed u/s.143(3) r.w.s. 263 ?*

*3. Whether the Ld. CIT(A) is right, under the facts and circumstances of the case, in granting relief to the assessee by way of allowing the development expenditure of Rs.2,00,00,000/- and payments of Rs.2,45,45,000/- made by the buyer to third party, on behalf of the assessee as per the request of the assessee when Ld. CIT in the order passed u/s.263 clearly decided the above two issues against the assessee as per the page 6 of the order u/s.263 ?*

*4. Whether, the Ld. CIT(A) is right, under the facts and circumstances of the case, in allowing / giving relief to the assessee on account of development expenditure of Rs.2,00,00,000/- and payments of Rs.2,45,45,000/- made by the buyer to third parties on behalf of the assessee as per the request of the assessee which are not claimed by the assessee in his Return of Income ignoring the binding decision of Supreme Court in the case of Goetze (India) Ltd. Vs. CIT 284 ITR 323 (SC) ?*

*5. Whether the Ld. CIT(A) is right, under facts and circumstances of the case in allowing the development expenditure of Rs.2,00,00,000/- to the assessee without any evidence and without giving any opportunity to the A.O. as required under Rule 46A to verify the claim of the assessee.*

*6. Any other additional ground that may be urged at the time of appeal hearing."*

3. The brief facts of the case are that assessee is an individual, derived income form interest, share of income from partnership and capital gains. He filed the return of income on 20.03.2012 admitting an income of Rs.2,45,910/- which does not include income from capital gains. The Assessing Officer, having converted the case of scrutiny, found that the assessee, during the year effected sale of land and therefore, asked to furnish the details. The assessee filed the information to that effect that he derived capital gain of Rs.20,993/-. The Assessing Officer determined the income at Rs.7,31,116/-. The CIT, Kurnool set aside the order by invoking the provision of Section 263 vide his order dt.23.03.2015. The said order became final, and the Assessing Officer proceeded to reassess the income for

the assessment year 2010-11 and completed reassessment on 31.03.2016. The Assessing Officer while completing the reassessment held that the total consideration on sale of land was Rs.4,67,20,000/- and not Rs.21.75,000/- as adopted by him in the regular assessment and allowed cost of acquisition of Rs.21,54,067/- without allowing any other claims made by the assessee and passed assessment order on 31.03.2016 u/s 143(3) r.w.s. 263 of the Act interalia making addition of long term capital gains at Rs.4,45,65,933/-.

4. Aggrieved with the order of Assessing Officer, assessee filed appeal before the ld.CIT(A), who granted relief to the assessee.

5. Aggrieved with the order of ld.CIT(A), Revenue is now in appeal before us.

6. In support of its ld.DR filed written submissions, which reads as under :

> *2.1 The assessee filed ROI on 20-03-2011 admitting an income of Rs.2,45,907/.. The case was taken for scrutiny u/s 143(3). The AO found that there were cash deposits in bank totalling to Rs.58.03 lakhs which were not properly explained. He therefore computed income 8% on such deposits and made the addition of Rs.4.64 lacs.*
>
> *2.2 The assessee did not prefer any appeal against the said order passed by the A.O. dated 19.03.2013.*
>
> *3.1 Later, the records were examined by the CIT, Kurnool. The CIT found that assessee has sold a property for Rs.4.67 cr, but has offered only Rs.21.75 lacs as actual receipt. The balance amount was stated to be with the developer as unsecured loan. CIT observed that as per JDA, assessee got Rs.2.4 cr as refundable deposit which was not examined by AO. Vide Sale deed 1009-2009, the property was sold for a sum of Rs.4.67 Cr and also the fact that*

*JDA was cancelled. The cancellation deed in riot obtained by the AO.*

*3.2 The assessee did not prefer any appeal against the order u/s.263 passed by CIT dated 23.03.2015.*

*4.1 The AO initiated consequential proceedings. During the present proceedings, the assessee stated the he received only Rs.2.40 Cr as refundable deposit and that Rs.2.45 Cr was not received by him but held by the third party as loan from assessee. AO further held that on. cancellation of JDA the amounts earlier received got merged with the sale deed. The AO thus passed order u/s 143(3) rws 263 dated 31-03-2016 by treating the sum of Rs.4.67 Cr for the purpose of CG.*

*5.1 The assessee filed appeal before the CIT(A), Kurnool against the order of the A.O. passed u/s 143(3) rws 263.Before CIT(A) the assessee raised fresh grounds and filed additional evidence. It was contended that AO did not consider the expenditure in relation to development and has now obtained confirmation letter. CIT(A) called for RR. AO objected to the additional evidence on the ground that this the expenditure was not claimed in the ROI and further the CIT in proceedings u/s 263 has already considered this issue.*

*5.2 After considering the above issues, the CIT(A) held that out of Rs.2.40 Crs received under JDA, a sum of Rs.40 lacs was not encashed and returned. Thus only Rs.2 cr was received. Further assessee has paid Rs.1.92 cr to Florence for development expenses. Florence has now given the confirmation letter. Later both Florence and assessee sold the land vide present sale deed for a sum of Rs.4.67 cr. Out of this sum Rs.2 cr is as per JDA and also received a further sum of Rs.21.75 lacs. A sum of Rs.2.45 cr was paid directly to Canopy for surrender of rights. Thus assessee only got Rs.2.21 cr. Balance was paid to third party (Canopy). CIT(A) also accepted the expenses of Rs.1.92 cr to Florence.*

*6.1.* The Revenue in the present ITA No. 1133/Hyd/2018 has preferred appeal before ITAT. The crux of the grounds of appeal are whether CIT (A) could only decide the issue which arose in order u/s 143(3) r.w.s 263. The findings of the AO were limited to the observations of the CIT in his order u/s 263. Thus, CIT (A) could not have decided the issue not arising out of order u/s 263.

6.2. In this context, it is submitted that in the original assessment, the only issue involved was disallowance of Rs.4.64 lakhs. No appeal was filed against this order dated 19.03-2013.Thus, order u/s 143(3) attained finality.

6.3 Later CIT passed order u/s 263 dated 23/03/2015. Again, in this order, the only issue set aside by the CIT was with regard to the re-computation of Capital Gain on the sum of Rs.4.67 cr. This order was also not challenged. Thus, order u/s 263 attained finality.

6.4 The CIT has given a finding that the assessee has received a sum of Rs.4.67 cr and not Rs.21.75 lacs as admitted and assessed by the AO. The amounts paid to third party on account of the assessee is definitely the amount received by the assessee. However, the CIT(A) went beyond the settled issues and accepted further evidences and analyzed the documents and facts which were already analyzed by the CIT.

