

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH : KOLKATA

[Before Hon’ble Shri S.S.Godara, JM & Hon’ble Shri M.Balaganesh, AM]

I.T.A No. 2353/Kol/2016

&

I.T.A. No. 910/Kol/2018

Assessment Years : 2007-08 & 2009-10

Shri Bijay Shankar Halwasiya
[PAN: AAQPH 4752 A]
(Appellant)

-vs-

ITO, Ward-44(4) , Kolkata
(Respondent)

For the Appellant : Shri S.M. Surana, Advocate
Shri D.K. Maroti, FCA

For the Respondent : Shri Saurabh Kumar, Addl. CIT Sr. DR

Date of Hearing : 13.11.2018

Date of Pronouncement : 05.12.2018

ORDER

Per M.Balaganesh, AM

1. These appeals by the assessee arise out of the separate order of the Learned Commissioner of Income Tax(Appeals)-13, Kolkata [in short the ld CIT(A)] in Appeal No.93/CIT(A)-13/Kol/2015-16 dated 06.09.2016 and Appeal No. 97/CIT(A)-13/W-44(4)/Kol/2015-16 dated 18.01.2018 against the separate order passed by ITO, Ward-44(4), Kolkata [in short the ld AO] under section 147 / 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 25.03.2015 and 30.03.2015 respectively for the Assessment Years 2007-08 and 2009-10 respectively. both the appeals are taken together and disposed off by this common order for the sake of convenience.

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2. The preliminary issue raised by the assessee in this appeal is as to whether the Id CITA was justified in upholding the validity of reopening of assessment in the facts and circumstances of the case. The inter connected issue involved therein is as to whether any capital gains did arise to the assessee in Asst Year 2007-08 in the facts and circumstances of the case.

3. The brief facts of this issue are that the assessee is an individual and had filed his return of income for the Asst Year 2007-08 on 8.9.2007 declaring total income of Rs 1,43,510/-. The return was processed u/s 143(1) of the Act. Later the assessment was sought to be reopened by the Id AO on the ground that the assessee had not disclosed any capital gain on conversion of his capital asset into business asset in the relevant financial year. Notice u/s 148 of the Act was issued and served on the assessee. In response to the said notice, the assessee stated vide letter dated 3.4.2014 that the original return filed may be treated as a return in response to notice u/s 148 of the Act. The brief facts of the dispute regarding the capital gains are that the assessee entered into a Development Agreement dated 13.9.2006 with M/s Kokra Develepor Pvt Ltd for construction of building on his ancestral land. It was agreed that assessee and developer would share 50% each of constructed portion and all construction and other related costs would be borne by the Developer. No construction activities were taken up / completed by 31.3.2007. The Id AO showcaused the assessee vide office letter dated 17.3.2015 mentioning as under:-

‘As per details of valuation by the valuer of Govt. of India for Income Tax & Wealth Tax, it has stated that the value of the landed property is Rs 38,22,000/- as on 01/04/1981 . So, by calculating C.I.I. for the financial year 2006-07 i.e on the date of 13/09/2006 , it has come to :

$38,22,000 * 519 (C.I.I. of 2006-07) / 100 (C.I.I. of 1981-82) = Rs 1,98,36,180/-$

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The matter has been duly passed on to the district valuation officer, Income Tax Department for valuation of the said land on 01/04/1981 and on 01/09/2006, but the reply has been yet to be received.

However, a preliminary report has been intimated by the valuation officer mentioning the value of the property as Rs 5.5 crores.

However, you have not shown any income from Long Term Capital Gain for transfer of your capital asset to your business asset in your joint venture accounts with M/s Kokra Developers (P) Ltd for the AY 2007-08.

Hence, you are show caused as to why the difference amount of Rs 3,51,63,820/- (Rs 5,50,00,000 – Rs 1,98,36,180) or the valuation of the said property valued by the district valuation officer is not treated as your income from long term capital gains for the financial year 2006-07 relating to assessment year 2007-08.”

The assessee objected to the determination of valuation of property at Rs 5.5 crores which was only based on an estimate and also informed the Id AO that the valuation officer of income tax department had visited the premises in Bhiwani on 19.3.2015 and all the documents and information on facts and findings were provided to him as per his requirements and satisfaction and that he had assured that the final report would be submitted by him in due time. Accordingly, it was pleaded by the assessee before the Id AO to keep the reassessment proceedings in abeyance till the receipt of the report from district valuation officer.

