

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : SMC-1 : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA No.403/Del/2018
Assessment Year: 2014-15

Avtar Singh Dheeran,
C/o Kapil Goel, Advocate,
G-26/124, Sector-7,
Rohini,
New Delhi.

Vs ITO,
Ward-66(5),
New Delhi.

PAN: AAIPD8887G

(Appellant)

(Respondent)

Assessee by	:	Shri Kapil Goel, Advocate
Revenue by	:	Shri Rajesh Kumar, Sr. DR
Date of Hearing	:	20.04.2021
Date of Pronouncement	:	10.06.2021

ORDER

This appeal filed by the assessee is directed against the order dated 16th October, 2017 of the CIT(A)-21, New Delhi, relating to assessment year 2014-15.

2. Facts of the case, in brief, are that the assessee is an individual and derives income from pension from the Ministry of Railways. He filed the return of income on 14th October, 2014 declaring the total income of Rs.1,31,638/-. The case of the assessee was selected for limited scrutiny with the reason -long-term capital loss on sale of property.ø During the course of assessment proceedings, the AO noted

that the assessee has sold one property bearing No.2538, Ward-XII, Punjabi Basti, Sabji Mandi, Delhi -110 007 for a consideration of Rs.83,50,000/- from which the assessee has deducted Rs.5,50,000/- as expenditure incurred on transfer and claimed capital loss of Rs.18,71,700/-. He noted that the assessee has claimed this capital loss by deducting the indexed cost of acquisition of the property at Rs.90,71,000/- based on a valuation report dated 25th August, 2014 wherein he has claimed the construction cost of ground, first and second floor. However, on perusal of the copy of the sale deed dated 25th February, 2014, he noted that only ground floor of the property was sold. He, therefore, issued a show cause notice dated 03.11.2016 asking the assessee to explain as to why the construction cost should not be restricted to ground floor only. He also asked the assessee to give proof of Rs.5,50,000/- which he claimed as expenditure on transfer.

3. It was submitted by the assessee that his father had purchased this property in 1959 from custodian of evacuee property in 1959 and to the best of his memory no construction of any type was added after 1969. Subsequently, it was stated that he had shifted to Paschim Vihar during 1984 riots and has sold the complete property from ground floor to roof and requested to consider the total construction cost of the property mentioned in valuation report. So far as the expenditure of Rs.5,50,000/- is concerned, it was submitted that this amount was spent to clear off electricity bills, water bills and domestic purchase from the locals and the major amount was spent to oblige his relatives/cousins to allow him to sell this property.

3.1 However, the AO was not satisfied with the explanation given by the assessee and again asked him to substantiate the proof of existence of first floor and second floor especially when the sale deed clearly shows the built up freehold property on ground floor with its exclusive roof/terrace rights upto sky, build on land area measuring 164.85 Sq. Mtrs and the sold portion has been shown at Rs.83,50,000/- along with map of the property. He also asked the assessee to explain the expenditure incurred for transfer of the property at Rs.5,50,000/- since, according to him, the expenditure claimed to clear off electricity bill, water bill and domestic purchases from locals and to oblige the cousins is not covered under the expenses on transfer. The AO also proposed the total long-term capital gain of Rs.40,93,635/- after deducting the indexed cost of acquisition at Rs.42,56,364/- from the sale consideration of Rs.83,50,000/-.

3.2 In response to the above, the assessee filed the following reply which has been reproduced by the AO and which reads as under:-

Sub ; Scrutiny Assessment for A.Y. 2014-15 (Mr. Awtar Singh Dheeran - PAN AAIPD8887G) Reference show cause Notice dated 24.11.2016 regarding capital gain on property)

Respected Sir/Madam,

With reference to the above, we would like to submit our replays under:

- The Assessee purchased the property referred to above (located at Basti punjabian, Municipal No.,. 2538 in ward XII, Sabji Mandi, Delhi -110 007) in 1959, with 2 storeys built up and some vacant portion of land.
- A copy of municipal tax receipt from that time clearly mentions a two storey building. A copy is attached for reference.
- Subsequently in the Late 1980s another floor was built.

- While the original plan of the building at the time of purchase is not available, a plan was made by an architect in 1984-85. A copy of this is attached for reference. Also attached for reference is the Architect receipt of Rs.600/- (1985) mentioning the existence of three storey building.

- Also when my relatives illegally occupied the floor in question after 1984 riots, I had filed a police complaint, a copy of the police complaint is also attached for reference.