6.5 Reliance is placed on ITAT Vizag decision in the case of B. Durga Prasad in ITA No.451/Viz/2016 dated 24-10-2018. In that case the ITAT observed that though the power of CIT(A) is coterminous with that of AO, the CIT(A) was given power to enhance the assessment, but the. CIT(A) was not vested with the power to redo the assessment made by the AO. The ratio laid down is very much applicable to the present case. By not filing any appeal the assessee has as much as foregone its right to be taxed appropriately.

6.6 In *CU v. Rai Bahadur Hardutroy Motilal Chamaria,f* 1967] 6.6 ITR 443 (SC) a three Judge Bench of the Supreme Court has has observed that it is only the assessee who has a right conferred under section 31 to prefer an appeal against the order of assessment made by the Income-tax Officer. If the assessee does not appeal the order of assessment becomes final subject to any power of revision that the Commissioner may have under section 33B of the Act. It was further held that *"the power of enhancement under section 31(3) of the Act is restricted to the subject-matter of assessment or the source of income*

*which have been considered expressly or by clear implication by the Income-tax Officer from the point of view of the taxability of the assessee",* and in the same para *"As we have already stated, it is not open to the Appellate Assistant Commissioner to travel outside the record, i.e., the return; made by the assessee or the assessment order of the Income-tax Officer with a view to find out new sources of income* and *the power of enhancement under section 31(3) of the Act is restricted to the sources of income which have been the subject-matter of consideration by the Income-tax Officer from the point of view of taxability. In this context "consideration" does not mean "incidental" or "collateral" examination of any matter by the Income-tax Officer in the process of assessment. There must be something in the assessment order to show that the Income-tax Officer applied his mind to the particular subject-matter or the particular source of income with* a *view to its taxability or to its non-taxability and not to any incidental connection."*

6.7 In the case of Gurjargravures P. Ltd., 111 ITR 1, the Supreme Court has concurred with the decision in the case of Rai Bahadur Hardutroy Motilal Chamria (supra).

6.8 In the case of B.P. Sheradfudin in [2017] 87 taxmann.com 330 (Kerala) the HC of Kerala had held Powers of Commissioner under section 251 are, indeed, very wide; but, wide as they are, they do not go to extent of displacing his powers under sections 147, 148 and 263. There is a solitary but significant limitation, according to Union Tyres, to the power of revision. It is not open to the Appellate Commissioner to introduce in the Assessment a new source of income and the assessment must be confined to those items of income which were the subject-matter of the original assessment. The relevant extract is as under –

> *"50. In course of time, Union Tyres was doubted.* In. *Sardari Lat &Co.,(supra) the same issue—whether the appellate authority has the power under section 251 to discover a new source of income—was referred to a Full Bench. After examining the authorities holding the fielding on that issue, the learned Full Bench has held that the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the assessing officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147, or section 148, or even section 263*

*of the Act if requisite conditions are fulfilled. It is inconceivable, according to Sardari Lal, that in the presence of such specific provisions, a similar power is available to the first appellate authority. Eventually, Sardari Lal upheld the decision in Union Tyres.*

*51. Undeniably, the precedential position on the powers of the first appellate authority under section 251 undulates. There are seeming contradictions. But, as held by Union Tyres, and affirmed on reference by Sardari Lal, there is a consistent judicial assertion that the powers under section 251 are, indeed, very wide; but, wide as they are, they do not go to the extent of displacing powers under, say, sections 147, 148, and 263 of the Act."*

6.9 The law is well settled that issues not considered in assessment, cannot be taken up in appeal. As is evident from the original assessment order the A.0 had accepted the addition of Rs.4.64 lakhs. Thus, order u/s 143(3) attained finality. Further the only issue set aside by the CIT was with regard to the actual amount of receipt on sale of land. The matter set aside was for the computation of capital gain on the sum of Rs.4.67 Cr. This order was also not challenged. Thus, order u/s 263 attained finality. The CIT(A) could thus decide issues which form the part of order u/s 14 ) r.w.s 263 only. Reliance is placed on the decision of Madras HC in Southern Foundation P. Ltd, Vs ACIT (Mad) 324 ITR 76.

7. In this case the decision of CIT(A) starts from Para-7.0 of its order in 2nd Sub Para of para-7.0 CIT(A) has grossly erred in considering the view that the developer and the appellant have agreed that the disputes with regard to the land be settled and that the agricultural land be levelled and converted into Non Agricultural residential land, in this context it is important to f draw the attention of Hon'ble ITAT towards the Page.2 and point/schedule C of the Joint development agreement between the assessee and developer which is reproduced as under :

*"Whereas the FIRST PARTY/OWNER has obtained the conversion of the agricultural land bearing survey No.9, of Srinivagulu Village, Begur Hubli, Bangalore South Taluk measuring an extent of 39 Guntas for non-agricultural residential purpose and which is more*

*fully described in the schedule hereunder vide orders of the Deputy Commissioner, Bangalore District in official Memorandum dated. 18.10.2004, bearing No. BDS/ALN: SR(S)393/04-05 after crediting the requisite conversion fee to the concerned authorities."*

8. In this, it is clearly mentioned that the land was converted from agricultural to non-agricultural Dated. 18.10.2004 which is before the date of JDA i.e. 29-10-2004 and the JDA remains the registered document was completely ignored by the CIT (A). Further in the same Para CIT (A) continues as:

*"With that view an amount of RS.1,91,00,000/- was paid to Florence Estates and Construction Limited, through cheques by. the Assessee during the period 04.11.2004 to 04.01.2005. The balance of Rs.9,00,000/- was retained by the appellant as an advance. The Florence Estates and Construction Limited, confirmed the fact that it received an amount of Rs.1,91,00,000/- from the appellant and that an amount of Rs. 1,92,54,650/- was spent by them. The appellant spent an amount of Rs.7,94,350/- from out of the advance for conversion from agriculture land to non-agricultural.*

*In fact Florence Estates and Construction Limited provided the details and the nature of the expenditure incurred by them which is extracted below:*

| Sl. No. | Particulars | Amount |
|---|---|---|
| 1. | Amount paid to Sri. Dwarakanath on T. Rama subbareddy towards land expenses as agreed upon at the time | Rs.51,00,000/- |
| 2. | Compensation/Claims paid to Occupants of land on behalf Mr. T. Rama Subba Reddy | Rs.42,56,250/- |
| 3. | Expenses incurred towards of the Agricultural land filling with boulders, soil and grounting being low level and water bed area. | Rs.98,49,400/- |
| | Total | Rs. 1,92, 05, 650 |

