IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "A" Bench, Mumbai.

Before Shri Narender Kumar Choudhry (JM)
& Shri Omkareshwar Chidara (AM)

I.T.A. No. 3811/Mum/2023 (A.Y. 2012-13)

ITO-41(1)(1) Room No. 611 Kautilya Bhavan Bandra Kurla Complex Bandra East Mumbai-400 051.	Vs.	Ahsan Usman Raeen 1/3, Milan Sadan Kherani Road Sakinaka, Andheri-E Mumbai-400 072. PAN : AAGPR4309D
(Appellant)		(Respondent)

Assessee by	Shri Piyush Chhajed & Shri Aayush Chhajed
Department by	Shri Manoj Kumar Sinha
Date of Hearing	24.06.2024
Date of Pronouncement	20.09.2024

ORDER

Per Omkareshwar Chidara (AM) :-

The Revenue instituted an appeal before the ITAT aggrieved by the appellate order of the learned Commissioner of Income Tax (Appeals) [Ld. CIT(A) for short] with following grounds of appeal :-

> 1. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) was justified in deleting the addition of capital gain of Rs.1,50,00,000/- made by the AO, holding that the transfer was made by the partnership firm, ignoring the fact that sale deed was entered into by the assessee and sale deed had no mention of the name of the partnership firm.
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> 2. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) was justified in deleting the addition of capital gain of Rs. 1,50,00,000/- made by the AO, holding that the asset was transferred to the partnership firm by the assessee, ignoring the fact that no conveyance deed was entered in this regard and also that the sale was effected in the name of the assessee and the amount was also received in the account of the assessee,

> 3. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) was justified in deleting the addition of Rs. 1,95,51,000/- made by the AO, on transfer of property, holding that the plot was handed over to the Municipal corporation in lieu of additional FSI and hence no profit was involved, ignoring the provision of section 2(47) of the Act that exchange is also considered as transfer of property and hence it attracts section 45 of the Act.

2. From the above it can be seen that first two grounds relate to the issue of deletion of the addition made by the Ld. CIT(A) relating to capital gains of Rs. 1.5 crores and the grounds No. 3 relates to deleting the addition made by the Ld. AO relating to transfer of property to the Municipal Corporation in lieu of additional FSI.

<u>Addition of capital Gains of Rs. 1.5 crores</u> :

3. The Ld. AO made addition of Rs. 1.5 crores on the premise that the property was held by the assessee and not by the partnership firm, in which the assessee is a partner. In this case, the Ld. AO has held that the assessee did not offer capital gains on sale proceeds of the immovable property, which was sold vide agreement dated 1.7.2011 for an amount of Rs. 5 crores. The Ld. AO observed that cost of acquisition was Rs. 3.5 crores and the difference of Rs. 1.5 crores was added as short term capital gains. Aggrieved by this addition, the assessee went in appeal to the Ld. CIT(A) who has deleted the addition by saying that the assessee is partner in the partnership firm viz. M/s. Zar Builders and Developers, which is engaged in the construction activities. The Ld. CIT(A) has held that the land was transferred to the partnership firm as its capital and the sale of this property was duly recorded in the books of M/s. Zar Builders and Developers. Ld.AR of the assessee has stated that the profit on sale of said building amounting to Rs. 1.5 crores was offered to tax in the hands of the firm @ 30.9%, which is higher than the rate applicable on capital gains considered by the Ld. AO. As the sale proceeds were already taxed in the hands of the firm, there cannot be any double

taxation in the hands of the partner and hence the Ld. CIT(A) deleted the addition.

4. The Revenue filed an appeal before the ITAT stating that the Ld. CIT(A) is incorrect in deleting the addition because sale was effected in the name of the assessee and the sale deed does not mention in the partnership firm.

5. Ld. DR argued that the sale consideration should be taxed in the hands of the assessee as the property was owned by him and sold by him as per sale deed.