- Also while valuation report has omitted to mention it, post the 1984 riots, there was some damage to building.

- Two third of property was sold in 2014. At that time valuation of the property was undertaken. A copy of the valuation report has been already submitted to the Department.

- Two third portion of the building sold in 2014 was subsequently demolished by the new owners. A photograph showing the demolition under progress is attached for ready reference.

- Currently, about one third (about 100 sq yds of the total built area) is still present in its original state.

Hope this justifies my stand on the subject. ö

4. However, the AO was not satisfied with the arguments advanced by the assessee. He noted that the assessee now is submitting that construction was carried out in the sold property in late 1980s whereas the assessee, vide his reply dated 16.11.2016 had clearly stated that no construction of any type was added after 1969. Further, the assessee submitted a plan made by an architect in 1984-85 and a receipt of Rs.600/- mentioning the existence of three storey building whereas assessee in his earlier statement had stated that his father had purchased a two storey building and no construction was carried out after 1969. The assessee has also stated that another floor was built in late 1980 whereas in the valuation report

dated 25.08.2014 the status of the construction as on 01.04.1981 stating the same to be of a three storey building. Therefore, he held that the submissions made by assessee himself is contradictory in terms of structure of building. Further, the valuation report submitted by the assessee is dated 25.08.2014 which is after the sale of the property and, therefore, the submission of the assessee is clearly an afterthought to set off any capital gains tax liability and to claim capital loss in the return with the sole purpose to evade tax. In view of this, the AO rejected the claim of the assessee and determined the long-term capital gain at Rs.40,93,635/-, the details of which are as under:-

<u>Fresh computation of capital gain</u>		
Full consideration of property sold		83,50,000/-
Less: Indexed cost of acquisition of property	$4,53,287^{**} \times \frac{939}{100}$	<u>42,56,364/-</u>
Total Long term Capital gain	<u>40,93,635/-</u>	
<u>Calculation of cost of acquisition</u>		
A. Area of land = 164.85 sq.mt.		
Value of land @ 1000/- per sq.mt = 164.85 X 1000 = Rs.1,64,850/- (as per L&D.O. rates)		
B. <u>Cost of construction</u>		
Total covered area	=	1775 sq.ft (as cost of construction restricted to ground floor only as discussed above)
Cost of construction @ Rs.125 sq. fts	1775 X 125	= Rs.2,21,875/-
Add: 30% cost of services i.e.	2,21,875 x 30%	<u>Rs. 66,562/-</u>
		Rs.2,88,437/-
** Value of property i. A + B = 1,64,850 + 2,88,437 = 4,53,287/-		

5. Thus, the AO made addition of Rs.40,93,635/- to the total income of the assessee.

6. In appeal, the Id. CIT(A) upheld the action of the AO by observing as under:-

5.iv I have carefully considered the findings of the AO as also submission of the appellant. It is noted that the appellant has sold 2/3rd portion of one property situated at 2538, Basti Punjabiyan, Sabji Mandi, Delhi vide sale deed dated 27.02.2014 for sale consideration of Rs. 83,50,000/-. As per the sale deed the property was having built up area on ground floor with its exclusive roof/terrace rights. The assessee's contention is that the property so sold was a three storey building consisting of ground floor, first floor and second floor and the assessee got approved valuer's report for determination of fair market value of the property as on 01.04.1981 as per which the fair market value and cost of construction as per registered valuer's report pertaining to first and second floor was arrived at Rs. 5,76,875/- and indexed cost of construction pertaining to first floor and second floor was arrived at Rs 54,16,856/-. The approved valuer's report is dated 25.08.2014 i.e, subsequent to the sale of property. The assessee has also claimed deduction of Rs. 5,50,000/- on account of expenditure incurred on transfer expenses which included electricity expenses, water bills and payment made to the cousins to settle the issue for selling the property. However, the AO has rejected the claim of the assessee for indexed cost of construction in respect of first and second floor as also deduction of Rs 5,50,000/- on account of transfer charges. As regards the issue of deduction of Rs 5,50,000/- on account of transfer charges it may be mentioned that as per section 49(1)(iii)(a) of IT Act the cost of acquisition of asset will be increased by the cost of any improvement of the asset incurred or borne by the previous owner or the assessee as the case may be. In the appellant's case the expenditure of Rs. 5,50,000/- was stated to be in account of electricity and water expenses and partly on account of payment made to the cousins of the assessee for settling the issues for transfer of the asset. It is noted that the assessee has not furnished specific details as to how much payment was made to the cousins and what was the main consideration for such payment. As regards the expenses on account of electricity and water charges, these expenses were for the regular maintenance of the property and cannot said to be on account of improvement of the asset. In other words, the assessee has not incurred any expenditure which may have qualitatively improved the assets. Therefore, the claim of the assessee was prima facie not covered under the provisions of section 49(1)(iii)(a) of IT Act, 1961. As regards the another issue of not allowing the benefit of cost of construction/indexed cost of construction in respect of first and second floor it is noted that the assessee has not filed any credible evidence either before the AO or before the appellate authority to prove that the house was having genuine constructed area of first floor and second floor. The only evidence being cited for such claim is the approved valuer's report dated 25.08.2014. However, the approved valuer's report he been prepared subsequent to the sale of property admittedly when the whole house has been demolished by the