*8.1. Here also CIT (A) has grossly erred in considering the appellant view without considering the following points:*

*(a) As per the JDA, the agreement was done with the M/s. Canopy Dwelling (P.) Ltd. Dated, 29/10/2004 so why the money was paid till 04/01/2005 that also by the M/s. FECL ?*

*(b) There is no mention about the Florence Estate and Construction Ltd. in either JDA or sale deed that any money was or has to the paid to the Florence Estate. and Construction Ltd. at any point of time or any expense made by them.*

*(c) When JDA was done with the Mis. Canopy Dwelling (P.) Ltd. why the amount was given to the Florence?*

*(d) As per JDA (Schedule D), Page No-3 (internal) the assessee is the absolute owner, in Lawful Possession and enjoyment of the Scheduled Property without any let or hindrance from anyone why the money paid to Florence Estate and Construction Ltd. (FECL referred here after) for compensation/claim paid to occupants of land on behalf of Mr. T. Rama Subbareddy and the amount paid to Sri. Dwarkanath on behalf of the Mr. T. Rama Subbareddy towards land expense as agreed upon at the time of registration, but the land was purchased by assessee from Dwarkanath & Associates Dated.27/07/2004, long back before the payment made to M/s. FECL (i.e. up_ to 04/01/2005). Further on going through the sale deed between Dwarkanath Associates and Assessee [(P.B (A) Page No.32-371 Page No.35 payment schedule Rs.15,00,000/- paid through Cheque No.385301 Dated 26.07.2004 but no where it mention about the amount of Rs.51,00,000/- (which is almost to be 3 times of consideration) as agreed by T. Rama Subbareddy.*

*Further one pertinent question also arises if it was paid to Dwarkanath also whether it was taken as the sale consideration while computing the capital gain in its case. It is also important to the notice of Bench about the points (2), (6), (7), (8).*

*9. Further as per the table mentioned by CIT(A), the third expenses paid to the M/s. FECL towards leveling of Agricultural land filling with boulder etc. of amount of Rs.98.49 Lakh also does not hold water as it is not mentioned in any of the 3 deeds which are registered before Government Authority and are only can be relied as an evidence i.e.*

*(1) Sale Deed between Dwarkanath Associates & T. Rama Subbareddy*

*(2) JDA between assessee & M/s. Canopy Dwelling (P) Ltd.*

*(3) Sale Deed between Assessee and M/s. Canopy Dwelling (P) Ltd. And others.*

*CIT(A) has erred in accepting the assessee's view ignoring all the three valid documents relying on the Cheque payments which cannot be proved that the same was given for this purpose only and one to one nexus cannot be proved simply by giving ledge, which cannot be sacrosanct document and in fact is a document of assessee and is only an afterthought.*

*10. Finally, ;it may also be appreciated that when the issue was not raised before the A.O. or the CIT(A) and the assessee was given due opportunity to file all the evidences before the lower authorities, no prejudice has been caused to him. Further merely relying on only cheque payment (if any) cannot itself justify the genuineness of transaction or purpose for which it was paid. It is also very clear itself justify the genuineness of transaction or purpose for which it was paid. It is also very clear from the valid documents that is sale deed and JDA, in which neither about Florence (M/s. FECL) not about such payment is mentioned. By merely filing the ledger and showing some bank payment, it cannot establish the purpose, nexus for this issue only it was paid. Further it cannot be ascertained that how the M/s. FECL has made this expense in their books of account and whether it has taken as their income. Reliance is placed on the following decision that merely movement through banking channel cannot prove the genuinicity or more specifically purpose.*

*(a) Sajan Dass and Sons Vs. CIT [2003] 264 ITR 435 (Delhi)*

*(b) Hillman Properties Pvt. Ltd. Vs. ITO (ITAT, Delhi)*

*It is therefore prayed that the order of the A.O. passed u/ 143(3) r.w.s. 263 may be restored."*

*4. It was contended by the Ld. Departmental Representative on the basis of the written submissions filed on 18.10.2022 reproduced herein above and also on the basis of submissions on 13.12.2023 with the appeal of the Revenue is required to be allowed. The prime contentions of the Ld. DR are as under :*

*(i) that the assessee had sold the property by Registered Sale Deed for a total consideration of Rs.4,67,20,000 to M/s. Canopy Dwellings Private Limited. The Ld. DR had submitted that finding of the Ld. CIT(Appeals) that the amount of Rs.2,45,45,000 received by the M/s. Canopy Dwellings Private Limited cannot form part of the sale consideration, was incorrect as the capital asset was transferred for the consideration mentioned in the Registered Sale Deed which was of Rs.4,67,20,000. The receipt of amount through the post dated cheque will not make the sale document as null and void, in any case, it is the condition mentioned in the sale deed that the amount was paid by the purchaser to M/s. Canopy Dwellings Private Limited on the instruction of the assessee. Further it is the case of the assessee before the Assessing Officer that the said amount, was shown as loan in the books of account of M/s. Canopy Dwellings Private Limited.*

*(ii) that it was submitted that the Ld. CIT(Appeals) had wrongly directed the Assessing Officer to allow deduction of the index cost of expenditure allegedly incurred by M/s. Florence Estates and Constructions Ltd. for an amount of Rs.2,21,54,067. It was submitted that the Ld. CIT(Appeals) has not examined the expenditure incurred by M/s. Florence Estates and Constructions Ltd. Further it was submitted that the assessee in the original assessment proceedings had not claimed any expenditure in the Return of Income and had accepted the assessment order passed by the Assessing Officer whereby the Assessing Officer has merely restricted the long term capital gain to Rs.20,993. It was further submitted that the proceeding u/s.263 and the order passed thereafter, are not for the benefit of the assessee and the deduction, now sought to be claimed by the assessee cannot be permitted to be taken by the assessee in the assessment / reassessment / recomputation done pursuant to the direction of the Learned PCIT. Further it was submitted that as per the clause of the Joint Development Agreement (JDA) entered between the assessee and M/s. Canopy Dwellings Private Limited, there is no obligation on the assessee to carryout or incur any expenditure with respect to the expenditure shown by M/s. Florence Estates and Constructions Ltd. It was further submitted that the obligation of the assessee asper the JDA are mentioned at page 21 which are as under :*

