

**IN THE INCOME TAX APPELLATE TRIBUNAL,
BANGALORE BENCH 'B'**

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER**

ITA No.75/Bang/2017
(Asst. Year 2008-09)

Smt. Roopa,
101, Yellappa Reddy House,
3rd Cross, TMN Street,
New Thippasandra,
Bengaluru.

. Appellant

Vs.

The Income-tax Officer,
Ward-7(2),
Bengaluru.
PAN – AVWPR4000Q.

. Respondent

Appellant by : Shri Narendrasharma, Advocate

Respondent by : Smt. Padmameenakshi, JCIT

Date of Hearing : 23-09-2017

Date of Pronouncement : 06-10-2017

ORDER

PER SHRI JASON P BOAZ, ACCOUNTANT MEMBER :

This appeal by the assessee is directed against the order of the CIT(A)-4, Bangalore dated 19.9.2016 for Assessment Year 2008-09.

2. Briefly stated, the facts of the case are as under:-

2.1 In the case on hand, the Assessing Officer ('AO') on verification of certain information found that the assessee had not filed her return of income for asst. year 2008-09. According to the AO, the assessee along with her mother and two brothers had entered into a JDA with Sai Deep Estates on 3/12/2007 for transfer of 50% of undivided share in property measuring 787 sq. ft bearing Katha No.18(earlier No.18 and 16) situated at 1st A Main Road, New Thippasandra, Bangalore in lieu of receipt of 50% of super built up area to be developed on the above property. Finding that the assessee's share of capital gain arising on account of transfer of land vide the JDA had not been offered to tax by the assessee since she had not filed her return of income for asst. year 2008-09, the AO initiated proceedings u/s 147 of the Income-tax Act, 1961 (in short 'the Act') and after recording reasons in this regard issued notice u/s 148 of the Act to the assessee on 20/1/2012. In response thereto, the assessee filed her return of income for asst. year 2008-09 on 24/12/2012 declaring NIL income. The assessment proceedings were then taken up and the assessment was completed u/s 143 r.w.s 147 of the Act vide order dated 25/3/2013, wherein the assessee's income was determined at Rs.47,14,769/-; on account of the AO holding that the assessee's share of 40.07% in the land transferred by the JDA has resulted in Long Term Capital Gains ('LTCG') of Rs.47,14,769/- arising to the assessee. The assessee's appeal before the CIT(A)-4, Bangalore was dismissed vide the impugned order dated 19/9/2016.

3. Aggrieved by the order of the CIT(A)-4, Bangalore dated 19/9/2016 for asst. year 2008-09, the assessee has preferred this appeal along with Form No.36, the assessee first raised original grounds of appeal. Subsequently on 23/9/2017, the assessee filed modified grounds of appeal which are as under:-

“1. The order of the learned Commissioner of Income-tax passed under Section 250 of the Act in so far as it is against the Appellant is opposed to law, weight of evidence, probabilities, facts and circumstances of the Appellant's case.

2. Grounds of Violation of Principles of Natural Justice.

i) The learned CIT (A) was not justified in passing the order in violation of principle of natural justice.

ii) The learned CIT (A) was not justified in passing the order without giving sufficient opportunity of hearing to produce necessary documents and confirmations for the Appellant on the facts and circumstances of the case.

iii) The Learned CIT (A) erred in passing the order without appreciating that the Appellant was not in receipt of the remand report and was never called for any rejoinder report by the learned CIT (A).

3. Grounds on transfer as per Section 2(47)(v) of the Act.

i) Without Prejudice, the learned CIT (A) failed to appreciate that there was no event of 'transfer' as defined in Section 2(47)(v) of the Act for the impugned assessment year on the facts and circumstances of the case.

ii) The learned CIT (A) failed to appreciate that no possession was handed over to the developer in the impugned assessment year on the facts and circumstances of the case.

4. Grounds on whether the lower authorities were justified in taking cost of construction of the developer as the full value of consideration of land on the facts and circumstances of the case.

i) The authorities below erred in law in considering the cost of construction as per the developer at Rs.1139 per Square feet and consequently, arriving at the sale consideration of land of the Appellant at Rs.48,69,759/- on the facts and circumstances of the case.

ii) The learned CIT (A) was not justified in confirming the order of the learned assessing authority who had taken the cost of the super built up area of the owner's constructed portion as per the developer as the full values of sale consideration on the facts and circumstances of the case.

iii) *Without Prejudice, the learned CIT (A) erred in not considering guideline value of the land as the sale consideration in the computation of capital gains on the facts and circumstances of the case.*

iv) *Without further Prejudice, the authorities below ought to have taken the guideline value of the land for the purpose of computation of capital gains on the facts and circumstances of the case.*

5. Grounds of non-granting of Section 54/54F exemption on the facts and circumstances of the case.

i) *The learned CIT (A) was not justified in non-granting of Section 54 exemption on the facts and circumstances of the case.*

ii) *The learned CIT (A) failed to appreciate that there was a residential property on the land subject matter of the development prior to the development.*

iii) *The learned CIT (A) failed to appreciate the evidences on record like confirmation from the developer, surrender of electricity meter acknowledgement etc., on the facts and circumstances of the case.*

iv) *Without Prejudice, the [earned CIT (A) erred in not granting exemption u/s.54F of the Act on the facts and circumstances of the Act.*

6. Grounds on Levy of interest under Section 234A and 234B in accordance with law.

a. The levy of interest under section 234 A and 234 B of the Act is bad in law as the period, rate, quantum and method of calculation adopted on which interest is levied are all not discernable and are wrong on the facts of the case.

7. The Additions are arbitrary and unreasonable and ought to be deleted in full.

8. The Appellant craves Leave to add, alter, substitute and delete any or all of the grounds of appeal urged above.

9. For the above and other grounds to be urged during the hearing of the appeal the Appellant prays that the appeal be allowed in the interest of equity and justice.”

4.1 The assessee has raised the following additional grounds:-

“1. Grounds on jurisdiction to re-open assessment u/s. 148 of the Act.

I. The order of the learned Commissioner of Income-tax [Appeals] in so far as it is against the appellant are opposed to law, weight of evidence, natural justice, facts and circumstances of the case.

II. *The authorities below erred in law in not holding that the notice issued by the learned assessing officer u/s 148 of the Act is in itself bad in law in as much as the notice proposes to 'reassess' the income of the appellant for the assessment year 2008-09 when there was no assessment order passed earlier in respect of this assessment year and consequently the order passed u/s 143(3) r.w.s 147 of the Act is bad in law and void ab initio on the facts and circumstances of the case*

III *The authorities below erred in law in not holding that the order of assessment passed by the learned assessing officer under Section 143(3) r.w.s 147 of the Act is bad in law since the mandatory conditions as envisaged in the Act to assume jurisdiction did not exist or having not been complied with and consequently, the reassessment requires to be cancelled on the facts and circumstances of the case.*

IV. *The authorities below failed to appreciate that the notice issued u/s. 148 of the Act is bad in law and void ab initio as the reasons recorded were not communicated to the Appellant though the same was requested vide letter dated 22/02/2012.*

V. *The learned CIT (A) failed to appreciate that the order of reassessment is further bad in law and void ab initio as the (e)arned assessing officer had no reason to*

believe that the income of the Appellant has escaped assessment and reassessment amounted to merely reasons to suspect on the facts and circumstances of the Appellant's case.

2. **Grounds on non-granting of correct cost of acquisition of the land on the facts and circumstances of the case.**

i) *The learned CIT (A) erred in not considering the correct cost of acquisition for the developer's portion of land in the computation of capital gains on the facts and circumstances of the case.*

ii) *The learned CIT (A) erred in considering the cost of consideration only to the extent of land measuring 1452.5 Sq. Ft. as against the total land measuring 7871.5 Sq. Ft on the facts and circumstances of the case.*

iii) *The learned CIT (A) erred in not giving the proportionate indexation benefit on the facts and circumstances of the case.*

3. *The appellant craves leave of this Hon'ble Tribunal, to add, alter, delete, amend or substitute any or all of the above grounds of appeal as may be necessary at the time of hearing.*

4. *For these and other grounds that may be urged at the time of hearing of appeal, the appellant prays that the*

appeal may be allowed for the advancement of substantial cause of justice and equity.”

4.2 According to the Id AR for the assessee, the additional grounds raised by the assessee on jurisdiction are purely legal in nature and go to the very root of the matter. It is contended that the reasons recorded by the AO for initiating proceedings u/s 147 of the Act were not communicated to the assessee despite the assessee making a specific request in this regard vide letter dated 22/2/2012 (placed at page 2 of paper book). The Id AR contends that in view of the above, the order of assessment framed by the AO without supplying the reasons recorded as sought for by the assessee, and deciding the objections against the notice issued u/s 148 separately, is not sustainable in law and liable to be quashed. In respect of addl. Grounds No.2, regarding the non-granting of correct acquisition of land it was submitted that this ground was inadvertently not raised before the Id CIT(A), and was being raised for the first time before the Tribunal and can be decided on the basis of facts already on the records of the AO/CIT(A). It was prayed that these grounds be admitted and disposed off on merits as these issues would not involve any investigation of any facts otherwise than those on the records of the department. In support of its plea for admission of these additional grounds, the Id AR for the assessee placed reliance on, inter alia, the following decision of the Hon'ble Apex Court in the case of NTPC Ltd., Vs. CIT (229 ITR 383) (SC).

4.3 The Id DR for Revenue vehemently objected to the admission of the additional grounds raised by the assessee (Supra), for the reason that the assessee failed to raise these issues before the authorities below.

4.4.1 We have heard the rival contentions and perused and carefully considered the material on record. In support of her contention that the AO has not supplied her with the reasons recorded for re-opening the assessment despite the assessee's specific request vide letter dated 22/2/2012, the assessee has filed an Affidavit dated 23/9/2017 wherein she has stated that she had requested the AO for being supplied with reasons recorded vide letter dated 22/2/2012. We find that the orders of both the AO as well as the impugned order of the Id CIT(A) are silent on this issue and therefore it is not possible to render a conclusive finding without referring to the records of assessment on this issue. It is well settled proposition of law that in case the assessee requests for being supplied with the reasons recorded for re-opening the assessment the AO is duty bound to supply the reasons and thereafter to decide upon the objections, if any, raised by the assessee against the notice issued u/s 148 of the Act, prior to the framing of the order of assessment. In the facts and circumstances of the case on hand, as discussed above, it is clear that when this issue raised by the assessee has not been considered by the authorities below, it is only in the fitness of things that we remit this issue to the file of the Id AO for consideration. In respect of the additional ground No.2(i) to (iii) raised (Supra), on the issue of non granting of correct cost of

acquisition of land while computing the LTCG, we are of the view that since the examination of this claim of the assessee, while computing the LTCG of transfer of said land, would not require the examination of any new facts other than those already on the records of the Department, the same is admitted for consideration and adjudication. The same is also remitted to the file of the AO for consideration and adjudication in accordance with law. Since the issue of validity of the reopening has been remitted to the file of the AO, therefore the other grounds modified/additional grounds of appeal raised on merits are also remitted to the file of the AO for consideration and adjudication thereon after affording the assessee adequate opportunity of being heard in the matter. We hold and direct accordingly. Similar view has been taken by the co-ordinate bench of this Tribunal in the case of the co-owners of said land i.e Damodar Reddy in ITA No.167/Bang/2017 dated 5/5/2017, also for asst. Year 2008-09.

8. In the result, the assessee's appeal for asst. year 2008-09 is allowed for statistical purposes.

Order pronounced in the open court on **6th October, 2017.**

Sd/-
(SUNIL KUMAR YADAV)
JUDICIAL MEMBER

Sd/-
(JASON P BOAZ)
ACCOUNTANT MEMBER

Bangalore
Dated : 06/10/2017
Vms

- Copy to :1. The Assessee
2. The Revenue
3.The CIT concerned.
4.The CIT(A) concerned.
5.DR
6.GF

By order

Sr. Private Secretary, ITAT, Bangalore.

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