buyer party. In fact the approved valuer's report has been obtained to claim the benefit of indexed cost of construction in respect of first and second floor and the approved valuer's has given such estimate not on the basis of physical inspection of the property but on the basis of facts stated by the assessee. In the approved valuer's report in part-11 declaration it is clearly stated that all the details/information including area and ownership details were provided by the party. Moreover, in the sale deed dated 27.02.2014 there is only mention of ground floor construction and even the map enclosed with the sale deed also indicate only ground floor construction.

Keeping in view of these facts the constructed area on first floor and second floor is not evidenced by any credible evidence and infact the documentary evidence in the form of sale deed dated 27.02.2014 proved only constructed area at ground floor. As regards the contention of the assessee that the AO has allowed credit for 100% land cost whereas cost of construction in respect of first and second floor was not allowed, it may be mentioned that as per the AO and as per the facts on record the sold land was having constructed area only on the ground floor and, therefore, the AO has rightly allowed 100% land cost whereas cost of construction claimed in respect of first and second floor was not allowed as there was no such construction. Considering all these relevant facts, the action of the AO in disallowing of deduction of Rs.5,50,000/- on account of transfer expenses/ cost of improvement and disallowing the indexed cost of construction in respect of first and second floor is confirmed. Accordingly, the addition made by the AO on account of Long Term Capital Gain for Rs 40,93,635/- is confirmed.ö

7. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

ö1. That on the facts and in the circumstances of the case and in law, ld CIT-A erred in arbitrarily confirming the assessment order passed by Ld AO in making additions of Rs 40,93,635/- on account of redetermination of long term capital gains without appreciating that assessee's major claim of indexed cost of construction is duly supported by impeccable evidences.

2. That on the facts and in the circumstances of the case and in law, ld CIT-A erred in arbitrarily confirming the assessment order passed by Ld AO in making additions of Rs 40,93,635/- on account of redetermination of long term capital gains without appreciating that substantial part of adjustment relating to indexed cost of construction pertains to period prior to 1/4/1981 and on said date statute requires fair market value FMV to be seen which is duly supported by approved valuer report which has not been put for cross valuation by DVO as per law.

3. That on the facts and in the circumstances of the case and in law, ld CIT-A erred in arbitrarily confirming the assessment order passed by Ld AO in making additions of Rs 40,93,635/- on account of redetermination of long term capital gains without appreciating that substantial part of adjustment relating to indexed cost of construction which construction got severely damaged and were not in habitable position.

4. That on the facts and in the circumstances of the case and in law, ld CIT-A erred in arbitrarily confirming the assessment order passed by Ld AO in making additions of Rs 40,93,635/- on account of redetermination of long term, capital gains without appreciating that substantial part of adjustment relating to indexed cost of construction being very old construction (prior to 1981) cannot be proved by any direct evidence for the period for which law does not require assessee to keep any records as per Rule 6F of Income tax rules.

That the appellant craves leave to add add/alter any/all grounds of appeal before or at the time of hearing of the appeal.ö

8. The ld. counsel for the assessee strongly challenged the order of the CIT(A) in confirming the addition made by the AO. Referring to section 55(2) of the IT act, the ld. Counsel submitted that the fair market value of the property has to be adopted at the option of the assessee and not at the option of the AO. He also relied on the following decisions:-

- i) Bawa Shiv Charan Singh vs. CIT, reported in 149 ITR 29; &
- ii) Madras Fertilizers Ltd. vs. CIT, reported in 209 ITR 44.