*" 12. <u>REFUNDABLE DEPOSIT</u> :*

*12.1 The DEVELOPER shall pay a sum ofRs.2,40,00,000/- (RupeesTwo Crore Forty Lakhs only) as refundable deposit in the following manner without interest :*

| | | |
|---|---|---|
| *a)* | *Amount paid by way of Cheque dated 29.10.2004, No.294620 drawn on Indian Overseas Bank, HRBR Layout Branch, Bangalore* | *Rs.1,00,00,000/-* |
| *b)* | *Amount paid by way of Cheque dated 29.11.2004, No.294621 drawn on Indian Overseas Bank, HRBR Layout Branch, Bangalore.* | *Rs.1,00,00,000/-* |
| *c)* | *Amount paid by way of Cheque dated 29.12.2004, No.294623 drawn on Indian Overseas Bank, HRBR Layout Branch, Bangalore.* | *Rs.40,00,000/-* |
| | *Total :* | *Rs.2,40,00,000/-"* |

8.2. It was submitted by the Ld. DR from the perusal of the JDA on the part of the assessee to incur any expenditure with respect to construction of the scheduled property rather it has obligation on the part of M/s. Canopy Dwellings Private Limited to carryout construction activity at any cost. The Ld. DR had drawn our attention to paragraphs 4.1 to 4.3 of JDA at pages 15 & 16 of the paper book filed by the assessee which are to be following effect.

8.3. It was further submitted that even in the cancellation deed, executed on 10.09.2009 by M/s. Canopy Dwellings Private Limited, it is clearly mentioned as under :

> *" WHEREAS, the parties to the Joint Development Agreement were not able to implement the scheme of the Joint Development of the Schedule Property and as the Party of the Second Part has not carried out any developmental activity over the schedule Property in view of the obstacles at the Schedule Property, pursuant to the said Joint Development Agreement dated 29/10/2004, the parties have now decided to cancel the said Joint Development Agreement in respect of the Schedule Property. The Second Party has not made use of the above mentioned Joint Development Agreement and the subsequent Power of Attorney, nor has created any charges or interest over the Schedule Property, in favour of any third person/s.*
>
> *WHEREAS for the reasons hereinbefore stated, the Joint Development Agreement has been infructuous to all intents and purposes rather than a mere documentary transaction and so of no effect nor of any use or benefit to the parties under this Deed, and the parties have mutually agreed and decided to relieve the respective liabilities arising out of the said Joint Development Agreement by having the same cancelled and settling all accounts between them fully and finally."*

8.4. It was submitted that as noted by Ld. CIT(Appeals) which is contrary to the order passed by the Assessing Officer is required to be confirmed.

9. Per contra, the Ld. AR had vehemently submitted that the order passed by the Ld. CIT(Appeals) is in accordance with law. He had drawn our attention to the written submission which are to the following effect :

> *"1. The issue involved in this appeal is determination of capital gain based on the execution of sale document by the appellant jointly with Canopy Dwelling Pvt. Ltd.in favour of Sri S. Aslam, Mrs. Nazima Aslam and Canopy Dwelling Private Limited.*

*2. The assessee filed return of income for the assessment year under consideration i.e. 2010-11 on 20.3.2012 admitting an income of Rs.2,45,907/-. The said return of income was processed u/s 143(1) of the I.T. Act.*

*3. The Assessing officer converted the case to scrutiny and completed the assessment u/s 143(3) on 19.3.2013 and determined the income at Rs.7,31,110/-.*

*4. While doing so, the Assessing officer computed the capital gain on sale of the property situated at Bangalore at Rs.20,993/-. The Assessing officer worked out the sale consideration received at Rs.21,75,000/-. After deducting the cost of acquisition of Rs.21,54,067/-, arrived at the net income of Rs.20,993/-.*

*5. The Commissioner of Income-Tax, Kurnool passed the order u/s 263 of the I.T. Act on 23.3.2015 directing the Assessing Officer to re-compute the capital gain in accordance with law.*

*6. The Assessing officer completed the re-assessment u/s 143(3) r.w.s. 263 on 31.3.2016. He determined the total income at Rs.4,52,76,111/-.*

*7. While doing so, he determined the LTCG at Rs.4,45,65,933/-. According to the re-assessment order the sale consideration received was Rs.4,67,20,000/- and not Rs.21,75,000/-.*

*8. The assessee filed an appeal before the CIT (Appeals) who held that the consideration received was only Rs.2,21,75,000/- and thereafter a deduction of Rs.2,21,54,057/- has to be allowed.*

*9. The department is in appeal against the order of the order of the CIT (Appeals). The*

*assessee filed the material papers in the form of Paper Book containing 79 pages. A petition requesting for admission of additional evidences consisting of 35 pages (placed at pages No.80 to 115 of the paper book) was also filed. The assessee requests the Hon'ble ITAT to kindly admit the additional evidence submitted.*

*10. The chronology of the events are:*

| S.No. | Particulars | Remarks |
|---|---|---|
| 01 | Date of purchase of land under consideration for a consideration of Rs.15 lakhs (purchase deed placed at pages No.32 to 37 of the paper book) | 27.07.2004 |
| 02 | Execution of Joint Development Agreement (placed at pages No.10 to 27 of the paper book) between the assessee and Canopy Dwellings Pvt. Ltd. And receipt of refundable deposit of Rs. 2 Crores (out of total of Rs.2.40 Crores, the cheque for Rs.40 lakhs was not honoured) | 29.10.2004 |
| 03 | Date of payment of Rs.1,92,05,650 to Florence Estates & Constructions Limited towards land | 2004 to 2006 |

| | | |
|---|---|---|
| | expense/claims/levelling charges, etc. | (Account copy submitted at pages No.29 to 31) |
| 04 | Date of execution of sale deed (placed at pages No.3 to 9 of the paper book) by the assessee jointly with Canopy Dwellings Pvt. Ltd., in favour of S. Aslam, Smt. Nazima Aslam and Canopy Dwellings Pvt. Ltd. | 10.09.2009 |

*11. As stated above, the assessee initially entered into Development Agreement cum GPA with Canopy Dwellings Pvt. Ltd. At that time, the said company paid Rs.2.40 crores as refundable deposit, out of which a cheque for Rs.40 lakhs was not honoured and the net amount received was only Rs.2 crores.*

*12. The assessee did not provide possession of the property to the developer but the Development Agreement was registered with the Sub Registrar as document No.19226/2004-05. Out of the said amount of Rs.1,92,05,650/- was paid to Florence Estates & Constructions Limited for incurring the expenditure on development/clearance of land. The said company provided account copy with details of expenditure incurred of Rs. 1,92,05,650/- and confirmed the receipt. Therefore, out of the advance received as per Development Agreement only an amount of Rs.7,94,350/- remained with the assessee which was incurred for payment of charges to the Bangalore Development Authority.*

*13. Later, on 10.09.2009,a sale deed was executed by the assessee and Canopy Dwellings Pvt. Ltd., in favour of the following three persons:*

1. *Sri S. Aslam*
2. *Smt. Nazima Aslam*
3. *Canopy Dwellings Pvt. Ltd.*

*The sale deed was registered with the office of the Sub Registrar at 5.10 PM vide document No.2913 /2009-10 which is before the cancellation of Development Agreement cum GPA which was also registered with the same Sub Registrar at 5.16 PM vide document No.2915/2009-10. As per the sale document, the total consideration payable was fixed at Rs.4,67,20,000/-. They have adjusted refundable deposit paid to the assessee of Rs.2 crores as per the Development*

*Agreement. Out of the balance amount Rs.2,67,00,000 receivable, a sum of Rs.2,45,45,000/- was paid to Canopy Dwellings Pvt. Ltd. who is the developer and who had the development rights in the property and the balance of Rs.21,75,000/- was paid to the assessee.*

*14. The amount of Rs.2 Crores paid initially was already spent for development by Florence Estates & Constructions Ltd., on behalf of the assessee. Therefore, the said amount of Rs.2 crores was consideration and was spent for development.*

*15. Rs.2,45,45,000/- was paid to Canopy Dwellings Pvt. Ltd. towards their rights who entered into Development Agreement and the said amount cannot be considered as received by the assessee. The balance amount of Rs.21,75,000/- received by the assessee belongs to the assessee.*

*16. It is further submitted that the amount mentioned in the sale document as paid to Canopy Dwellings Pvt Ltd., of Rs.2,45,45,000/- was in fact not paid. The cheques issued by Sri S. Aslam were not honoured by him. The company Canopy Dwellings Pvt. Ltd. was allowed to continue as a co-owner on the condition that it would make efforts in obtaining necessary approvals for construction. As Canopy Dwellings Pvt. Ltd. was not in a position to obtain approvals from Bangalore Development Authority, Sri Aslam himself carried out the work and got the approvals much later. Sri Aslam filed a Writ Petition before the High Court of Karnataka against the Bangalore Development Authority and got the approvals from the said authority on 1.10.2012. Thereafter Sri Aslam developed the property. Therefore, Sri Aslam did not pay amount of Rs.2,45,45,000/- to Canopy Dwellings Pvt. Ltd., and no part of the amount was received either by Canopy Dwellings Pvt. Ltd. or by the assessee. Therefore, the decision of the CIT (Appeals) is correct.*

*In view of the above, the assessee prays the Hon'ble ITAT to kindly dismiss the appeal filed by the Revenue."*

10. The Ld. AR had submitted that once the assessee has not received the consideration as mentioned in the order of Ld. CIT(Appeals), the value of the property, then no interreference is called for. It was submitted that the Ld. CIT(Appeals) in the order, has given the details of the payment received by the assessee from M/s. Canopy Dwellings Private Limited and thereafter at pages 15 to 19 had recorded the following finding :

> *" 7. I find that the appellant Sri Rama Subba Reddy originally acquired the land admeasuring 39 guntas situated in Sy.No.9, Srinivagilu village, Begur Hobli, Koramangala, Bangalore South, Karnataka for a total consideration of Rs.15 lakhs on 27.07.2004. He entered into a Joint Development Agreement with Canopy Dwellings Pvt. Ltd., Bangalore on 29.10.2004 represented by its Managing Director Sri*

*Rizvi which was registered as Doc.No.19226/2004-05 with Sub Registrar (Urban), Bangalore South, Bangalore. At the time of entering into the development agreement an amount of Rs.2,40,00,000/- was paid to the appellant through three cheques of Rs.1 crore, Rs.1 crore and Rs.40 lakhs. The cheque issued for Rs.40 lakhs was returned and was not encashed. In effect the Developer paid advance of Rs.2 Crores. The appellant and the developer have agreed that the disputes with regard to the land be settled and that the agricultural land be levelled and converted into non agricultural residential land. With that view, an amount of Rs.1,91,00,000/- was paid to Florence Estates and Construction Ltd., through cheques by the Assessee during the period 04.11.2004 to 04.01.2005. The balance of Rs.9,00,000/- was retained by the appellant as an advance. Th Florence Estates and Construction Ltd., confirmed the fact that it received an amount of Rs.1,91,00,000/.- from the appellant and that an amount of Rs.1,92,54,650/- was spent by them. The appellant spent an amount of Rs.7,94,350/- from out of the advance for conversion from agriculture land to non agriculture.*

*In fact Florence Estates and Construction Ltd., provided the details and the nature of the expenditure incurred by them which is extracted reproduced hereinabove.*

*In spite of the fact that the appellant and Florence Estates and Construction Ltd., have done their part, the Developer was not in a position to develop the land. At that stage, the developer and the appellant together decided to dispose off the land. The impugned sale is the result of such decision by the appellant and the developer. They accordingly sold the converted and developed land. The appellant executed the sale deed in favour of Sri Aslam S., Smt. 'Nazeema Aslam and Canopy Dwellings Pvt. Ltd., i.e. the developer itself. According to this agreement, the total consideration as mentioned at Rs.4,67,20,000/-. Out of this amount, the payments were made as under :*

*Rs.2,00,00,000 paid to the appellant at the time of entering into the development agreement was treated as consideration as per the sale agreement. This amount represents adjustment of advance earlier paid but not a fresh payment. Rs.21,75,000/- further payment made to the appellant at the time of execution of the sale document. Rs,2,45,45,000/- paid to Canopy Dwellings Pvt. Ltd. for surrendering its rights in favour of the vendees.*

*As per the sale document, the appellant surrendered his right in the property whereas the developer surrendered its rights obtained by way of entering into the development agreement. The developer continued to hold some interest in the property and is, therefore, shown as the vendee also.*

*From the details it is clear that the appellant in all received Rs.2,21,75,000/- (Rs.2 crores as advance at the time of entering into the development agreement and Rs.21,75,000/- at the time of execution of the sale deed). The balance of the*

