

**IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA**  
[Before Shri Waseem Ahmed, AM & Shri K. Narasimha Chary, JM]

**I.T.A No. 1083/Kol/2012**  
**Assessment Year: 2007-08**

Sam Developers (PAN: AASFS6276N) Vs. Assistant Commissioner of Income-tax,  
Circle-40, Kolkata.  
(Appellant) (Respondent)

Date of hearing: 24.10.2016  
Date of pronouncement: 18.11.2016

For the Appellant: Shri J. P. Khaitan, Advocate  
For the Respondent: Shri S. S. Alam, JCIT, Sr. DR

**ORDER**

**Per Shri K. Narasimha Chary, JM:**

This appeal by assessee is arising out of order of CIT(A)-XXX, Kolkata vide Appeal No.112/CIT(A)-XXX/Circle-40/2011-12 dated 20.01.2012. Assessment was framed by ACIT, Circle-40, Kolkata u/s. 143(3) of the Act for AY 2007-08 vide his order dated 30.12.2009.

2. Brief facts of the case are that the Assessee is a developer. A survey u/s. 133A of the Act was conducted on 14.03.2007 in the business premises of assessee and documents/loose bunch, exercise book, computerized loose sheets, purchase book, bank register etc. were impounded. Its return was selected for compulsory scrutiny and notice u/s. 143(2) of the Act was issued on 27.03.2008 and duly served on the assessee in collecting the questionnaire and hearing at length. The following points were recorded basing on such impounded document and material:

*(i) The assessee firm has shown WIP of Rs.1,45,00,000/- in the estimated P/L a/c and balance sheet as on 31.03.2007. On calculation it transpires that WIP does not include proportionate cost of land and only cost of construction is taken into consideration. It caused under valuation slashing net profit and income tax payable thereupon.*

*The calculation of this undervaluation may be made on the following basis; total sanctioned area of the project was 60,000 Sq. Feet out of this the assessee firm has already shown 40,000 Sq Feet (approx) as sold out and so 20,000 sq. feet (approx) remained unsold till 31. 03.2007, total amount debited by the assessee firm against purchase of land amounted*

to Rs.2.20 Crores. Therefore Rs.73,00,000/- (approx.) being 1/3<sup>rd</sup> of the amount debited under land should have been included in the WIP.

(ii) The three partners of the assessee firm had sold their individual land of three cottah (one cottah each) for this the firm has to incur Rs.45,96,250/- (or purchasing three cottah of land. Whereas the firm paid Rs.58,00,000/- to Smt. Archana Saha for five cottah of land. Considering the same proportion the cost of three cottah of land comes to Rs.34,80,000/-.

It was asked to them why the balance amount of Rs 11,16,250/- ( Rs.596250/- - Rs.3480000/-) would not attract the provision of sec 40A(2) (b) of the I. T. Act. In reply they submitted that this higher price was paid to them for a special position and shape of three cottah of land ( rectangular ). In comparison to "L" shaped land of Smt Archana Saha and same could be verified from the site plan."

After going through the final survey report, copies of impounded documents information received through notice u/s. 133(6) of the Act and record available, the AO made certain additions and in so far as this appeal is concerned, the addition of Rs.5,77,000/- in respect of work in progress and Rs.8,87,974/- towards the cost of land transferred by the partners to the assessee firm are relevant. In appeal, the Ld. CIT(A) gave relief to the tune of Rs.4,13,650/- in respect of the value of work in progress, and confirmed the balance portion and also the addition of Rs.8,87,974/- on account of the excess sale consideration paid to the partners. Challenging the same, assessee has filed this appeal before us on the following grounds:

"1. For that the Ld. CIT(A) erred in upholding the addition to the extent of Rs.1,63,350/- on account of work in progress.

2. For that the Ld. CIT(A) erred in holding that section 40A(2) was applicable and in upholding the addition of Rs.8,87,974/-."

3. It is the argument of the Ld. AR that in respect of ground no. 1, the AO found that the value of 530 sft constructed area escaped the tax whereas Ld. CIT(A) found that only 150 sft after allowing 380 sft. allowed to WBSEB as per their norms during the FY 2005-06. Ld. AR explained that the assessee submitted the details of the flats sold during the year 2006-07 before the AO and the same was available before the Ld. CIT(A) also. Ld. AR submitted that there is an arithmetical error in calculating the total area that was sold during the year 2006-07 and as a matter of fact, it is 31,035 sft. but both the authorities below erred in calculating it as 30885 sft. On ground no. 2 he has admitted that both the authorities below erred in comparing the cost of five cottahs of land of one Sm. Archana Saha with the case of three cottahs of land which the partners of the assessee firm transferred to the

assessee and there is a difference in the area of construction and also the layout of the land which has a bearing on the cost factor.

4. Per contra, Ld. DR vehemently relied on the orders of the authorities below in respect of ground nos. 1 and 2. On ground no. 2 it is his argument that the authorities below considered the layout and the location of the land and have come to a reasonable conclusion in respect of the addition thereof. He further submitted that the AO considered the cost of improvement made to the land that was purchased from Smt. Archana Saha and after considering the said factors only they have reasonably reached the figure of Rs.8,87,974/- and such a finding does not warrant any interference.

5. In so far as the first ground of appeal is concerned, we have seen the orders of the lower authorities. In the assessment order the AO stated that during the FY 2006-07 relevant to AY 2007-08 the assessee sold 30885 sft. The Ld. CIT(A) also proceeded on the same footing and vide entry no. 5 of the table drawn by him at page nos. 4 and 5 of his order he mentioned that according to the assessee the land sold during the FY 2006-07 was 31035 sft. whereas according to the AO, it was 30885 sft. Since the Ld. CIT(A) allowed 380 sft. of land allowable to WBSEB as per their norms, ultimately he found that 150 sft. could not be accounted for properly and the value of which is liable for tax.

6. At page 53 of the paper book the details of the land sold during the year 2006-07 are furnished. In these details flat area and parking space are separately mentioned. Total flat area is 27885 sft. and there is no dispute in respect of this. However, the total of the parking area is given as 3000 sft. but Ld. AR calculated this and shown to us that it is to 3150 sft. but not 300 sft. This is how the Ld. AR accounted for 150 sft. which the authorities wanted to bring into tax. On this aspect, since it is a matter of arithmetical mistake, both the Ld. AR and Ld. DR submitted that the matter may be remanded to AO for proper conclusion as to the area of the land that was sold during 2006-07. We also find it just and proper to accept the same.

7. Now coming to the other ground. Since it is the argument of the Ld. AR that the authorities below erred in comparing the cost of the five cottahs of land and the cost of the three cottahs of land of the partners of the assessee firm which were transferred to the

assessee, we find it necessary to look into the facts and circumstances surrounding these two transfers and the factors influencing in the cost involved in transferring all these lands. There is no dispute that originally there was an agreement for purchase of land between Smt. Archana Saha and M/s. Shyam Developers (page nos. 1 to 14 of the paper book) way back on 15.06.2001 in which vide clause 2 (a), (b), (c), (d) and (e) smt. Archana Saha was agreed to be given 37% of the share in ground, first, second, third and fourth floors after construction of the building thereon. Subsequently, there was another agreement on 27.06.2003 (page nos. 15 to 20 of the paper book) between the same parties stating that to obviate any future misunderstanding and to avoid any wasteful litigation the shares were fixed vide clause 2 thereof. Under this clause in the place of 37% in the ground plus fourth floors of the built up area, Smt. Archana Saha was agreed to be allotted 960 sft. including floor service area (Flat No. 3) and 945 sft. including floor service area (Flat No. 4) in the second floor 300 sft. of car parking, in the ground floor of Block B, and 200 sft. including floor service area (One room) in Block C, and 1073 sft. area including floor service area on the 3<sup>rd</sup> floor of Block C. This is how there was an agreement. Again vide agreement dated 08.06.2006 (page nos. 27 to 32 of the paper book) vide clause 2 thereof the parties agreed that a sum of Rs. 58 lacs was to be paid to Smt. Archana Saha in so far as five cottahs of land obtained from Smt. Archana Saha.

8. Vide agreement dated 04.06.2004 the partners of the assessee firm agreed to convey three cottahs of land to the assessee and agreed to receive some built up area. The AO calculated the value of this three cottahs of land at Rs.45,96,250/- and while comparing this Rs.45,96,250/- of three cottahs of land with Rs.58 lacs for five cottahs of land calculated that there is an excess payment of Rs.11,16,250/-. He considered the plea of the assessee that an amount of Rs.2,28,276/- was incurred by the assessee for development, the AO concluded that a sum of Rs.8,87,974/- was in excess and is liable to be added back to the total income of the assessee.

9. First of all the contention of the Ld. AR is that the sale consideration of five cottahs of land of Smt. Archana Saha was crystallized as on 15.06.2001 whereas the value of the land that was transferred by the partners of the assessee firm was crystallized in terms of the cost of built up area they got to their share as such, when there is a gap of six years in

between it would be unreasonable to say that there is an excess payment to the tune of Rs. 11 lacs or Rs. 8 lacs as the case may be. The second ground of contention is that Smt. Archana Saha's land is in "L" shape permitting only ground plus two floors whereas the land transferred by the partners of the assessee firm was rectangular in shape abutting the road on two sides providing more access for ingress and egress as such, naturally there will be difference in price. He submits that arithmetical calculation will not work in respect of the value of land because the factors like location, layout and condition of the land will be influenced on cost.