9. He accordingly submitted that the ld.CIT(A) is not justified in sustaining the addition made by the AO especially when the assessee has proved beyond doubt that it was a three storied building and, therefore, the AO should have allowed indexed cost of acquisition for the three storied building as per the valuation report filed by the assessee.

10. The Id. DR, on the other hand, strongly supported the order of the CIT(A). Referring to page 8 of the order of the CIT(A), he drew the attention of the Bench to the categorical finding given by him wherein he has stated that as per sale deed, the property was having built up area of ground floor with its exclusive roof/terrace rights. Further, the valuer has valued the property after the same was sold. The assessee has not filed any credible evidence to prove that the house was having genuine constructed area of first floor and second floor. The claim for various expenses are also clearly not coming under the purview of expenses on transfer. No specific details for payments were filed. The map enclosed along with the sale deed also mentions only one floor. Therefore, in view of the decision of the Hon~~o~~ble Supreme Court in the case of Sumati Dayal and Durga Prasad More where it has been held that surrounding circumstances may also be considered, the Id.CIT(A) is fully justified in sustaining the addition made by the AO.

11. The Id. Counsel, on the other hand, relying on the decision of the Ahmedabad Bench of the Tribunal in the case of Symbiotic Ltd., reported in 481 ITR (AT) 2010, submitted that it is the assessee or the Registered Valuer who can decide the fair market value and not the AO. He submitted that the assessee had given the report of the architect, the municipal tax receipt for three storied building evidencing the existence of the first floor and second floor. Therefore, the addition sustained by the CIT(A) should be deleted.

12. I have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and CIT(A) and the paper book filed on behalf of the assessee. I have also considered the various decisions cited before me. I find, the assessee, in the instant case, sold a property bearing No.2538, Ward-XII, Punjabi Basti, Sabji Mandi, Delhi -110 007 for a consideration of Rs.83,50,000/-. For the purpose of computing capital gain, the assessee has deducted Rs.5,50,000/- as expenditure incurred on such transfer and after claiming indexed cost of acquisition has claimed capital loss of Rs.18,71,700/-. While claiming the capital loss, the assessee has determined the indexed cost of acquisition of the property at Rs.96,71,000/- based on a valuation report dated 25th August, 2014 wherein the assessee has claimed the construction cost of ground, first and second floor. However, as per the sale deed dated 25th February, 2014 accompanied with a map of the property, it is noted that only ground floor of the property was sold. The AO, therefore, rejecting the various explanations given by the assessee, re-determined the indexed cost of acquisition of the property at Rs.42,56,364/- and after deducting the same from the sale consideration, arrived at the long-term capital gain of Rs.40,93,635/-. I find, the Id.CIT(A) upheld the action of the AO, the reasons of which have already been reproduced in the preceding paragraphs. It is the submission of the Id. Counsel that the property was a three-storied building and the municipal tax receipt for Rs.600/- shows the existence of first floor and the second floor and, therefore, the lower authorities are not justified in rejecting the

cost of construction of the first floor and second floor as per the report given by the registered valuer.

13. On a pointed query by the Bench at the time of hearing as to why the sale deed contains only the ground floor and not first and second floors, the Id. Counsel submitted that an attempt to reduce the stamp duty by the buyer might have forced the assessee to mention the same as only ground floor. If the above contention of the Id. Counsel is accepted, then, it is also quite possible that the assessee might have received more money for the first and second floor from the buyer who had shown lesser amount of sale consideration to avoid future tax liability. At the same time, the assessee has also enclosed a receipt for Rs.600/- mentioning the existence of first and second floor. It is also pertinent to mention here that the AO has not called the buyer to find out the truth nor the assessee has produced the buyer for his examination. It is also not understood as to how the valuer has given the report without verifying the existence of the property and has simply valued the property on the basis of submissions made by the assessee. Considering the totality of the facts of the case and in the interest of justice, I deem it proper to restore the issue to the file of the AO with a direction to grant one final opportunity to the assessee to substantiate his case by producing the buyer and the registered valuer for their examination by the AO and to arrive at the true character of the property. The AO shall decide the issue as per fact and law after giving due opportunity of being

heard to the assessee. I hold and direct accordingly. The grounds raised by the assessee are accordingly allowed for statistical purposes.

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

The decision was pronounced in the open court on 10.06.2021.

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 10th June, 2021

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Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi