

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI ABRAHAM P. GEORGE, AM & GEORGE GEORGE K., JM

I.T.A. No.235 /Coch/2016
Assessment Year : 2006-07

M/s. Trio Property Developers (P) Ltd., 4 th floor, Indus Avenue, Kallai Road, Kozhikode. [PAN: AAAC 8548D]	Vs.	The Assistant Commissioner of Income-tax, Circle-1(1), Kozhikode.
(Assessee-Appellant)		(Revenue-Respondent)

Assessee by	Shri C.B.M. Warriar, CA
Revenue by	Shri Shantham Bose, CIT(DR)

Date of hearing	24/05/2017
Date of pronouncement	07/06//2017

ORDER

Per ABRAHAM P.GEORGE, ACCOUNTANT MEMBER:

Assessee in this appeal assails an order dated 28/03/2016 of Pr. CIT, Kozhikode passed u/s. 263 of the Income Tax Act, 1961 (in short'the Act').

2. Facts approps are that assessee, a property developer had filed its return of income for the impugned assessment year declaring a loss of Rs.27,541/-. It seems the return was originally processed u/s. 143(1) of the Act. On 22/03/2013, a notice u/s. 148 of the Act was issued to the assessee. Pursuant

to such notice, assessee filed another return which reflected the same loss as shown in the original return. Assessee had during the relevant previous year entered into a Memorandum of Understanding (MOU) and Joint Development Agreement (JDA) with one M/s. Focus Mall, a partnership firm, for developing a property measuring 59.42 Ares of Kasaba Village, Kariakunnu Desom, Kozhikode. As per terms of these agreement dated 21/12/2005, assessee granted exclusive license to M/s. Focus Mall, to enter into the property and construct a shopping mall. It seems assessee delivered actual, physical and vacant possession of the property to the developer. As per the agreement, developer was to construct a shopping mall with a minimum super built-up area of 1,34,801 sq ft. of which 71,444 sq. ft. was to be delivered to the assessee and the developer was to retain balance Rs.63357 sq. ft. The price for the constructed area of 71,444 sq. ft. which was to be delivered to the assessee, as per the agreement was Rs.975 per sq. ft. The Assessing Officer was of the opinion that assessee having handed over the possession of the land, there was a transfer within the meaning of 2(47) of the Act read with section 53-A of the Transfer of Property Act, 2002 (T.P. Act). Assessee was required to explain why capital gains arising out of the transfer was not shown in its return.

3. In its reply, it was stated by the assessee that M/s. Focus Mall was granted only a license to enter into the property and there was no transfer of property to the said M/s. Focus Mall. As per the assessee, it had not executed any

irrevocable power of attorney in favour of M/s. Focus Mall. Contention of the assessee was that there was no handing over possession, but only a license to enter into the property for constructing a building. Thus as per the assessee, there was no transfer within the meaning of 2(47) of the Act. However, the Assessing Officer was not impressed. According to him, the terms of the MOU and JDA clearly had all the ingredients necessary for constituting a transfer, as contemplated in Section 53A of the T.P. Act. Further, according to him, execution of a power of attorney was not an essential ingredient for attracting section 53A of the T.P. Act. Though assessee had offered capital gains on certain units sold by it out of the space allocated to it, in the assessment year 2009-10, as per the Assessing Officer, this would not be a reason not to consider the capital gains in the impugned assessment year. He, thereafter, computed the capital gains taking the full value of consideration at the rate of Rs.975 per sq. ft. for the area of 71,444 sq. ft. to which the assessee was entitled, computing Long Term Capital Gains at Rs.5,46,97,415/-.

4 On 22.01.2016, a notice was issued by Pr. CIT u/s. 263 of the Act. As per the Pr. CIT while computing the capital gains, Assessing Officer had erroneously taken full value of consideration of the property sold at Rs.6,96,57,000/-. Pr. CIT noted that M/s. Focus Mall, the developer, in its Profit and Loss account for the financial years relevant to the assessment years 2008-09 and 2009-10, had shown a project cost of Rs.28,87,93,737/-. Since 53% of the constructed area

was the share of the assessee, as per Pr. CIT, the consideration for the transfer should have been taken at Rs.15,30,60,680/-, being 53% of the project cost of Rs.28,87,93,737/- incurred by M/s. Focus Mall. As per Pr. CIT, full value of the consideration of the land was erroneously considered as Rs.6,96,57,000/- against the correct amount of Rs.15,30,60,680/-. Pr. CIT noted that the Assessing Officer had not conducted necessary enquiries during the course of scrutiny proceedings to determine the full value of consideration and therefore, the assessment order was erroneous and prejudicial to the interests of the Revenue.

5. In reply to the above notice, assessee submitted before Pr. CIT that there was no transfer at all coming within the ambit of the T.P. Act. As per assessee there was only a license given to enter into the property. Contention of the assessee was that the agreement specified a price of Rs.925 per sq. ft. and developer had undertaken the project based on this consideration. However, Pr. CIT was not impressed by the above explanation. According to him, assessee having handed over the possession to the developer, conditions of section 53A of the T.P. Act stood satisfied. Further according to the Pr. CIT, construction was undertaken by M/s. Focus Mall and M/s. Focus Mall had incurred total cost of Rs.28,87,98,737/- for the project, and according to the MOU the assessee was entitled to 53% of the area which translated to only Rs.15,30,60,680/-. He was of the opinion that the Assessing Officer had failed to conduct a proper verification. He held the order to be erroneous and prejudicial to the interests of

the Revenue and directed the Assessing Officer to make a fresh assessment after giving an opportunity of hearing to the assessee.

6. Now before us, Ld. AR strongly assailing the order of the Pr. CIT submitted that in the first place there was no transfer of property during the relevant previous year. According to him, even if it was presumed that there was a transfer, the terms of the MOU and JDA could not be ignored. Ld. Counsel submitted that Assessing Officer had examined the JDA. as well as the MOU and accepted the price of Rs.975/- per sq. ft. for valuing 71,444 sq. ft. area to which the assessee was entitled. As per Ld. AR, cost shown by the developer in its P&L account, could not be construed as a reason to hold that the order of the Assessing Officer suffered from any error. The Assessing Officer had carefully gone through the JDA and the MOU and the consideration was, as per the Ld. AR, rightly arrived at Rs.975 per sq. ft. According to him Assessing Officer's conclusion which was arrived at after due application of mind could not be said to be erroneous and prejudicial to the interests of the Revenue. Contention of Ld. AR was that twin conditions which were to be satisfied for invoking the jurisdiction vested u/s. 263 of the Act were not satisfied in the instant case. He placed reliance on the decision of the Mumbai Bench of the Tribunal in the case of Small Wonder Industries vs.CIT and the decision of the Delhi Bench of the Tribunal in the case of Gurucharan Dass Arora vs. CIT (2017) 53 ITR (Trib.) 364, apart from a host of other judgments.

7. Per contra, Ld. DR strongly supporting the order of Pr. CIT submitted that Pr. CIT had specific information which proved that M/s. Focus Mall had incurred a total cost of Rs. 28,87,93,737/- for developing the property. According to him, Assessing Officer should not have blindly accepted the rate mentioned in the MOU and JDA. Ld. DR submitted that the Assessing Officer fell in error when he failed to verify the records pertaining to M/s. Focus Mall. By not showing the correct assessable project cost, as per Ld. DR, the assessee was trying to conceal its long term capital gains. The order of the Assessing Officer, as per Ld. DR was erroneous and prejudicial to the interests of the Revenue and hence Pr.CIT was justified in invoking the jurisdiction vested on him u/s. 263 of the Act.