10. We find some force in this argument of the Ld. AR. When we read the agreements dated 15.06.2007, 27.06.2003 and 08.06.2006 that were executed between Smt. Archana Saha and the assessee consistently it is mentioned that the second agreement dated 27.06.2003 and 08.06.2006 is nothing but a continuation of the terms and conditions relating to the rights, liabilities and disabilities of the parties under the agreement dated 15.06.2001. Therefore, it can reasonably be presumed that whatever the price i.e. agreed to be paid to be paid to Smt. Archana Saha was with reference to the agreement or the prevailing market value as on 15.06.2001. Though it was agreed that 37% of the built up area shall be the sale consideration for her and subsequently modified to be expressed in terms of sq. ft. ultimately in terms of money, there is no disturbance in the original terms of agreement. It is, therefore, reasonable for the assessee to contend that the sale consideration of Rs. 58 lacs cannot be taken as the market value as on 08.06.2006, but it has a nexus with the market value of either land or built up area prevailing as on 15.06.2001. This aspect was not considered by the AO but simply the AO and the Ld. CIT(A) proceeded on the premise that Rs. 58 lacs was comparable with the price of the built up area that had fallen to the share of the partners of the assessee firm. The subtle difference between the price of the land as on the date of agreement and the price of the land as could be calculated from the built up area that had fallen to the share of the partners of the assessee firm missed the attention of the authorities. This aspect requires reconsideration by the authorities below.

11. Now coming to the aspect of the location and layout of the land. Admittedly the land of Smt. Archana Saha is "L" shape and the land of the assessee firm is rectangular shape. Further it has been the consistent argument of the assessee that only ground plus two floors

alone are permissible as per municipal rules in the land of Smt. Archana Saha whereas in the assessee's land the built up area is more. According to them, in the entire land of five cottahs of Smt. Archana Saha's land the building is with built up area only 4620 sft. wherein in the land of three cottahs of the assessee the built up area was 6160 sft. There is no denial of this fact. During the assessment proceedings the AO extracted certain information from one of the three partners of the assessee and relevant questions are question no. 13 and 14 which are as follows:

*“Q.13. As per agreement dated 4<sup>th</sup> day of June, 2004 you have conveyed the land measuring three cottahs one chittak and nine sq. ft. to M/s. Sam Developers and against the same you are supposed to get ----- (i) Shri C. R. Sen, two flats measuring 1004 and 1014 super built up area and two nos. car park space; (ii) Shri A. K. Adhikary; two flats measuring 1004 & 1014 sq. ft. super built up area and two nos. car park space & (iii) Shri N. Majumder; one flat measuring 2014 sq. ft. super built up area and two nos. car park space.*

*Please state the value of such flats and car park space and how do match the value in respect of sale considerations received from other sellers of land.”*

*Answer: since we are the partners of the firm (M/s. Sam Developers), we value the property at the cost of construction i.e Rs.43,86,250/-.*

*Car parking space measuring 100 sft each comes to Rs.2,10,000/- @ Rs.350/- sft for 600 sft in total.*

*Therefore, total consideration comes to Rs.45,96,250/-.*

*Q. 14. In the reply against Q. 10 you have mentioned that against five cottahs of land you have paid Rs.58 lacs to Smt. Archana Saha. Proportionately your consideration should be Rs.34,80,000/- in terms of monetary value. But as per your reply in the previous question, the same is calculated at Rs.45,96,250/-. Please explain why the difference of amount will not attract the provisions of section 40A(2)(b) of the I. T. Act, 1961?”*

*Answer: From the site plan it is obvious that Smt. Archana Saha's land is L shaped, which is not suitable for construction, while land belonging to the three partners (individually) is square shaped and the same allowed after amalgamation with other plots full utilization of the project. Therefore, higher price is to be paid for the piece of land owned by the partners.*

12. The above information that was available before the AO clearly shows that the land that was transferred by the partners of the assessee firm to the assessee was valued not on the basis of prevailing market value in the locality nor on the basis of any document that was available before the AO but purely assessed on the basis of cost of construction. Therefore, the cost of construction of that portion that had fallen to the share of the partners is taken up the value of the land whereas the value of the land of Smt. Archana Saha was, as contended by the Ld. AR, was relatable back to the agreed value of land as on 15.06.2001. Straight comparison of these two values, therefore, does not seem to be on

correct footing and the AO has to make comparison of this cost of the land as prevailing on 15.06.2001 or basing on the cost of construction. On this aspect also Ld. AR prayed before this Tribunal to set aside the matter to AO for fresh calculation of the value of the land. We find every justification for the same.

13. In view of our finding on ground nos. 1 and 2, we find it just and proper to set aside both the grounds to the AO to decide afresh considering the observations made hereinbefore. Appeal of assessee is allowed for statistical purposes.

14. In the result, the appeal of assessee is allowed for statistical purposes.

Order is pronounced in the open court on 18.11.2016

Sd/-  
(Waseem Ahmed)  
Accountant Member

Sd/-  
(K. Narasimha Chary)  
Judicial Member

Dated :18<sup>th</sup> November, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – Sam Developers, 2/N, Gurudas Dutta Garden Lane, Kolkata-700 067
2. Respondent –ACIT, Circle-40, Kolkata
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.