4. The Id AO observed in his order as under:-

“Since this is a time barring case and the assessment proceedings have to be completed within the stipulated time. Rather depending on the assessee's submission, it is inevitable to substantiate with the preliminary report provided by the department's valuation officer. The assessee's contention for objection on the preliminary report by the valuation officer is not tenable as because it is an expert opinion. The preliminary report by the District Valuation Officer is estimated and duly reported to this office on 07/11/2014 is as under:

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“The circle rates for the above mentioned property available for the year 2005-06 is Rs. 10,000/-; and the area of the property is 5500 Sq. yard; thereby taking the preliminary valuation of the property to Rs. 5.50 Crores.”

Whatever, the valuation officer said in his report; it has to be considered as there is no other option to judge the value of the property. The assessee as well as the A.O. is not the authority to take such decision for estimating the property value. That's why the matter was passed to the District Valuation Officer and I compel to rely on the report, as it is one & only basis to complete the assessment proceedings. Considering all of the above, the difference amount of Rs. 3,51,63,820/- (Rs. 5,50,00,000/- which is valued on 01/09/2006 - Rs. 1,98,36,180/- which is valued on 01/04/1981) is treated as income from long term capital gains and added to the total income of the assessee.”

5. The assessee specifically drew the attention of the Id CITA that as per the development agreement dated 13.9.2006 and in supplementary agreement dated 9.3.2007, it was clearly mentioned that possession of land would be handed over only after approval of project sanction plan by the Municipal Council, Bhiwani and actual date of filing of project sanction plan was 15.10.2007 and sanction obtained on 19.10.2007 for construction of total 2271.19 sq.yard vide Misal No. 179 dated 15.10.2007 for 1100 sq.yard in the name of Amarish Halwasiya and Misal No. 180 dated 15.10.2007 for 171.19 sq.yard in the name of Bijay Shankar Halwasiya respectively and actual date of handing over of possession by land owners to developer was on 29.10.2007, falling in Asst Year 2008-09. It was specifically argued that the possession of the land was not handed over by the assessee to the developer in Financial year 2006-07 and hence there is no transfer within the meaning of section 2(47) of the Act read with section 53A of Transfer of Property Act, 1882. Hence at the first instance, there cannot be any capital gains in Asst Year 2007-08 and consequently there cannot be any income escaping assessment for the Asst Year 2007-08. The assessee further submitted that balance land out of total land around 5500 sq.yard as per development agreement dated 13.9.2006 was not constructed and was under possession of land owner and with mutual consent, no further construction would be made due to

some unavoidable circumstances and development agreement dated 13.9.2006 stood complied to the extent of 2271.19 sq.yard only.

5.1. The assessee further submitted that it is generally accepted perception that land pertaining to construction portion allotted to developer would be considered as transfer and sale consideration of such land would be cost of construction of constructed area allotted to the land owner. Here when land appurtenant to constructed portion allotted to developer is sold, there will be long term capital gain when land is ancestral, value as on 1.4.1981 will be the original cost and indexation cost to be arrived at on sale of land to developer which is appurtenant to his constructed area. Sale consideration will be cost of construction of constructed portion allotted to land owner and difference will be long term capital gain or loss. Here there cannot be any question of throwing or converting any investment into stock in trade as no investment was made by land owner and he has no stock in trade or doing any trading business. Further it is a case of getting ancestral property developed, hence to allege that assessee has thrown his property into stock in trade is beyond all relevant provisions of the Act. Whenever the developers portion will be sold to him, the assessee may have capital gain on sale of ancestral land.

6. The Id CITA observed that final valuation of land for Financial Year 2006-07 of Departmental Valuation Officer (DVO), Rohtak vide their report dated 30.3.2015 was Rs 2,33,24,000/-. The indexed cost of acquisition for the assessee after taking cost inflation index for financial year 2006-07 was Rs 1,98,36,180/- as has been worked out by the Id AO in his order. The Id CITA observed that the assessee's argument for not giving possession of land to developer in financial year 2006-07 is not acceptable on the ground that security deposit of Rs 50 lacs was given to the assessee by the developer in financial year 2006-07 and development agreement was also executed in financial year 2006-07. Therefore, remaining and other activities were only follow up activity. The Id CITA held that the development agreement effectively amounts to transfer agreement

and possession was handed over by the assessee to the developer granting permission to the developer to enter upon the land and do construction thereon. According to Id CITA, the date of development agreement dated 13.9.2006 determines the date of transfer and that the actual date of taking physical possession or the instances of possessory acts exercised was not very relevant. He held that the fact that legal ownership continues to remain with the owners or that the handover of land can be demanded by the developer only when he gets map approved was really not germane to the applicability of section 2(47)(v) of the Act. Accordingly he determined the long term capital gains on transfer of 5500 sq.yard of land at Rs 34,87,820/- as under:-