8. We have perused the orders and heard the rival submissions. In the first place, what we notice is that the original assessment was pursuant to a reopening done u/s. 147 of the Act. Though, it has not been stated in as many words, a reading of the assessment order clearly indicate that the re-assessment proceedings were initiated since assessee in its return had not shown the capital gains arising to it, on the alleged transfer of property for development as per the JDA and MOU entered with M/s. Focus Mall on 21/12/2005. Assessing Officer had thereafter made detailed study of the agreement entered by the assessee with M/s. Focus Mall. Assessee had submitted before the Assessing Officer that there was no transfer during the relevant previous year and capital gains arising on sale of the units were returned in the assessment year 2009-10. However,

the Assessing Officer took the view that as per clause 2.1 of the agreement, assessee having delivered actual, physical and vacant possession of the property to the developer, there was a transfer. Para 3 of the original assessment order is very relevant and this is reproduced hereunder:

"3. Accordingly, as per clause 2.1 of the Agreement, the assessee delivered actual, physical and vacant possession of the property to the developer. The developer agreed and undertook to develop the property by constructing a shopping mall with minimum super built-up area of 1,34,801 sq. ft. The market value of land was fixed at Rs.10,00,000/- per cent. The developer also undertook to deliver to the owner, owner's constructed area of above 71,444 sq. feet at an agreed price of Rs.975.sq. ft. The developer was entitled to developers area of 63357 sq. ft. of the total area".

9. The Assessing Officer had also noted that some units allocated to the assessee by M/s. Focus Mall were sold by the assessee during the month of March, 2007. A number of such instances have been noted by the Assessing Officer on pages 6 & 7 of his order. Assessing Officer worked out the capital gains considering the full value of the consideration as Rs.6,96,57,000/-, being value of 71,444 sq.ft. of the constructed area to which assessee was entitled at Rs.975 per sq. ft. The rate of Rs. 975 per sq. ft. has been taken from para 3.4 of the JDA. This particular clause is reproduced hereunder:

"3.4 Further the Developer undertakes to deliver to the Owner or to their nominees, the Owners Constructed Areas in such number of units as agreed between parties) about 71444 Sq. ft. Of super built up/saleable

area (inclusive of proportionate share in the common area) at an agreed price of rs.975/- per sq. ft. of super built up/saleable area.”

When the whole assessment done by the Assessing Officer was based on the JDA and MOU entered into by the assessee on 21/12/2010, we cannot say that Assessing Officer had accepted the price of Rs.975/- per sq. ft. mentioned in clause 3.4 of the JDA without application of mind. We cannot say that this aspect alone was not considered by the Assessing Officer while he relied on the JDA and MOU to make the assessment itself. That apart, the expenses incurred by M/s. Focus Mall in its Profit and Loss account may have little relevance for the assessment of capital gains in the hands of the assessee. Such expenditure was not in the control of the assessee and whether such expenditure was incurred for this project also cannot be within the knowledge of the assessee. When the assessee entered into JDA with M/s. Focus Mall, it had agreed to a price which as far as assessee was concerned was final. Assessee could not be burdened with a varying value of consideration, in consonance with what was debited by the developer in its books of accounts. We are of the opinion that the Assessing Officer was justified in relying on the JDA in fixing the sale consideration and computing the capital gains. We do not find any error in the order of the Assessing Officer. In any case, when the assessee ultimately effect sales of the units made available to it by the developer, the cost that it can set off against the sale consideration will be only what has been accepted by it. Viewed from this angle we cannot say that there was any prejudice caused to the revenue.

Thus, we are of the opinion that the twin conditions necessary for invoking jurisdiction vested u/s. 263 of the Act were not satisfied in this case. Order of Pr. CIT is set aside.

10. In the result, the appeal of the assessee is allowed.

Pronounced in the open court on 07-06-2017.

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

sd/-
(ABRAHAM P. GEORGE)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 07th June, 2017

GJ

Copy to:

1. M/s. Trio Property Developers (P) Ltd., 4th floor, Indus Avenue, Kallai Road, Kozhikode.
2. The Assistant Commissioner of Income-tax, Circle-1(1), Kozhikode.
3. The Commissioner of Income-tax(Appeals), Kozhikode.
4. The Pr. Commissioner of Income-tax, Kozhikode.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin