

**IN THE INCOME TAX APPELLATE TRIBUNAL,
AGRA BENCH, AGRA**

**BEFORE : SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

ITA No. 227/Agr/2013
Assessment Year: 2009-10

Kuldeep Srivastava C/o Naresh Agarwal & Associates, Chartered Accountants, F-4, Gobind Bhavan, 4384/4A Ansari Road, Darya Ganj, New Delhi.	Vs.	Income-tax Officer, Ward 3(2), Mathura.
PAN : AZRPS9404L		
(Appellant)		(Respondent)

Assessee by	Sh. Pankaj Gargh, Advocate
Department by	Sh. Shailender Shrivastava, Sr. DR

Date of hearing	13.02.2025
Date of pronouncement	13.02.2025

ORDER

Per Satbeer Singh Godara, Judicial Member:

This assessee's appeal for assessment year 2009-10, arises against the Commissioner of Income Tax (Appeals)-I [(in short the "CIT(A)"], Agra's order dated 14.02.2013 in Appeal No. 316/CIT(A)-I/Agra/ITO-3(2)/Mathura/11-12 , involving proceedings under section 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

2. Heard both the parties at length. Case file perused.

3. Coming to the sole substantive issue between the parties regarding correctness of assessment of short-term capital gains in assessee's hands, we note that learned CIT(Appeals)'s detailed discussion to this effect reads as under :

"5.9. The contention of the Id. AR that the income from sale of flats constructed on the land under consideration has been declared by the company, M/s. TechmanBuildwell Pvt. Ltd. And it has also been assessed in its hand and, therefore, if any income is taxed in the hand of the assessee(appellant), it would amount to double taxation, it also not acceptable because it has been held by the Hon'ble Supreme Court in the case of Jamna Prasad Kahhaiya Lal vs. CIT 130 ITR 244(SC) that there is nothing in law to prevent the revenue to tax the income in the hand to which it actually belongs, notwithstanding the facts that such income is shown by someone else and assessed. In this case, the facts are that in the course of the assessment proceedings for the assessment year 1967-68, relevant to the accounting year ending Diwali 1966, the ITO noticed in the books of account of the assessee firm, consisting of one person Kanhiyalal and his sons, five cash credit of Rs. 9,250/- in the names of Kanhiyalal 's sons. Kanhiyalal, the assessee's managing partner, disavowed all knowledge as to the capacity of the creditors to advance the said amounts and, in fact, he admitted that the creditors had no independent source of income and he could not explain the said cash credits. The assessee, however, contended that the creditors, i.e., his sons having made voluntary disclosures under section 24 of the Finance (No. 2) Act, 1965 and the same having been accepted by the Commissioner and tax paid thereon, the impugned amounts could not be treated as its income from undisclosed sources. The ITO rejected the assessee's claim on the grounds, inter alia. (i) that the disclosures made under the said scheme granted immunity from further taxation only to the declarant, and not to a person to whom the income actually belonged, and (ii) that the assessee having failed to prove the genuineness and source of the said cash credits, the impugned amount must be treated as the assessee's income from undisclosed source. On appeal, the AAC set aside the ITO's order and upheld the assessee's claim. On appeal by the revenue, the tribunal, after taking into consideration the statement of Kanhiyalal, and having regarding to the age of the creditors and the facts that none of them and any independent source of income at any time, held that the ITO was justified in holding that the assessee failed to discharge the burden of proof under section 68 of the Income Tax Act in regard to the nature and source of the cash credits and, therefore, the said credits and to be treated as the assessee's income from undisclosed sources. On reference under section 257 the Hon'ble Supreme Court Held as under: -

"The scheme of the Finance (No.2) Act, 1965, make it abundantly clear that it was meant to project only those who preferred to disclose the income they themselves had earned in the past and which they had failed to disclose at the appropriate time. It is undoubtedly true that the Act was brought on the statute book to unearth the unaccounted money, but there is no warrant for the proposition that by enacting the same, the Legislature intended to permit, or connive at, any fraud sought to be committed by making benami declarations. If the contentions were to be accepted., it would follow that an assessee in the higher income group could, with impunity, find out few near relatives who would oblige him by filing returns under section 24 of the Act, disclosing unaccounted income of the assessee as their own and claiming that the said income was kept by them in deposit with the assessee.

2. *The legal fiction created by section 24(3) of the Finance (No. 2) Act, 1965 by virtue of which the amount declared by the declarant was to be charged to Income Tax "as if such amount were the total income of declarant" was limited in its scope, and it could not invoked in the assessment proceedings relating to any person other than the person making the declaration under the said Finance Act so as to rule out the applicability of section 68 of the Income Tax Act, it was restricted to the voluntary disclosures scheme itself. The protection enjoyed by the declarant under that scheme extended only to the amounts so declared being not liable to be added if any assessment of the declarant. **There was no absolute finality attached to the declaration especially when the nature and source of the sum declared was being determined for the purpose of its inclusion in the income of an assessee other than the declarant. Accordingly, the ITO was entitled to determine whether the amount disclosed was or were not the income of the declarant while dealing with the case of another assessee under section 68 of the Income Tax act.***

3. *Further, in a case of description, there was no question of double taxation. The situation was of the assessee's own making getting false declaration filed in the names of the creditors with a view to avoid higher slab of taxation. Once is was that the income declared by the creditors did not belong to them, there was nothing to prevent the same being taxed in the hands of the assessee to which is actually belonged.*

4. In the instant case, since the assessee failed to discharge the burden of proof placed upon him under section 68 of the Income Tax Act, the inclusion of the impugned amount in the assessee's income was justified."

In view of the above ratio laid down by the Hon'ble Supreme Court in the above mentioned case law (marked in bold), it is immaterial whether the company, M/s. Techman Buildwell Pvt. Ltd. Has declared the sale proceeds of the flats in its return of income and also it has been assessed because whatever profit would arise on the portion of the sale consideration which pertains to the value of the land, that income clearly does not belong to the company but it belongs to the assessee (appellant) as the land is registered in his name. Such position has been clarified by the AO during the discussion pointing out that out of total sale consideration, the assessee (appellant) has received that part of the sale consideration which pertains to the cost of the land and improvement in its value due to flats constructed thereon. Its subsequent payment to the company out of sale consideration received by him will not change the nature of income in his hand, which has arisen out of transferring the land to the purchaser of the flats which exists in his name.

5.10 Looking to all the surrounding circumstance under which the assessee (appellant) had acquired a land in his name and later on this land has been given to builder by retaining the ownership with him, the flats were got constructed on such land and later on the flats were sold along with the cost of the land, the whole arrangement is like a joint development agreement between the owner of a land and a builder in which, the owner of the land provides a land and builder constructs flats and after making the flats, the builder recovers its cost of construction along with profit and balance amount is realized by the owner of the land and at the time of selling of flats, either by dividing the flats between them or by sharing the sale consideration. Such type of arrangement are quite prevalent in metro cities where many persons are having old property / land and they are not able to sell such old

land / property and for selling such land / property, they get the flat constructed on such old land / property by a builder and then sell those flats to earn capital gain after making improvement in the value of the land due to construction of flats on such land. In the present case, the assessee(appellant) instead of having any old land in his name, he has purchased a land from the market and got it developed by a builder by getting flats constructed thereon, such arrangement is quite evident because at the time of selling flats, the assessee(appellant) has sold flats himself as being vendor and recovered only that part of sale consideration, which is related to the cost of land and some portion of cost of flats due to making of improvement in the cost of land. Since, the land in the name of assessee(appellant) is in the nature of capital assets, if any income is arising to the assessee(appellant) on sale of such land along with flats built thereon, it would be taxed under the head capital gain. Since the property (land along with flats) has been sold before completion of three years from the date of purchase of land. The capital gain shall be taxed as short term capital gain. Therefore, **I confirm the decision of the AO for taxing the income on sale of land along with flats built thereon under the head Short Term Capital Gain.**

5.11.1 For computation of Short Term Capital Gain in the assessment order, the AO has estimated the cost of construction at Rs.50,37,165/- and further he has added an amount of Rs.5,50,697/- as construction cost of open area and arrived to a total cost of construction at Rs.55,87,862/-. After adding the cost of land along with the cost of construction of 11 flats at Rs.1,58,20,749/- and after computation of cost of seven flats sold during the year on proportionate basis. He has arrived to a cost of construction of Rs.1,00,67,743/-. He has deducted the cost of construction along with land computed by him for seven flats at Rs.1,00,67,743/- out of the total sale value of Rs.1,82,44,500/- and arrived to short term capital gain has been disputed by the Id. AR contending that the estimation of the cost of construction made by the AO is only estimated cost of construction and it was never confronted to the assessee(appellant) during the course of assessment proceeding. In his view, such estimation of the cost of construction should not be made, when the actual cost of construction was provided by M/s. Techman Buildwell Pvt. Ltd. To the AO. In order to verify this contention of the Id. AR, I have gone through the assessment record and I have found that during the course of assessment proceeding, the details of cost of construction of seven flats during the year under consideration on proportionate basis was provided and the same has been computed at Rs.1,26,70,086/- as given below: -

Cost of transfer GK1/222	Rs.	15,234
Cost of compounding GK1/222	Rs.	5,82,352
Cost of construction GK1/222	Rs.	62,70,000
Cost of land GK1/222	Rs.	58,02,500
	Rs.	<u>1,26,70,086/-</u>

Therefore, I find that the AO is not justified estimating the cost of construction on the basis of a rate provided by the Ghaziabad Development Authority, when the actual cost of construction has been provided by the builder company, M/s. Techman Buildwell Pvt. Ltd. And he has also not brought any evidence on record showing that such details of cost of construction provided by the builder company was not correct. Therefore, the AO is directed to take cost of construction of flat at Rs. 1,26,70,086/- instead of Rs. 1,00,67,743/- estimated by him.

5.11.2 For computation of capital gain, the AO has taken entire amount of the sale consideration received by the assessee(appellant). However, after going through the

sale deed, I have found that some of the amounts have been directly paid to the company, M/s. TechmanBuildwell by the purchaser. Such amount which has been paid to the company directly by the purchasers of the flats can be considered as related to the share of profit of the company under a joint development of the project, which has been received by it directly. In view of the above factual position, found from the sale deeds, I find that it would be more logical to tax the assessee (appellant) for the portion of sale consideration that has been actually received by him for the purchasers of flats. Such amount received by the assessee (appellant) directly from purchaser of all the seven flats has been computed as under after modifying it as per the provision of section 50C and the same is reproduced as under: -

Name of the vendee	Amount of total sale consideration	Stamp registration value	Amount considered for computing capital gain	Sale amount received by the assessee	Proportionate stamp value for assessee
1	2	3	4	5	6
Sanjeev Kumar	20,30,000	18,25,000	20,30,000	11,00,000	11,00,000
Sanjay Kumar	26,50,000	23,61,000	26,50,000	17,00,000	17,00,000
Arvind Kumar	30,00,000	34,24,000	34,24,000 (u/s 50C)	22,50,000	25,68,000
Sri Bhagwan Rastogi	23,75,000	23,65,000	23,75,000	20,18,750	20,18,750
Sayaad Shaukat Ali	23,25,000	26,45,000	26,45,000 (u/s 50C)	20,00,000	22,75,268
Coln. Bupendra Singh	23,30,000	24,90,000	24,90,000 (u/s 50C)	20,00,000	21,37,339
Manoj Kr. Agarwal	26,00,000	26,30,000	26,30,000 (u/s 50C)	23,40,000	23,67,000
Total	1,73,10,000	1,82,44,500		1,34,08,000	1,41,66,357

5.11.3 In view of the chart made on the previous page, the value of sale consideration of land owned by the assessee (appellant) and flats constructed thereon as received by him for the purpose computation of capital gain comes to Rs. 1,41,66,357/- Therefore, **for the purpose of computation of capital gain, sale consideration received by the assessee (appellant) should be taken at Rs.1,41,66,357/- instead of Rs.1,82,44,500/- as computed by the AO.**

5.11.4 After finalizing the sale consideration of land along with the flats constructed thereon as received by the assessee (appellant), the purchase cost to the assessee (appellant) for land along with the flats constructed thereon sold should also be computed. For this purpose, the full value of the land (pertaining to 7 flats) should be taken in the hand of the assessee because the land belonged to him. As far as the cost of construction of 7 flats is concerned, it should be apportioned between the assessee (appellant) and the company in the ratio of the sale consideration received by the assessee (appellant) and the total sale consideration of 7 flats and the same is computed as under: -

$$\begin{aligned}
 \text{Cost of construction} &= \text{Total cost (-) cost of land} \\
 &= \text{Rs. 1,26,70,086/- (-) Rs. 58,02,509/-} \\
 &= \text{Rs. 68,67,586/-}
 \end{aligned}$$

Proportionate cost of construction to the assessee(appellant)

$$\frac{1,34,08,000}{1,73,10,000} \times 68,67,586 = \text{Rs. } 53,19,502$$

For computing the total cost of property sold, purchase cost of land should be added in the proportionate cost of construction as computed above. The total value of cost of purchase is computed as under: -

$$\text{Cost of land (7flats) + proportionate cost of construction (7flats)} \\ \text{Rs. } 58,02,500/- + \text{Rs. } 53,19,502/- = \text{Rs. } 1,11,22,002/-$$

5.11.5 After computing the value of sale consideration received by the assessee(appellant) on sale of land along with flats constructed thereon and purchase cost of such land along with the flats constructed, the short term capital gain should be computed in the hand of the assessee(appellant) as under: -

Sale consideration as per section 50C	Rs. 1'41'66,357
Cost of property as computed in para 5.11.4	<u>Rs. 1,11,22,002</u>
Short term capital gain	<u>Rs. 30,44,355</u>

5.12 In view of the above computation. I hold that the assessee(appellant) is liable for being assessed to tax under the Income Tax Act, 1961 under the head Short Term Capital Gain for an amount of Rs. 30,44,355/- earned by him of selling of land purchased by him in earlier year after getting its value improved due to flats constructed thereon. Therefore, I confirm the addition made by the AO under the head short term capital gain to the extent of Rs. 30,44,355/- out of total amount of addition of Rs. 81,76,757/- made in the assessment order and accordingly, the assessee(appellant) gets relief of Rs. 51,32,402/-. In view of my above decision, all the grounds taken by the appellant from Grounds nos. 1 to 4 and 6 to 8 are decided as discussed in the paras as discussed above dismissing the plea of the appellant for next texting the income arising on sale of land and flats constructed thereon in his hand and also dismissing his plea of not taxing such income under the head Capital Gain but providing part relief on the amount of capital gain computed by the AO.”

4. Learned counsel submits in this factual backdrop that the impugned short term capital gains have been wrongly assessed in the assessee's hands as it was the company herein namely M/s. Techman Buildwell Pvt. Ltd. which not only had owned and possessed the land in question but also it bore the entire cost and the sale consideration has also been transferred to its account. There is hardly any dispute that the

learned lower authorities went on record the clinching facts that the assessee all along had acted as the purchaser as well as seller of plot/land in question. Learned counsel very fairly admitted that the assessee has indeed represented himself as the true purchaser as well as seller before the registration authority(ies). That being the case, we are of the considered view that whatever was the alleged oral argument between the assessee and the company, the learned lower authorities have rightly assessed the impugned capital gains in his hands going by the overwhelming evidence against him. Rejected accordingly.

5. No other ground is raised/pressed before us.
6. This assessee's appeal is dismissed.

Order pronounced in the open court on 13.02.2025.

Sd/-
(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Sd/-
(SATBEER SINGH GODARA)
JUDICIAL MEMBER

Dated:

*aks/-/Subodh

Copy forwarded to:

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

Asst. Registrar, ITAT, Agra