*consideration was paid by the vendors to Canopy Dwellings,Pvt. Ltd., the developer.*

*Therefore, in accordance with the provisions of Sec.45, the sale consideration received by the appellant has to be adopted at Rs.2,21,75,000/- and not Rs.4,67,20,000/-.*

*The next question is what is deductable from the sale consideration received by the appellant for arriving at the capital gain. According to the appellant, he spent an amount of Rs.2 crores paid to Florence Estates and Construction Ltd., towards development and Rs.7,94,350/- being the expenditure incurred towards taxes etc. for conversion of the land and for other purposes. These amounts are claimed by the appellant in addition to the cost of purchase. The computation of the appellant is as under:*

*Sale Consideration received as per Sale document dated* *46,720,000*

*10.9.2009*

*Less : Sale Consideration received by Canopy*

*Dwelling P Ltd towards sale of his rights*
*Cheque No.361421 dated 10.9.2009* *10,000,000*

*Cheque No.361422 dated 10.9.2009* *10,000,000*

*Cheque No.361423 dated 10.9.2009* *4,545,000*

*Assessee received towards his share of sale consideration*
*22,175,000*

*Cheque dated 29.10.2004 - Rs.1,00,00,000*

*Cheque dated 29.10.2004 - Rs.1,00,00,000*

*Cheque No.361425 dated 10.9.2009-*

*Rs.10,00,000*

*Cheque No.361426 dated 10.9.2009-*

*Rs.11, 75,000*

*Amount paid by Florence on behalf of*

*Assessee*

*Amount paid to Dwarakanath towards cost of* *5,100,000*

*reimbursement*

| | | |
|---|---|---|
| *Cost of Development expenses towards Land* | | |
| *levelling, claims permissions etc.,* | *14,105,650* | |
| *Amount incurred towards taxes by the* | *794,350* | *20,000,000* |
| *Assessee* | | |
| *Net Amount received by the Assessee towards Sale Consideration* | | *2,175,000* |
| *Less : Purchase Cost* | | |
| *Purchase cost of Lang on 27.07.2004 -* | *1,975,000* | |
| *Indexed at 632/480 till 2009 -10* | *1,500,000* | |
| *Stamp duty charges - Indexed at 632/480 till 2009 -10* | *179,067 136,000* | *2,154,067* |
| *Long term Capital gain* | | *20,933* |

*I have already held that the amount of Rs.2,45,45,000/- received by Canopy Dwellings Pvt. Ltd., cannot form part of the sale consideration of the appellant for determining the capital gain and the sale consideration for the appellant has to be Rs.2,21,75,000/- only. The said amount is to be adopted for determining the Capital gain.*

*The next question is whether the amount of Rs.1,92,05,650/- claimed by the appellant as spent by Florence Estates and Construction Ltd., is allowable or not. The appellant before me submitted the account copy of the appellant with Florence Estates and Construction Ltd. The letter of confirmation was also filed to the effect that the company incurred the expenditure of Rs.1,92,05,650/- on the developmental works which are extracted in the above paragraphs. When the matter was remanded, the AO mentioned that the appellant did not claim the expenditure in the return of income filed and that he was prevented from claiming such expenditure because of the decision of the Supreme Court in the case of Goetze India vs. CIT reported in 285 ITR 223.*

*The other contention of the AO was that the CIT while passing the order u/s 263 rejected the claim. On the other hand, the contention of the appellant is that the decision of Supreme Court has no application before the appellate authority and that the*

*CIT while passing the order merely set aside the assessment for reconsideration.*

*I have already extracted the submissions made by the appellant in this regard. The Apex Court made it clear that the decision in the case of Goetze India is limited to the powers vested in the Assessing Officer. The appellant is now before an appellate authority. On the other hand, the Supreme Court in the case of Jute Corporation of India vs. CIT reported in 187 1TR 688 held that such claims are permissible. Therefore, the Assessing Officer's objection on this ground is not warranted.*

*The next objection by the AO is also not warranted because at para 7 of the order u/s 263, the CIT held that the issue of recomputing the capital gain is remitted to the file of the AO after examining the issue in detail and after eliciting the material from the appellant. The AO also mentioned that no claim was made in the return of income by the appellant. This is also incorrect. The appellant did not admit capital gain in the original return of income. At the time of assessment, the appellant admitted the amount received by him as the consideration and claimed deduction towards the cost of acquisition. The amount paid to Florence Estates and Construction Ltd. is deducted while admitting the consideration itself. Therefore, it is not correct for the AO to mention that no such claim was made at the time of original assessment. The said claim was made and it was allowed by the AO at the time of completion of the regular assessment.*

*8. In view of the above discussion and in view of the submissions made by the appellant in this regard, I am inclined to hold that the expenditure of Rs.2,00,00,000/- i.e. Rs.1,92,05,650/- incurred by Florence Estates and Construction Ltd. And Rs.7,94,350/- incurred by the appellant are deductable; besides, the indexed cost of acquisition as claimed of Rs.21,54,067/-.*

*I direct the AO to compute the capital gain by adopting the sale consideration at Rs.2,21,75,000/- and deducting the above mentioned amounts aggregating to Rs.2,21,54,067/-.*

*Thus the grounds Nos.2, 3, 4, 5, and 6 are directed against the computation of capital gain are allowed. Ground Nos.1 and 8 are general in nature and needs no adjudication. Ground No.7 which is against charging of interest is consequential in nature and, therefore, not adjudicated. The appeal is decided accordingly.*

*9. In the result, the appeal is allowed."*

*It was submitted that before deciding the issue, the Ld.CIT(A) had sought the remand report from the Assessing Officer. In the remand report, the learned A.O. has given the following reply :*

*" To*

*The Commissioner of Income Tax (Appeals),*
*Kurnool.*
*(Through Proper Channel)*

*Sir,*

*Sub : Submission of Remand Report inthecase of Sri T. Rama Subba Reddy, PAN : ADSPT8833F – Assessment Year 2010-11 – ITA No.004/2016-17/CIT(A), Kurnool – Comments on the admissibility of the Addl. Evidence – Submission of – Reg.*

*Ref : The CIT(A), Kurnool letter in F.No. /Addl.Evid/CIT(A)/*

*KNL/2017-18, dt.03.01.2018.*

*******

*Kind reference is invited.*

*During the process of appeal proceedings before the CIT(A), Kurnool, the assessee has claimed expenses ofRs.1,92,05,650/- towards Development charges incurred in FY 2004-05 to FY 2006-07. The additional evidence filed by the assessee for allowance of the aforementioned expenses should not be allowed for the following reasons :*

1) *The assessee has not claimed this expenditure in the Return of Income filed. The expenses which are not claimed in Return of Income will not be allowable either by the Assessing Officer or in appeal as held by the Supreme Court in the case of Goetze (India) Ltd. Vs. CIT (284 ITR 323).*

2) *Further, this claim does not form additional evidence as it was already considered by the CIT in the order passed u/s. 263 dt.23.03.2015 and the CIT rejected the claim. The assessee can agitate on this issue only before the Hon'ble ITAT and not before the CIT(A). The main gist of the CIT's order u/s.263 regarding the expenses is reproduced as follows :*

*During the course of proceedings u/s.263, Assessee vide letter received on 09.03.2015 has stated that -*

*" Sale Deed executed on 10.09.2009, relevant to A.Y. 2010-11 for selling 42271 sq. ft. after layout. Accordingly, your assessee has incurred towards development including cost of conversion all the amounts received from the developer and therefore the A.O. erred in taking only the cost of land for the purpose of indexation. As could be seen from the pages 4 & 5 the advances to vendee i.e. your assessee covered by the advances paid during the execution of Joint Development Agreement dated 10.09.2004".*

*This is factually incorrect since in the sale deed dated 10/09/2009 as the 11th clause (Pg 8) it is clearly mentioned that –*

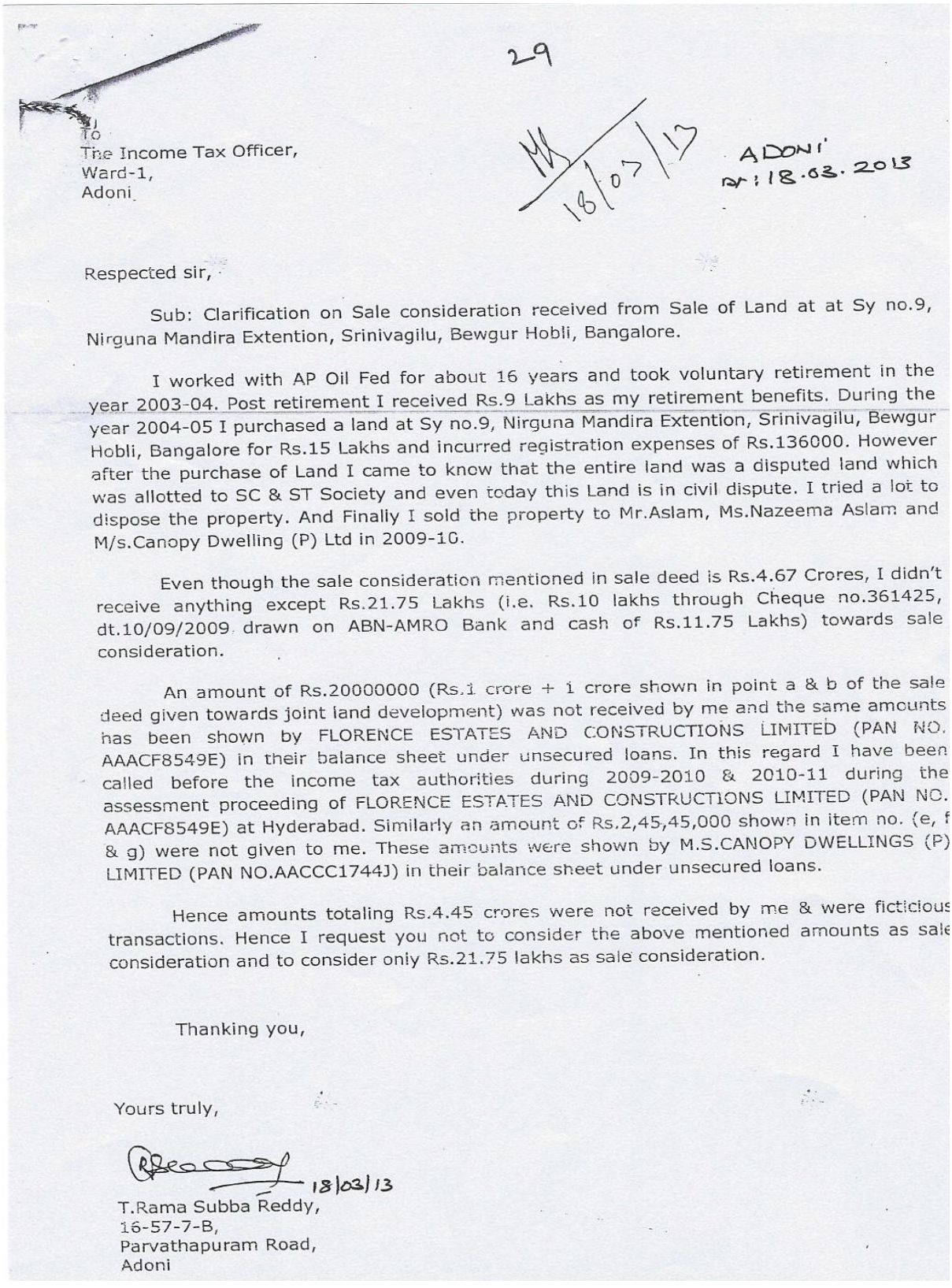
*"The schedule property is not developed except for being converted from agricultural use to non-agricultural residential purpose."*

*It is evident that the assessee had not revealed full and correct facts of the sale to the department. It is obvious from the sale deed that the sale consideration received by the assessee is Rs.4,67,20,000/- and not Rs.21,75,000/- as admitted by the assessee during the scrutiny proceedings u/s.143(3) and as assessed by the Assessing Officer vide order u/s.143(3) dated 19.03.2013. The amounts paid to a third party on account of the assessee is definitely the amount received by the assessee only."*

*In consequent to the order of the CIT u/s.263, the Assessing Officer has passed an order u/s.143(3) r.w.s. 263 and hence, the additional evidence filed by the assessee is not admissible."*

11. It is the contention of the Ld. DR that the learned A.O. has not made any comments about the admissibility of the additional evidence and extent of expenditure incurred by M/s. Florence Estates and Constructions Ltd. on the property. The ld.DR further submitted that the assessee in his reply before the Assessing Officer had submitted that in the case of M/s. Florence Estates and Constructions Ltd., the IT authorities have examined the above noted issue and have adjudicated that the amount in the hands of M/s. Florence Estates and Constructions Ltd. Our attention was drawn to page

29 of the paper book filed by the Revenue, wherein the following reply was submitted by the assessee before the Assessing Officer :



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To
The Income Tax Officer,
Ward-1,
Adoni.

