IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE "B" BENCH, BANGALORE

Before Shri Chandra Poojari, Accountant Member
and
Shri Prakash Chand Yadav, Judicial Member

ITA No. 720/Bang/2024 (Assessment Year:2020-21)		
DCIT, Circle - 4(1)(1) Room No. 230, 2nd Floor BMTC Building, Koramangala Bangalore 560095 PAN – AAMHR4231A	vs.	Ramesh Narayana Reddy (HUF) #62, Sonnenahalli Mahadevapura Bangalore 560048
(Appellant)		(Respondent)

Assessee by:	Shri V. Srinivasan, Advocate
Revenue by:	Shri Subramanian S., JCIT-DR

Date of hearing:	24.07.2024
Date of pronouncement:	30.07.2024

O R D E R

Per: Prakash Chand Yadav, J.M.

The present appeal of the Revenue challenges the DIN & order No. ITBA/NFAC/S/2003-24/1061428431(1) of the National Faceless Appeal Centre, Delhi [CIT(A)] dated 23.02.2024 passed under Section 250 of the Income Tax Act, 1961 (the Act) in respect of Assessment Year (AY) 2020-21.

2. Aggrieved with the order of the ld. CIT(A) the Revenue has come up in appeal before us and raised the following grounds: -

> *"The Ld. Addl. CIT(A) has erred in deleting the addition of Rs. 1,18,01,752 as deemed Rental income on the ground that there was no addition made in the case of other two co-owners of the same property for the same assessment year. The NFAC has not considered that the assessments of three different co-owners were completed in faceless manner. There is no algorithm for allocation of cases of three different assessees having common interest in a single property to a single assessing officer for assessment. Hence, omission of addition in cases of other two co-owners of the property wherein assesses is an owner may be because*

of lack of proper care and the diligence. This cannot be a reason for deletion of addition made.

➢ *The NFAC erred in not considered that the assessee himself has admitted in grounds no. I of appeal that even if the deemed rent is taxable, the assessing officer ought to have added Rs.39.33,917/- (1/3 of 1,18,01,752) since he is a co-owner having 1/3 share in property. In above manner, the assessee has disputed only taxable share of deemed rental income in assessee's hand however, the NFAC has deleted the addition in entirety.*

➢*The Led. NFAC has erred in allowing assessee's ground related to treatment of LTCG offered by the assessee at Rs.25,75,90,104/- as STCG at Rs. 29,76,76,017/- on the ground that there was no addition made in the case of other two co-owners of the same property for the same assessment year. The NFAC has not considered that the assessments of three different co-owners were completed in faceless manner. There is no algorithm for allocation of cases of three different assessees having common interest in a single property to a single assessing officer for assessment. This cannot be a reason for deletion of addition made.*

➢*The Ld. NFAC has erred in holding that though the same nature of income of assessee was considered as LTCG in previous AYs, the same should be considered as LTCG only for the current year also. The NFAC erred in not discussing the correct legal position on the issue and in not considering the fact that any inadvertent error occurred during previous year's cannot be held as a certificate of repeating the same in future years. The action of one assessing officer on an issue does not become the judicial precedence/case law to be followed by others. In case of disagreement, the correct legal position should be discovered by higher judicial bodies/courts to bring similarity of opinion.*

➢ *The Ld. NFAC has erred on facts and circumstance of the case in not considering that the right to receive asset as per JDA is a fictitious capital asset moreover it is guarantee to receive the asset in future. It cannot be termed as liquidable capital asset for computation of capital gain before it is actually brought to existence. Further, the asset transferred on which capital gain is under consideration is not the right but they are Flats. Though the occupancy certificate for the asset under consideration was received by the assessee only on 25.06.2019, the capital asset came into existence in the hands of assessee on 25.06.2019 and hence, the AO has correctly taken the date of acquisition as 25.06.2019. Further, as the asset does not qualify for Long Term Capital Asset, the question of indexation of cost does not arise.*

➢ *The Ld. NFAC has erred in corroborating assessee's plea that the TDS was deducted @ 10% as per provision of section 1941(b) however, the deductor inadvertently quoted the section as 1941(a). The Ld. NFAC erred in not considering the fact that the assessee failed to furnish copy of agreement or any other document to substantiate the property rented was house property and not plants & Machineries. The assessee ignored the fact that there may be case that TDS was deducted at higher rate inadvertently however, the section was quoted correctly by the deductor."*

3. At the outset the revenue has challenged the order of the CIT(A) on three counts.

a. **NAFC has erred in deleting the addition of Rs 1,81,01,752/- on account of deemed rental income from the flats owned by assessee, these flats were allotted to assessee as a result of joint development agreement.**
b. **NAFC has erred in taxing capital gain as Long Term Capital Gain (LTCG) declared by assessee instead of Short Term Capital Gain (STCG) as assessed by AO.**
c. **NAFC has erred in deleting the addition of Rs 4,75,590/- made by AO on account of rental of plant and machinery.**

4. The brief facts of the case are that the assessee, an HUFfiled its return of income on 30.11.2020 declaring an income of Rs.2,75,83,189/-. Thereafter the assessee revised its return of income on 25.03.2021 by declaring an income of Rs.27,51,54,480/-. The assessee has entered into a Joint Development Agreement (JDA) with one Brigade Enterprises Ltd. for development of his lands which were earlier used by the assessee for agricultural purposes. During the course of assessment proceedings. The AO observed that the assessee has received rental income in respect of plant & machinery from one entity. The AO observed that the assessee has not reflected this income in its return of income despite the fact that the tenant has deducted TDS u/s 194I(a). Accordingly, the AO has made an addition of Rs.4,75,590/-. The assessee clarified that the assessee has not rented out any plant & machinery, rather it was an amount for the rent of the flat which amount was already included by the assessee in its rental income. However, the AO could not find any force in the submission of the assessee and added the income under the head ‘income from other sources’(IOS). Thereafter the AO scrutinised the JDA dated 14.03.2022 and show caused why the deemed rental income from the properties, developed under the JDA would not be assessed in the hands of the assessee. The assessee replied that the flats were

not occupied by assessee rather acquired with an intention of sale and the assessee has duly offered the capital gain on sale of these flats when they were completed sold. However, the AO made an addition of deemed rental income amounting to Rs.1.18 crores in the hands of the assessee ignoring the factual and legal position. Lastly, the AO observed that the amount long term capital gain amounting to Rs.25,75,90,409/- shown by the assessee is not long term capital gain as the assessee has got occupancy certificate only on 25.06.2019and hence the gain arose is taxable as short term capital gain. Accordingly, the AO treated the long term capital gain as short term capital gain and enhanced the income of the assessee.

5. Aggrieved by the order of the AO the assessee filed appeal before the CIT(A), inter alia, contending that the addition made by the AO vis-a-vis deemed rental income in respect of the flats received by the assessee under the JDA is not tenable as the assessee acquired these flats for sale not for self-occupation. The ld. Counsel of the assessee next contended that the AO has erred in treating the long term capital gain as short term capital gain. AR of the assessee also pointed out that in respect of the issue of rental income from plant and machinery, assessed by AO under the head IOS, the payee has wrongly mentioned that the TDS has been deducted u/s 194I(a) and the fact of the matter is that the rate qua 194I (b) @10% were applied by the deductee while deducting the TDS.

6. After considering the submissions of the assessee, the ld. CIT(A), in respect of the first ground, i.e. deemed rental income, allowed the appeal of the assessee, observing that the assessee in his case has held the flats for sale and not for self-occupation and has ultimately sold the flats in subsequent years. The ld. CIT(A) was of the view that no material has been brought on record by the AO for concluding that the flats were to be used by the assessee for self-occupation. The ld. CIT(A), relying on the judgement of the Hon'ble Mumbai Bench of the Tribunal in the case of **Sachin R. Tendulkar v. DCIT**

[2018] 172 ITD 266 (Bom) allowed the appeal of the assessee. Besides this, the ld. CIT(A) was also of the view that the AO is not correct in discriminating the assessee from the other two co-owners who were also part of the JDA and in their hands no addition qua deemed rental has been made by department. Similarly, the ld. CIT(A) allowed the appeal of the assessee on the issue of short term capital gain of long term capital gain. The relevant findings of the ld. CIT(A) are as under: -

> *"7.8.4 I have perused the documents on record and it is seen that the facts and circumstances of the case under consideration as well as the facts and circumstances of the case of other two co-owners are similar. In respect of the remaining two co-owners, the AO has accepted the long term capital gain, cost of acquisition/improvement as well as income declared under the head income from house property and moreover no such deemed rental income was charged. However, out of the assessment of three co-owners, only in the case of the appellant of the AO has not accepted the contention of the appellant on similar facts, which is not justifiable.*
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> *7.9 Decision on the taxability of capital gains*
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> *(i) During the assessment proceedings, the AO observed that, the flat, which have been claimed to be sold and on the same flats, the assessee has offered long term capital gain, has come into existence during the year only as the occupation certificate with respect to the said project was received on 24.06.2017 & 28.12.2018 and Occupancy Certificate (Final) was received on 25.06.2019. Since the asset in question itself came into existence on 25.06.2019 i.e. during the year, the asset on which sale the long term capital gain is claimed, does not qualify as a long term capital asset. Accordingly, the AO issued a showcause notice and in response the appellant submitted reply dated 03.09.2022 as under.*
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> *"When we sell residential flats we sell two components, one undivided interest in land and other constructed portion Hence the value of flat includes not only construction value but also land value. The land which we retained was acquired during 1960 and profit attributable to land is long term. Regarding construction value, your good self is aware that we have acquired the right to receive flats when Joint development agreements were entered. One was entered on 15-12-2010 and other was entered on 19.06.2013 Right to receive asset is a capital asset and in our case, it is construction of flats. When assessment order was passed during 15-16, it was accepted by department. We have received deemed considerations in the form of right to acquire flats. On these considerations we have paid capital gains tax also. Hence, the date of recurring for indexation purpose is the agreements dates. Though occupancy certificate is not relevant for this purpose, we are enclosing the same for your perusal...."*
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> *(ii) After considering the reply of the appellant, the AO held as under:*
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> *"The submission of the assessee has duly been considered, however the same is not acceptable. As per the submission made, the Occupancy Certificate (Partial) were received on 24.06.2017 & 28.12.2018 and Occupancy Certificate*

(Final) was received on 25.06.2019. The assessee has sold the flats. The flats, in question, are undoubtedly in the nature of capital assets. Since, the asset itself has come into existence only after final occupancy certificate is received, the asset does not qualify the holding period for the treatment of those assets as long term capital assets. In light of the above, the gain arisen from sale of capital assets cannot be treated as long term capital assets and will be subject to tax under the head "Short Term Capital Gain","

As against the long term capital gain offered by the appellant of Rs. 25,75,90,404/-, the AO computed the short term capital gain of Rs. 29,76,76,017/-."

7. The ld. CIT(A) also observed that for AYs 2014-15 and 2015-16 the cases of the assessee were assessed u/s. 143(3) of the Act and the department treated the gain under similar facts as long term capital gain. Therefore, in view of the principle of consistency also the ld. CIT(A) allowed the appeal of the assessee. So far as the last issue as to the taxation of income from flat instead of plant and machinery the CIT(A) held that the same is to taxed under the head income from house property, and the assessee has already declared such income and no separate addition is required.

8. The learned D.R., Shri Subramanian, appearing for the Revenue vehemently argued that the ld. CIT(A) has erred in deleting the addition of deemed rental income from the flats owned by the assessee. The learned D.R. also contended that the ld. CIT(A) has erred in treating the short term capital gain as long term capital gain and relied upon the previous year's assessment orders. The learned D.R. also filed certain judgements in order to support his case. The first judgement relied upon by the learned D.R. is **Dimple Enterprises v. DCIT [2023] 154 taxmann.com 653 (Mum-Trib.)** to contend that the deemed rent of unsold stock is to be computed notionally by the AO. In respect of the issue of gain to be taxed as LTCG or STCG the Ld DR has relied upon on the order of AO, similarly for the issue of hiring income from plant and machinery to be taxed as IOS the Ld DR relied on the order of the AO.

9. The ld. Counsel of the assessee relied upon the order of the ld. CIT(A). He has painstakingly taken us to the paper book filed before the ld. CIT(A) and reiterated the submissions made before the authorities below.

10. We have considered the rival submissions and the arguments advanced by both sides, we observe that it is settled position of law as propounded by the Hon'ble Supreme Court in the case of Union of India v. Kaumudini Narayan Dalal reported in [2001] *249 ITR* 219(SC) that the approach of the Revenue in respect of the assessees, **who are party to same transaction should be uniform**. It has been held by the Hon'ble Supreme Court that the Revenue cannot adopt the tactics of pick and choose while assessing the citizens of India, otherwise it would be violation of Article 14 of the Constitution of India. Therefore, we are of the view that the ld. CIT(A) is correct in deleting the addition of deemed rental income applying the rule of equality before law. Notwithstanding to this on merits also we observe that, whether deemed rental annual value is assessable in respect of the flats which were not acquired for self-occupation rather kept as investment for sale, we find that Coordinate Bench of the Mumbai ITAT in the case of Sachin R Tendulkar(Supra) has decided the issue in favour of assessee. Further the decision relied upon by the Ld DR in the case of Dimple Enterprise(supra) is a decision rendered in completely different set of facts as in that case the unsold flats were kept as stock in trade. However, in the present case neither such facts are there nor the DR has argued that the assessee has been keeping these flats as stock in trade. Therefore, the decision relied upon by the Ld DR is not applicable to the facts of the case at hand.

11. In respect of the second issue whether the gain arose to the assessee on sale of flats would be long term capital gain or short term capital gain, we observe that the assessee has sold flats, in which land component is also embodied. Undisputed facts are that assessee has acquired the land somewhere

in 1960 and the rights in flats, allotted to assessee has been accrued on 15-12-2010 and other was entered on 19.06.2013, when the Joint Development agreements were entered into by the assessee. No material has been brought on record by the AO or by DR before us to refute these factual observations made by the NAFC. Further in AYs 2014-15 and 2015-16. The gain attributable to this land was earlier assessed by the department as long term capital gain. The learned D.R. failed to point out any change in the facts and circumstances even this impugned year. Therefore, applying the principle of consistency as formulated by the Hon'ble Supreme Court in the case of Radhasoami Satsang v. CIT (1992] 193 ITR 321 we are of the view that the ld. CIT(A) is correct in allowing the appeal of the assessee.

12. In respect of last issue that is the taxability of income from alleged plant and machinery. We observe that before the AO assessee has submitted that he has given one flat on rent to M/s Musigma Business Solutions @ 1,58,530 p.m. (herein after referred to as Payee) and the payee has wrongly applied the mentioned section 194I(a). Before CIT(A) assessee submitted that assessee has received an amount of Rs 12,52,387 annual rent from payee and if any separate addition of Rs 4,75,590/- would be made because of the wrong mentioning of the provisions of TDS it would be amounting to double taxation. We observe that there is no clear finding of the AO or CIT(A) on this issue as to what was the monthly rent and how much TDS was deducted by the payee because if we multiply 1,58,590/- by 12(1,58,590X12) then the amount would come Rs19,02,360/- and not 12,52,387/- as considered by the CIT(A). Therefore, the AO has to re-examine the issue a fresh. We made it clear that in case the payee has deducted TDS @ 10% and assessee would be able to reconcile the correct amount of rent with 26AS then certainly the income to be taxed as Income form House property and addition is required to be made. With this observation we deem it necessary to remit this issue to the

file of AO for examination. We direct the AO that he will confine the fresh proceedings to this issue only.

13. In view of the above, the appeal filed by the Revenue partly allowed for statistical purposes.

Order pronounced in the open Court on 30th July, 2024.

Sd/-	Sd/-
(Chandra Poojari)	**(Prakash Chand Yadav)**
Accountant Member	**Judicial Member**

Bengaluru, Dated: 30th July, 2024
n.p.

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3. *The CIT, concerned*
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By Order

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Assistant Registrar
ITAT, Bangalore