Final value of land of 5500 sq.yard as determined by DVO on 1.9.2006	2,33,24,000
Less: Indexation value of cost of acquisition	1,98,36,180
Long Term Capital Gain	----- 34,87,820 -----

7. The Id CITA further observed that if a person desires to develop or exploit in any other manner, a capital asset held by him, he may take full advantage of the full provisions of section 45(2) of the Act. Such a person or the assessee may convert the capital asset into stock in trade and thereafter, he may either develop it or exploit in any other manner. Such a course of action will be very useful in the case of a person who desires to develop a plot of land, which he is holding as a capital asset. He may convert such a plot of land into stock in trade and thereafter, by way of development of plot of land, he may construct residential or commercial building units on the same. Such a course of action will provide an advantage to such a person, because he will not be required to pay capital gains tax immediately on the date of conversion of capital asset into stock in trade. He may, in view of provisions of section 45(2) of the Act make payment of capital gains tax at the time of sale of such capital asset, after its conversion

into stock in trade. Besides, such an assessee will have another advantage by way of reduction of his tax liability in respect of the gains resulted by him, by way of difference between the market value of capital asset on the date of its conversion into stock in trade and the cost of such capital asset. In other words, he will be required to pay capital gains tax in respect of such gains in place of normal tax, which is definitely higher than the capital gains tax. Thus the tax liability of the assessee in such a case will be two fold as follows:-

1. He will be required to pay capital gains tax on the amount of difference between the market value of the capital assets on the date of its conversion into stock in trade and cost of such capital asset. He will have an additional advantage as such capital gains tax will be required to be paid only at the time of sale of such stock in trade.

2. The assessee will be required to pay tax on the business income by way of profit realized by him, as a difference between the sale price of stock in trade and market value of capital asset on the date of its conversion into stock in trade.

8. The Id CITA keeping in view the aforesaid observations, held that capital gains of the assessee is determined at R 34,87,820/- for Asst Year 2007-08. Remaining addition made by the Id AO on account of capital gains of Rs 5,15,12,180/- (5,50,00,000 – 34,87,820) is hereby deleted. It is not chargeable in Asst Year 2007-08 as there is no sales during the year and it will be charged in the year in which actual land sold / transferred in proportion to total land area. The AO is directed to compute the capital gain afresh and charge the same as discussed above.

9. Aggrieved, by the aforesaid action and observations of the Id CITA , the assessee is in appeal before us.

10. We have heard the rival submissions. At the outset, we find that the assessee had only given its 5500 sq.yard of land in part for development pursuant to a development

agreement. The said agreement specifically contained a clause that the possession of the land shall be handed over to the developer by the assessee only after obtaining the sanction of the building plan. Admittedly, the building plan was sanctioned on 29.10.2007 falling in Asst Year 2008-09. Hence possession as per the development agreement, could be effectively and constructively handed over to the developer by the assessee only on 29.10.2007 falling in Asst Year 2008-09. The temporary permission granted by the assessee to the developer to enter upon the land for the purpose of inspection of the land and prepare a building plan and start construction thereon does not fall within the ambit of possession as contemplated in section 53A of the Transfer of Property Act, 1882. Hence we hold that there was no transfer in Asst Year 2007-08 in the facts of the instant case. We find that the Id AO had recorded reasons for reopening the assessment on the ground that the assessee by entering into development agreement dated 13.9.2006 had converted his capital asset (i.e land) into business asset and accordingly assessee is liable for capital gains u/s 45(2) of the Act. Since no capital gains was disclosed by the assessee for Asst Year 2007-08, his income had escaped assessment for which assessment was reopened. At the outset, we hold that there is no conversion of capital asset into stock in trade by the assessee pursuant to development agreement dated 13.9.2006. The possession of the land is to be transferred only after obtaining the sanction of the building plan which happened on 29.10.2007 falling in Asst Year 2008-09. Even otherwise, the provisions of section 45(2) of the Act make it clear that even if there is conversion of capital asset into stock in trade, the capital gains shall arise to an assessee only in the year in which such converted stock in trade is sold. Admittedly the alleged stock in trade was not sold by the assessee in Asst Year 2007-08. It is not the case of the revenue also that any stock in trade was sold by the assessee in Asst Year 2007-08. Hence there cannot be any capital gains in Asst Year 2007-08 even on alleged conversion of capital asset into stock in trade. Hence we hold that the basis of reopening pursuant to reasons recorded , fails on all force of law.