18/07/13

ADONI
Dt: 18.03.2013

Respected sir,

Sub: Clarification on Sale consideration received from Sale of Land at at Sy no.9, Nirguna Mandira Extention, Srinivagilu, Bewgur Hobli, Bangalore.

I worked with AP Oil Fed for about 16 years and took voluntary retirement in the year 2003-04. Post retirement I received Rs.9 Lakhs as my retirement benefits. During the year 2004-05 I purchased a land at Sy no.9, Nirguna Mandira Extention, Srinivagilu, Bewgur Hobli, Bangalore for Rs.15 Lakhs and incurred registration expenses of Rs.136000. However after the purchase of Land I came to know that the entire land was a disputed land which was allotted to SC & ST Society and even today this Land is in civil dispute. I tried a lot to dispose the property. And Finally I sold the property to Mr.Aslam, Ms.Nazeema Aslam and M/s.Canopy Dwelling (P) Ltd in 2009-10.

Even though the sale consideration mentioned in sale deed is Rs.4.67 Crores, I didn't receive anything except Rs.21.75 Lakhs (i.e. Rs.10 lakhs through Cheque no.361425, dt.10/09/2009 drawn on ABN-AMRO Bank and cash of Rs.11.75 Lakhs) towards sale consideration.

An amount of Rs.20000000 (Rs.1 crore + 1 crore shown in point a & b of the sale deed given towards joint land development) was not received by me and the same amounts has been shown by FLORENCE ESTATES AND CONSTRUCTIONS LIMITED (PAN NO. AAACF8549E) in their balance sheet under unsecured loans. In this regard I have been called before the income tax authorities during 2009-2010 & 2010-11 during the assessment proceeding of FLORENCE ESTATES AND CONSTRUCTIONS LIMITED (PAN NO. AAACF8549E) at Hyderabad. Similarly an amount of Rs.2,45,45,000 shown in item no. (e, f & g) were not given to me. These amounts were shown by M.S.CANOPY DWELLINGS (P) LIMITED (PAN NO.AACCC1744J) in their balance sheet under unsecured loans.

Hence amounts totaling Rs.4.45 crores were not received by me & were ficticious transactions. Hence I request you not to consider the above mentioned amounts as sale consideration and to consider only Rs.21.75 lakhs as sale consideration.

Thanking you,

Yours truly,

18/03/13

T.Rama Subba Reddy,
16-57-7-B,
Parvathapuram Road,
Adoni

12. Per contra, the Ld. AR submitted that M/s. Florence Estates and Constructions Ltd. in its reply had confirmed to have received the amount of Rs.2 Crores from the assessee and it was shown by M/s. Florence Estates and Constructions Ltd. as loan in its books of accounts. It was submitted that the amount has not been received by the assessee pursuant to the JDA and it was spent for improvement of land by the said M/s. Florence Estates and Constructions Ltd for the improvement of the land and therefore, the amounts spent for cost of improvement is required to be considered while computing the cost of acquisition after cancellation of the JDA, pursuant to the sale deed 10.09.2009.

13. We have heard the rival contention of the parties. The Revenue has raised various ground including the violation of Rule 46A of the Income Tax Rules by the ld.CIT(A) while passing the impugned order. In this regard, it is relevant to mention here that the assessee had filed additional ground before the ld.CIT(A) and the ld.CIT(A) had called for the remand report from the Assessing Officer vide communication dt.01.02.2018. In the remand report, the Assessing Officer has objected to consideration of the fresh evidence filed before the ld.CIT(A). However, no objection or argument was given for allowing or disallowing the expenditure claimed by the assessee for making the improvement / development of land allegedly incurred by M/s. Florence Estates. The learned CIT(A) has also not examined the admissibility of the expenditure and has accepted that M/s Florence Estates has incurred the expenditure for making the improvement of the subject matter of the land. While doing so, the ld.CIT(A) failed to consider the condition / stipulation mentioned in the Joint Development Agreement dt.29.10.2004 and the other stipulation in the cancellation deed dated 10.09.2009. In JDA, it was mentioned that charges for the improvement / development of land will be borne by M/s. Canopy Dwellings and in the cancellation deed, it is mentioned that no development has taken place. In our view, these two important documents were required to be consider by the ld.CIT(A) while considering the allowability of the expenditure incurred

by M/s. Florence Estate while computing the cost of acquisition. The needful was not done by the ld.CIT(A) and the ld.CIT(A) without any examination has allowed the cost of acquisition, allegedly incurred by M/s. Florence Estate. In the light of the above, we are of the opinion that the cost of acquisition arrived at by the ld.CIT(A) cannot be sustained. Since there is no examination on the claim of cost of acquisition by the ld.CIT(A), we are of the opinion that this ground of the Revenue is required to be allowed. Accordingly, we are of the opinion that the matter is remanded back to the file of Assessing Officer for fresh examination.

14. As we have remanded the issue of admissibility of the expenditure incurred for determining the cost of acquisition to the file of Assessing Officer, we deem it appropriate not to adjudicate the remaining grounds on merit. Accordingly, all the other grounds raised by the Revenue are also remanded back to the file of Assessing Officer with a direction to decide the issue denovo after affording the opportunity of hearing to the assessee and decide the issue afresh. Needless to say that we have not decided any of the issues on merit and the Assessing Officer is directed to decide the issue without being influenced by any of our observations made hereinabove. Thus, the appeal of Revenue is allowed for statistical purposes.

15. In the result, the appeal filed by the Revenue is allowed for statistical purposes.

Order pronounced in the open Court on 28th June, 2024.

| | |
|---|---|
| Sd/- | Sd/- |
| (MADHUSUDAN SAWDIA)<br>ACCOUNTANT MEMBER | (LALIET KUMAR)<br>JUDICIAL MEMBER |

Hyderabad.
Dated: 28.06.2024.
** Reddy gp*

Copy of the Order forwarded to :

1. Sri T. Rama Subba Reddy,
   D.No.16-54/7-B, Parvathapuram Road, Adoni-518
   301 Kurnool District, Andhra Pradesh.
2. The ITO, Ward-1, Adoni, Andhra Pradesh.
3. Pr. CIT, Kurnool.
4. DR, ITAT, Hyderabad.
5. Guard file.

*By Order*

*Asst. Registrar.*

*ITAT, Hyderabad.*