



\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ITA 1884 OF 2010

JUDGMENT RESERVED ON: 02.9.2011  
JUDGMENT DELIVERED ON: 09.9.2011

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through :Mr. N.P. Sahni, Sr. Standing  
Counsel.

*VERSUS*

LORD BUILDCONS PVT. LTD. . . .RESPONDENT

Through: Mr. Vikram Kapoor, Advocate with  
Mr. Dilip Kapoor, Advocate.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI  
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The respondent/assessee (hereinafter referred to as 'the assessee) had filed the return for the assessment year 2005-06 at an income of ₹7,08,334/-. It is in the business of building construction i.e. buying plots, constructing flats thereon and



selling the same. During the assessment proceedings, the Assessing Officer noticed that the assessee had purchased the ground floor of an old building constructed on a plot of land measuring 500 sq. yds. At that time, first and second floor of the said property was also constructed and they were owned by some other persons. For the purchase of ground floor, the assessee had paid a consideration of ₹97,20,000/- which included stamp duty of ₹7,20,000/-. After purchase of the ground floor, the assessee entered into 'Property Development Agreement' with the owners of first and second floor. This agreement, *inter alia*, stipulated that the old construction existing on the said plot shall be demolished entirely and new building would be constructed which would consist of basement, ground, first, second and third floor. After completion of the construction, the first and second floor were to be handed over to the original owners and the assessee was to retain basement, ground and third floor.

2. All the floors were constructed as per the agreement. As per the assessee, it incurred a cost of ₹29,18,445/- on the construction work of all these floors which included first and second floor though they were meant for original owners. Subsequently, the assessee sold the newly constructed ground floor at ₹ 90 lacs on



30<sup>th</sup> March, 2005. The basement and third floor, which had become the property of the assessee was shown as 'closing work in progress' and it was valued by the assessee at ₹ 50,62,500/-. The assessee had made the valuation of basement and third floor on weighted average method for ground floor, basement and third floor in the ratio of 4:1.25:1. Since ground floor was sold at ₹ 90 lacs, on that basis, value of the basement was worked out at ₹90,000,00/- x 1.25/4 = ₹28,12,500/-. Applying the same formula, the value of the third floor was worked out at ₹ 90,000,00/- x 1/4 = ₹ 22,50,000/-.

3. It was on this basis that value of basement and third floor as 'closing work in progress' was shown at ₹50,62,500/- [28.12:22.50 lacs]. The assessee gave its justification for adopting 'weighted average method' to the ground floor, basement and third floors in the ratio of 4:1.25:1 respectively, on the ground that at the relevant time, the construction of basement as well as third floor was illegal; those floors had not been sold till date; as per municipal by-laws, the third floor is extension of second floor i.e. no dwelling unit or kitchen is allowed on the third floor; basement is allowed only for the purpose of godown for storage purpose or for parking. On this basis, it was submitted that the



value of the basement as well as third floor had to be comparatively much less and could not be compared with other floors. It was also submitted that as per the Circle rates of Category-B colonies, cost of plot comes to ₹14,30,000/- and even if the construction cost of entire supe structure is taken into consideration, valuation of 'closing work in progress' was quite fair, if not high. The Assessing Officer did not accept the valuation of 'work in progress' as calculated by the assessee. The Assessing Officer did not accept the ratio adopted by the assessee. He pointed out that even as per the valuation reports submitted by the assessee, he himself valued the market price of ground floor at approximately twice that of other floors whereas the assessee had taken the value of ground floor as four times of the other floors. He further observed that concrete evidence of the market price of only ground floor was available as the same was sold for ₹ 90 lacs. He applied the ratio of 2.5:1:1.25 which was adopted by the valuer himself taking the value of ground floor at ₹90 lacs. He valued the basement and third floor as ₹ 36 lacs and 45 lacs respectively.

4. In appeal, the CIT (A) reversed the aforesaid order of the Assessing Officer. Before the CIT (A), the argument of the



assessee was that the 'work in progress' shown by the assessee was nothing but the closing stock only as the assessee had not added anything further in the said floors. Valuation was done on the basis of cost or market price whichever is less and it was not proper on the part of the Assessing Officer to adopt the value of the closing stock as cost only. It was also argued that the first floor and second floor of the same very building were sold in April, 2005 and September, 2005 for a consideration of ₹48 lacs and ₹36 lacs respectively, which could not be the basis to compare the realizable sale value of basement and third floor with many deficiencies in the properties, inasmuch as, the basement could not be used for other purposes than a storage and third floor was illegal. It was also argued that the assessing Officer had adopted the value of each floor by dividing the total cost by 3 instead of 5 since the building consisted of 5 floors and not 3 floors. The CIT (A) accepted both these pleas and held that basement and third floor could not be sold out as an independent dwelling unit and, therefore, realizable sale value of these floors was much lesser than the sale value of the second floor. He further held that the cost incurred by the assessee in the construction of the said building should have been divided by 5 and not by 3 since five floors were constructed. The view of the CIT (A) has been



affirmed by the ITAT resulting into dismissal of the appeal of the Revenue against which present appeal is preferred on the substantial question of law formulated as under:-

“Whether the Income Tax Appellate Tribunal was correct in law and on fact in deleting the addition made by the AO on account of undervaluation of closing stock of work in progress amounting to ₹ 33,63,130/-?”

5. We shall first advert to the question as to whether the cost of construction incurred by the assessee should have been divided by 3 or by 5. Here, we do not agree with the approach of the CIT(A) and ITAT. No doubt, five floors were constructed. However, two floors were handed over to the original owners. Insofar as the assessee is concerned, it acquired three floors namely basement, ground and third floor and as is the business proposition for these three floors, it incurred the entire cost. Therefore, insofar as the assessee is concerned, cost which was borne by the assessee for these three floors had to be taken into consideration and not five floors.

6. Coming to the issue of apportionment of the cost, we find that neither the Assessing Officer nor the CIT(A)/ITAT have arrived at the valuation of basement and third floor by adopting the valid



method. The Assessing Officer simply took the sale price of ground floor and applied the ratio of 2.5:1:1.25. He did not consider or deal with the argument of the assessee regarding realizable value of the basement and third floor particularly the assessee's argument that basement was meant only for storage and third floor was illegally constructed.

7. Likewise, the CIT (A) as well as ITAT also did not advert to the issue with relevant consideration in focus and it simply went by the consideration that cost should have been divided by 5 and on that basis deleted the addition.

8. Thus, we are of the opinion that the Tribunal was not right in deleting the addition made by the Assessing Officer. At the same time, it is noted that this issue is not looked into and considered even by the AO in its proper perspective. While setting aside the order of the authorities below, we remit the case back to the AO with the direction to consider the cost to be divided by 3 and thereafter the AO shall proceed to determine as to what ratio is to be applied between basement, ground and third floor having regard to the nature of basement and third floor and then arrive at the value of 'closing work in progress'.



9. The appeal is disposed of in the aforesaid terms.

(A.K. SIKRI)  
JUDGE

(INDERMEET KAUR)  
JUDGE

SEPTEMBER 09,2011  
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