6. After hearing both sides, it was decided that the addition made by the Ld. AO is not correct because it was clearly mentioned that the assessee transferred the cost of plot as his contribution to the partnership firm, which was not disputed by the Department. Secondly, there cannot be any double taxation on the sale of land. If only the assessee wants to pay tax in his hand in fact the assessee is a beneficiary and not the Revenue because if it is taxed as short term capital gains, the Revenue gets tax at the rate of 20%, whereas the partnership firm paid @ 30.9% and hence there cannot be any grievance for the Department. Thirdly, when the Revenue does not dispute the issue of assessee's contribution of land to the partnership firm, the capital gains cannot be taxed in the hands of individual. As the assessee had contributed land as his capital and the resultant profit on sale of building is already taxed in the hands of Zar Builders and Developers, the partnership firm, the same cannot be once again taxed in the hands of the assessee as capital gains. Hence the decision of deletion of addition made by the Ld. CIT(A) is correct and hence the order of the Ld. CIT(A) is upheld. The addition made by the Ld. AO is hereby deleted.

<u>Treating surrender of land as unexplained money</u> :

7. Second issue relates to addition made by the Ld. AO on the ground that sale of the property amounting to Rs. 1.95 crores was not reported by the assessee and hence the same was treated as unexplained money u/s. 69A of the Act and the same was added to the total income of the assessee.

8. The Ld. CIT(A) deleted this addition made by the Ld. AO stating that there is no sale of property, which was not reported by the assessee and all the flats, which were sold were admitted in the return of income as per the Rules of Municipal Corporation Vasai. The partnership firm, as a builder, had to surrender a portion of one Plot-D to Municipal Corporation when the town development plan was approved by the Municipal Corporation. The assessee's claim that he has not received any monetary consideration for the same but it received TDR from the Deputy Director of Town Planner and hence section 69A of the Act is not applicable to him. Disregarding the contention of the assessee, the Ld. AO made addition of Rs. 1.95 crores as mentioned above.

9. Aggrieved by this addition made by the Ld. AO, the assessee filed an appeal before the Ld. CIT(A). Before the Ld. CIT(A) assessee took above ground No. 3 and submitted that he has not received any monetary compensation for surrendering a portion of one Plot-D, but he has received TDR from the Deputy Director of Town Planner and the market value of the same is Rs. 1.95 crores. In this regard, relevant documents were filed before the Ld. CIT(A).

10. The Ld. CIT(A) deleted the addition as he agreed with the arguments of the assessee and held that section 69A shall not be invoked in this case as no real income has accrued or arisen in the hands of the assessee at the time of transfer of plot to the Municipal Corporation.

11. Aggrieved by the deletion of the addition made by the Ld. AO, the Department filed an appeal before the ITAT with ground No. 3 as mentioned above.

12. Ld. DR has argued that the TDR received by the assessee is equivalent to the money and on receipt of the same, it should be admitted as the income of the assessee and the Ld. AO is correct in making the addition.

13. Ld. AR of the assessee has submitted that there is no real income received by the assessee at the time of transfer of plot to the Municipal Corporation and what was received is only a right to construct additional space in future. As and when the assessee builds an extra space and sale consideration is received, then only assessee gets benefit and income is taxable only in the year of sale not in this year of getting TDR certificate. Secondly, the Ld. AR further argued that the Extra FSI got by partnership firm because of TDR was utilised in subsequent years and sale consideration of such flats was already offered for tax in the hands of Partnership firm @ 30% maximum marginal rate. Hence, the same cannot be taxed again in the hands of the assessee once again.

14. After hearing both sides, it is held that as per “Real Income” theory, receipt of TDR is not taxable in the current year as the assessee did not get any benefit and as and when assessee builds additional space and sells the same, income which arises is taxable in that year only. Secondly, section 69A of the Act cannot be invoked as the assessee has not received any unexplained money in the current year hence addition made by the Ld. AO is not appropriate and liable to be deleted. Thirdly, as the income from sales of flats by using the additional space received because of TDR was already offered in the hands of the Partnership firm at maximum marginal rate of tax @ 30%, there cannot be double taxation.

15. In view of the above, the Departmental appeal is dismissed.

Order pronounced in the open court on 20th September, 2024.

Sd/-	Sd/-
(Narender Kumar Choudhry)	(Omkareshwar Chidara)
Judicial Member	Accountant Member

Mumbai : 20.09.2024

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai

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