We hold that the reopening was made in the instant case based on incorrect assumption of facts by the Id AO.

10.1. Even on merits, the Id AO estimated the value of 5500 sq.yard of land at Rs 5,50,00,000/- based on estimated value quoted by the DVO on an interim basis. The Id AO failed to appreciate that ultimately some portion of land was even held by the assessee. In any case, 5500 sq.yard of land was never sold in full by the assessee. Moreover, the total value determined by the DVO at a later stage i.e during first appellate stage was fixed at Rs 2,33,24,000/- for entire 5500 sq.yard of land. The Id CITA having agreed to the said consideration value for the purpose of computing capital gains at Rs 34,87,820/- by considering full value of consideration figure at Rs 2,33,24,000/- , made totally unwanted and irrelevant observations in his appellate order by observing that the assessee shall be liable for business income at Rs 5,15,12,180/- (5,50,00,000 – 34,87,820) in the year in which land is sold. In any case on merits, we hold that the capital gains arise only in the year in which possession of the land was handed over to the developer pursuant to the provisions of section 2(47)(v) of the Act read with Section 53A of the Transfer of Property Act, 1882. Reliance in this regard is placed on the decision of Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia of Bombay vs CIT reported in 260 ITR 491 (Bom).

10.2. Hence we hold that the reopening made by the Id AO based on absolute incorrect assumption of facts deserves to be quashed. Accordingly, the grounds raised by the assessee are allowed both in law as well as on merits.

11. In the result, the appeal of the assessee in ITANo. 2353/Kol/2016 for Asst Year 2007-08 is allowed.

ITA No. 910/Kol/2018 – Asst Year 2009-10 – Assessee Appeal

12. The only issue involved in this appeal is as to whether the Id CITA was justified in deleting the business income added by the Id AO in the sum of Rs 26,60,000/- and on the contrary directing the Id AO to compute the long term capital gains on transfer of land by the assessee to the developer, in the facts and circumstances of the case.

13. The brief facts of this issue are that the assessee entered into a development agreement dated 13.9.2006 with Kokra Developers Pvt Ltd for construction of multi storied building on assessee's ancestral land. It was agreed that assessee and developer will share 50% each of constructed portion and all construction and other related costs would be borne by the developer. On the basis of aforesaid development agreement dated 13.9.2006, the developer could not complete the construction during the year and only some shops were constructed. 4 shops were allotted to the developer and land appurtenant thereto of 253.33 sq.yards was transferred to developer out of total 2550 sq.yards, originally agreed as his share and construction was not fully complete on balance land. The assessee executed transfer deeds for 4 shops to the developer in consequence of the development agreement with the developer for total value of Rs 53,20,000/- (assessee's 50% share is Rs 26,60,000/-) as per transfer deeds dated 17.11.2008. The assessee stated that this consideration of Rs 53,20,000/- was meant only for the limited purpose of stamp duty valuation on transfer of proportionate land pertaining to 4 shops allotted to the developer. The assessee further clarified before the Id AO that equivalent constructed area has been handed over to him by the developer as remaining 50% of constructed area as per terms and conditions of development agreement dated 13.9.2006 and the same was under his possession and not sold / let out during the financial year 2008-09 and in future, whenever his portion were sold out / let out, resultant gain / loss would be duly accounted for by him in his income tax returns. The assessee also clarified that he is not dealing in any construction activity and has no

trade license to deal in such type of construction activity and hence property cannot be treated as stock in trade in his hands.

14. The Id AO however, disregarded all these contentions and held that 50% of sale proceeds of land attributable to 4 shops transferred to the developer pursuant to transfer deed becomes business income of the assessee and accordingly added a sum of Rs 26,60,000/- (53,20,000 * 50%) as undisclosed income from business of the assessee.

15. The Id CITA observed in his order as under:-

“During the course of appellate proceeding the appellant has also produced the copy of transferred agreement wherein it has been clearly stated that in lieu of the agreement as per joint development agreement there is transfer of 253.33 square yard of land on which four shops are also constructed and it was only the portion of land which was to be transferred to the developer after the completion of contract as joint agreement. In this case no material value has been received by the appellant rather in lieu of transfer of aforesaid land where four shops were constructed by the developer. The appellant has got benefited for getting free of cost construction in his share in lieu of transferring land under the joint development agreement. Keeping in view of the aforesaid facts it is clear that the appellant has transferred land for AY 2009- 10 on which proportionate capital gain is chargeable on 253.33 square yard as it has been determined in AY 2006-07 at Rs.34,87,820/- on 5500 square yard .

As regard the cost of construction for remaining shops which are left with the appellant will be treated as NIL and the market value as on date of sale will be reduced by the stamp value of land on the date of conversion of assets into stock in trade as mentioned in AY 2006-07 and differential will be the business profit of the appellant. Therefore except capital gain on this transfer of land no business profit was to be charged. Therefore, the addition made as a business profit in the hands of the appellant is hereby deleted and the AO is directed to compute the LTCG and tax it to the portion of land transferred to the developer. The ground of appeal is partly allowed.

It is further seen that the building is completed in the year itself as it has been transferred to the developer but the appellant has not shown sale of any shop of his share, therefore neither capital gain has been paid nor business profit has been given. The AO is directed to ascertain the ALV of the constructed shop which are in the share of the appellant as per amended provision and deemed rental income may be worked out and taxed accordingly. The business profit and capital gain should also be charged after ascertaining the sale of these shops year-wise.

7. *In the result the appeal of the appellant is partly allowed."*

16. Aggrieved, the assessee is in appeal before us.

17. We have heard the rival submissions. At the outset, we hold that there was no conversion of capital asset (i.e land) of the assessee into stock in trade at any time. The assessee had only entered into development agreement dated 13.9.2006 for construction of multi storied building. The entire cost of construction is to be borne by the developer. The consideration for the assessee would be 50% of constructed portion which includes shops to be built thereon. We find that during the year under appeal, the assessee had just executed transfer deeds for the lands proportionate to the 4 shops allotted to the developer. It was also specifically mentioned before the Id AO that the said transfer deeds were executed only for the limited purpose of fixing stamp duty on transfer of proportionate land attributable to 4 shops allotted to the developer. Actually we find that the assessee held 5500 sq.yards of land in total and had retained some portion of land with him which was never transferred to the developer. The possession of the land to be transferred by the assessee was to be done on obtaining the sanction of the building plan as per the specific clause contained in this regard in the development agreement dated 13.9.2006. Admittedly the sanction of the building plan was obtained on 29.10.2007 and the possession of land (after retaining the land which was not the subject matter of development agreement) was handed over by the assessee to the developer in Asst Year 2008-09. This tantamounts to transfer u/s 2(47)(v) of the Act read with section 53A of the Transfer of Property Act, 1882 and capital gains, if any, on transfer of land, should be considered only in Asst Year 2008-09. Reliance in this regard is placed on the decision of Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia of Bombay vs CIT reported in 260 ITR 491 (Bom). We hold that pursuant to the development agreement dated 13.9.2006 and handing over of possession of land in Asst Year 2008-09 by the assessee to the developer , the

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developer has already been entitled to 50% superstructure portion together with ownership of land thereon in Asst Year 2008-09 itself. Title is already held with developer in Asst Year 2008-09 itself. The Transfer deeds executed on 17.11.2008 in respect of lands proportionate to 4 shops were only for betterment of existing title to the developer. Hence there cannot be any capital gains or business income in the hands of the assessee for Asst Year 2009-10 in respect of the land held by the assessee or the shops. Accordingly, the grounds raised by the assessee are allowed.

18. In the result, the appeal of the assessee in ITA No. 910/Kol/2018 for Asst Year 2009-10 is allowed.

19. To sum up, both the appeals of the assessee are allowed.

Order pronounced in the Court on 05.12.2018

Sd/-

[S.S. Godara]
 Judicial Member

Sd/-

[M.Balaganesh]
 Accountant Member

Dated : 05.12.2018
 SB, Sr. PS

Copy of the order forwarded to:

1. Shri Bijay Halwasiya, 1B, Halwasiya Road, Kolkata-700007.
2. ITO, Ward-44(4), Kolkata, 3, Government Place(West), Kolkata-700001.
- 3..C.I.T.(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar
 ITAT, Kolkata Benches

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