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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

R-39,40,40A & 40B

\+ **ITA No. 159/2005**

COMMISSIONER OF INCOME TAX - III ..... Appellant
Through: Mr. Zoheb Hossain, Sr. Standing Counsel

versus

VASAVI PRATAP CHAND .....Respondent
Through: Mr. S. Krishnan, Advocate with Mr. Anoop Sharma, Advocate.

With

\+ **ITA No. 205/2005**

COMMISSIONER OF INCOME TAX - XI ..... Appellant
Through: Mr. Zoheb Hossain, Sr. Standing Counsel

versus

SIDHARTH P. CHAND ..... Respondent
Through: Mr. S. Krishnan, Advocate with Mr. Anoop Sharma, Advocate.

With

\+ **ITA No. 786/2005**

VASAVI PRATAP CHAND ..... Appellant
Through: Mr. S. Krishnan, Advocate with Mr. Anoop Sharma, Advocate.

versus

DY.COMMISSIONER OF INCOME ..... Respondent
Through: Mr. Zoheb Hossain, Sr. Standing Counsel

And

\+ **ITA No. 806/2005**

SIDDHARTHA PRATAP CHAND ..... Appellant
Through: Mr. S. Krishnan, Advocate with Mr. Anoop Sharma, Advocate.

versus

DY. COMMISSIONER OF INCOME ..... Respondent
Through: Mr. Zoheb Hossain, Sr. Standing Counsel

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% 23.08.2017

Dr. S. Muralidhar, J.:

1. These are four appeals under Section 260A of the Income Tax Act, 1961 ('Act') directed against the common order dated 25th November 2003 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 4962 and 4967/Del/2002 for the Assessment Years ('AYs') 1995-96. ITA Nos.159 and 205 of 2005 are by the Revenue and ITA Nos. 786 and 806 of 2005, are by the Assessee.

Questions of law

2. In ITA Nos.159 and 205 of 2005 filed by the Revenue, by the order dated 13th September 2005, while admitting the appeals, this Court framed the following question of law:

> "Whether the ITAT was correct in holding that the value of land as declared and assessed under Section 7(4) of the Wealth Tax Act could not be adopted as market value of the asset as on 1.4.1981 for purposes of computing taxable gain under the

Income Tax Act?"

3. While admitting the Assessee's appeals ITA Nos. 786/2005 and 806/2005 by orders dated 5th September 2005 and 13th September 2005 respectively this Court framed the following questions of law:

> "(i) Whether in the facts and circumstances of the case, the ITAT has committed any error in rejecting the appellant's plea that the taxable capital gain arising from the sale of the land in question was to be computed with reference to the cost of acquisition of 100% value of the asset transferred by the appellant and co-owners in terms of the agreement dated 2.5.1984, executed with the builder and not by reference to the market value of 44% of the said asset?
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> (ii) Whether the ITAT committed an error in rejecting the contention of the appellant that the market value of the land in question had to be determined by reference to 10.11.1984, and not 1.4.1981?
>
> (iii) Whether the ITAT committed any error in law by not reducing the land and development charges from the sale consideration received by the assessee while working out the capital gains?"

Brief facts

4. The brief facts are that the residential property situated at 6, Aurangzeb Road, New Delhi comprising of a house and open land admeasuring 2.85 acres was purchased in 1947 by Mr. Sumer Chand. After his death in 1951, one of the co-owners, Mr. Pratap Chand, succeeded to the property. Mr. Pratap Chand converted the property into a Hindu Undivided Family ('HUF') property in 1953-54 consisting of himself, his wife, Ms. Vasavi Pratap Chand (Appellant in ITA No. 786/2005), and his son, Mr. Sidharth Pratap Chand (Appellant in ITA No. 806/2005).

5. In 1969-70, the property was partially partitioned among the three members of the HUF in equal proportion. The property thus came to be owned by the three co-owners namely Mr. Pratap Chand, Ms. Vasavi Pratap Chand and Mr. Sidharth Pratap Chand. It is stated that Mr. Sidharth Pratap Chand, after his marriage in 1977, held one-third share of the property in the status of HUF.

6. To overcome the restrictions applicable to the property under the Urban Land Ceiling Act, 1976 ('ULCA'), the three co-owners entered into an agreement with Ansal Properties & Industries Ltd. ('Ansals') on 2nd May 1984. In terms of said agreement, the building on the land was to be demolished and an apartment complex was to be constructed thereon. It was agreed that the co-owners would get built-up area of 89,136 sq. ft. which constituted 56% of total built up area. 44% of the built up area would belong to Ansals. The entire cost of construction was to be met by Ansals. According to the Assessees, and as noted by the ITAT in its order dated 5th June 2000, the prominent features of the agreement entered into with Ansals were as under:

> "a) the assessee and the other co-owners did not part with their ownership right in the land;
>
> b) they however permitted the Builder to demolish the main building and construct dwelling units at its cost;
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> c) they permitted the builder to comply with the formalities towards construction of dwelling units by subscribing as owner of the land;
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> d) the co-owners did not have any concern with the

construction of the property. In other words, there was no common business carried on by the co-owners along with builders;

e) there was no agreement as regards sharing of profit out of the activities of the builders;

f) for the permission granted to develop the land owner by the co-owners, it was agreed by the builders that the owners of the land would be entitled to 56% of built area on the final construction of the dwelling units.

7. The co-owners entered into agreements with various flat buyers and ultimately sold constructed flats during the AYs 1993-94 to 1995-96. During the AY in question, i.e. 1995-96, the three co-owners sold 18,636 sq. ft. of built up area for a total consideration of Rs. 4,72,98,075/-. Each co-owner disclosed a loss of Rs. 31,30,663/- under the head "capital gains" in their individual returns.

8. Initially, both the Assessing Officer ('AO') and the Commissioner of Income Tax (Appeals) ['CIT (A)'] treated the flats as stock-in-trade and the land as converted stock-in-trade. They then concluded that the transaction was an adventure in the nature of trade and the income therefrom had to be taxed as business income. However, the ITAT, by its order dated 5th June 2000, disagreed with the above conclusion and held that neither the flats nor the land could be considered stock-in-trade. They were capital assets. Therefore, in the view of the ITAT, the profit on sale of the capital assets was taxable under the head "Capital Gains". Having held as such, the ITAT remanded the matter to the AO for calculation of "Capital Gains" in the normal course.

Proceedings before the AO on remand

9. The AO, when considering the matter on remand, noted in his order dated 28th March 2002 that, as per the statement of capital gains filed by the Assessee, the cost of acquisition of the assets sold during the year was calculated @ Rs. 1450.60 per sq. ft. The cost of the 18,361 sq. ft. of built-up property worked out to Rs. 2,70,26,128/-. For computing capital gains, the inflation indices of 1985-86 (125) and 1995-96 (259) were used to arrive at the indexed cost of the asset at Rs. 5,59,98,139/-. The rate of Rs. 1450.60 per sq. ft. was arrived at by equating the value of the total built up area (89,135 sq. ft.) with the market value of the total land admeasuring 2.85 acres at Rs. 12,93,30,000/- [as per the Land & Development Office ('L&DO') rate list as on 31st March 1987]

10. The AO held such a method of calculation of the cost of acquisition of the asset as put forth by the Assessees was not correct. The AO further noted that the asset, as on 1st April 1981, was a residential property. It was only several years after the collaboration agreement entered into with Ansals that the property had value of Rs. 12,93,30,000/-. The AO noted that Mr. Sidharth Pratap Chand had filed an appeal in this Court under the Wealth Tax Act, 1996 ('WTA') challenging the assessment order under the WTA valuing the property at Rs. 12,93,30,000/-. Further, it was an accepted fact that the three co-owners of the property had indicated the value of their share in the property as Rs. 2,03,000/- in their wealth-tax returns (and accepted by the Department).

11. The AO, accordingly, held that the cost of acquisition of property (one-

third share) would be only Rs. 2,03,334/-. In other words, the AO adopted the computation of cost of acquisition in the manner indicated in Section 49(1)(i) of the WTA. It was held that "the cost of acquisition of the asset cannot be arrived at on the basis of its value which was adopted for periods many years after 1st April 1981 and that too treating it as commercially valuable after the collaboration agreement." Therefore, the cost of acquisition, for the purpose of calculating capital gain, was taken at Rs. 2,03,300/-. Capital gain was valued at Rs. 1,56,56,005/- and the taxable income after the deduction under Section 80L of the WTA was worked out as Rs. 2,13,54,652/-.

Proceedings before the CIT (A)

12. By its order dated 24th October 2002, the CIT (A) held that the cost of acquisition of the 56% built up area, which fell to the share of the three co-owners, should be taken at Rs. 3.01 per sq. ft. and nothing more. This was even less than the value computed by the AO. Accordingly, the AO was directed to re-compute the enhanced long-term capital gains after deducting cost of acquisition worked out on the aforesaid basis, albeit after indexing the same for inflation from the date of collaboration agreement to the present accounting period when the transfer took place.

Assessees' contentions before the ITAT

13. The matter then travelled at the instance of the Assessee to the ITAT. The Assessee contended as under:

(i) Since what was sold by the Assessees were the flats and not the land, the cost of acquisition of flat should have been determined.

(ii) The land had already been sold when the Assessees entered into collaboration with the builders on 2nd May 1984. Hence, the cost of acquisition of flats was equal to the value of the entire land as the Assessees had surrendered all their rights in such land under the said agreement.

(iii) Department could levy the tax on the capital gain arising from the sale of such land in AY 1985-86 but it had missed the bus by not assessing the Assessees in that year. Regarding the market value, it is submitted that it was determined by the AO in the original assessment proceedings and not disturbed by the order of the Tribunal. Therefore, the AO was bound to adopt the same cost of acquisition as on 10th April 1981.

(iv) Alternatively, it was contended that the sale of property was of an improved property and, therefore, the cost of acquisition would be equal to the cost of acquisition of 44% of the land plus cost of improvement. The cost of improvement would be equal to the value of 44% of land as on 2nd May 1984 when the collaboration agreement was entered into. Regarding cost of acquisition of 56% of land, it was submitted that one should assess the market value as on 10th December 1984 when it was released from the ambit of ULCA since the character of the land would remain the same.

14. The Assessees contended that the value of the land assessed under

Section 7 (4) of the WTA did not represent the market value as on 1st April 1981. It was the 'frozen value'.

Impugned order of the ITAT

15. In the impugned order, the ITAT noted that Clause 21 of the collaboration agreement stipulated that after the building was ready for occupation, the co-owners would transfer the land, as and when required, in favour of the co-operative society or a limited company or association of persons or firm of the flat-buyers or in the name of nominees or successors of either the co-owners or the builders, as the case may be. It further noted that, as per Clause 4 read with Clause 1 of the agreement, the Assessee would receive 56% of the built up area after the construction of flats was completed at the cost of the builder. The built up area would not only include the flat portion but also the common area, parking place, basements etc. A combined reading of these clauses, in the ITAT's opinion, clearly showed that 56% of the built up area including land would be retained by the Assessees and 44% by the builder. In terms of Clause 21 of the agreement, the ITAT held that "the ultimate effect of the transfer of land would be that each flat owner would own his respective right in the land which is transferred to each flat owner or to the cooperative society or in other status of the flat owners."

16. It was held by the ITAT that "what was transferred under the collaboration agreement by the assessee to the builder was only 44% of the land owned by them in consideration of 56% of the built up area and not the entire land as contended by the learned counsel for the assessee." Consequently, the ITAT held that the Assessees not only transferred the flats

but also the proportionate land.

17. As regards the costs of acquisition as 56% of built up area, the ITAT noted, "Admittedly, no conveyance deed has been executed by the assessee. From the nature of the agreement, it is clear that assessee was bound to transfer the land after the possession of built up flats was given by the builder to the Assessees." It further held that, "there was simultaneous transfer of possession of 44% of land by the assessee to the builders and possession of 56% of built up by area the builder to the Assessees in Financial Year 1991-92 in terms of Section 2 (47) of the Income-Tax Act, 1961 read with Section 53A of Transfer of Property Act. Hence, the contention of the Assessee's counsel that land was transferred on the date of collaboration agreement is rejected."

18. It was further categorically held as under:

> "9. [...] Therefore, we are of the considered opinion that consideration for the transfer of 44% land was the cost of construction of 56% built up area which was to be incurred by the builder. This very sum would also amount to investment by assessee in the construction of flats and, therefore, the cost of construction of the flats by the builder would also amount to the cost of acquisition of the flats by assessee."

19. Thereafter, in para 10, the ITAT concluded as under:

> "10. In view of the above discussion, it is clear that in the year under consideration, there was transfer of not only the flats as super structure but also the proportionate land in as much as 56% of the land was retained by the assessee under the collaboration agreement. So we are in agreement with the alternate contention of the assessee's counsel that it was a sale of improved asset and consequently, cost of acquisition would

> include the cost of flats as well as cost of land. As far as cost of flat is concerned, we have already observed that it would be equal to the cost of construction of 56% of the built up area. The reason is obvious. The sale consideration of 44% land was in kind and, therefore, it also amounted to investment in the construction of built up area. Hence, the same will be taken as cost of acquisition of flats after examining the record of the builder."

20. The ITAT further held that, as far as the cost of acquisition of land is concerned, it had to be its market value as on 1st April 1981. Further, the ITAT disagreed with the CIT(A) that, "the value of the land as declared under Section 7(4) of Wealth-tax Act should be adopted" since, in its opinion, such value is a frozen value for the purpose of Section 7(4) of the WTA and did not represent the market value as on 1st April 1981.

21. Reference was made by the ITAT to the decision of the Supreme Court in ***Shekhawati General Traders Ltd. v. ITO [1971] 82 ITR 788 (SC)*** where it was observed that, for the purposes of ascertainment of the fair market value on a particular date, any event prior or subsequent to the said date was wholly extraneous and irrelevant and could not be taken into consideration. The ITAT concluded that, "the frozen value of land u/s 7(4) could not be taken as market value as on 1.4.81." Therefore, it was held that the AO, as well as the CIT (A), had grossly erred in adopting such valuation as market value as on 1st April 1981.

22. The ITAT further held that whether the possession of the flats was taken by the Assessee in FY 1991-92, as contended by the Assessee's counsel, was required to be verified by the AO who would also have to determine the

period of holding. The ITAT held: "If it is found that it is long term capital asset then indexed cost would also be determined otherwise no indexation would be allowed." The impugned orders of the CIT (A) were modified and the matter was restored to the file of the AO for determination of costs of acquisition/ index cost of acquisition for the purposes of computing the capital gain assessable to tax.

Revenue's Appeals

23. As far as the question framed in the Revenue's appeals, there may be no quarrel with the proposition that the figure indicated in the wealth tax return filed by the Assessee cannot possibly be taken to be the basis for determining capital gains.

24. At this juncture, it is necessary to refer to the decision of this in ***Siddharth Pratap Chand v. CWT (2014) 360 ITR 30 (Del)***. In the said decision, reference was made under Section 27 (3) of the WTA. Of the three questions framed, two read as under:

> "a) Whether the Tribunal did not err in law in not accepting the claim of the assessee that 1/3rd share in the property No.6, Aurangzeb Road continuing to be in self occupation of the assessee, even after the collaboration agreement dated 2.5.84 with M/s Ansal Properties and Industries Ltd. was to be valued at Rs.2,03,334/- as returned on the valuation date in accordance with the provisions of sec. 7(4) of the W.T. Act, 1957?
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> b) (i) Whether the Tribunal did not err in law in holding that the ownership in the property situate at 6, Aurangzeb Road was not transferred after the execution of the collaboration agreement dt. 2.5.84 with M/s Ansal Properties & Industries Ltd. and the assessee was liable to the W.T. Act, 1957?"

25. The said questions pertained to AYs 1987-88 to 1992-93. After noting the facts and the submissions made by learned counsel, it was held that there was no transfer of title as far as land was concerned and the Assessee continued to be the one-third co-owner of the property. Accordingly, the questions (a) and (b)(i) were answered against the Assessee and in favour of the Revenue. It is further held that Section 7(4) of the WTA was not applicable since, although the Assessee had transferred the possession of the property, he had not transferred the title in the property in terms of the collaboration agreement dated 2nd October 1984 entered into with Ansal. It is further noted that clause 21 of the letter dated 2nd May 1984 reads as under:

> "21. That after the building is ready for occupation, you will transfer the land, as and when required, in favour of the cooperative society or a limited company or Association of persons or firm of the flat-buyers or in the name of our/your nominees or successors as the case may be, or, alternatively, if desired by you, you may transfer the land in favour of a cooperative society earlier also if permissible under law and if practicable."

26. Having heard Mr. Zoheb Hossain, learned Senior Standing Counsel for the Revenue, and Mr. S. Krishnan, learned counsel appearing for the Assessee, the Court is satisfied that no error was committed by the ITAT in holding that the value declared in the tax return filed by the Assessees under WTA cannot be taken to be the cost of acquisition in the hands of the Assessees.

27. Accordingly, the question framed in ITA Nos. 159 and 205 of 2005 is answered in favour of the Assessee and against the Revenue and the appeals are accordingly dismissed.

Assessees' Appeals

28. Turning now to the Assessees' appeals, it is seen that the impugned order of the ITAT correctly understood the nature of transaction. There was no transfer of the title to the land by the Assessees in favour of Ansals. Indeed, what was transferred under the collaboration agreement was only 44% of the land owned by them in exchange for 56% of the built up area and not the entire land as contended even before the ITAT by learned counsel for the Assessees.

29. Further, the Assessees not only transferred the flats to buyers but the proportionate right in the appurtenant land as well. The contention of the Assessees that the land was transferred on the date of the collaboration agreement was also rightly rejected. There was a transfer of possession of 44% of the land by the Assessees to the builder and possession of 56% of the built up area by the builder to the Assessees in terms of Section 2 (47) of the Act read with Section 53A of the Transfer of Property Act. The consideration for the transfer of 44% land was the cost of construction of the 56% built up area.

30. The Court is unable to find any error in the finding returned by the ITAT accepting the alternative contention of the Assessees that it was improvement of assets and costs of acquisition would include the costs of flats as well as the cost of land. There was no difficulty as far as costs of flat was concerned as it would be equal to costs of construction of 56% of the built up area. As far as cost of acquisition of land was concerned, it had to be the market value of land as on 1st April 1981. It was noted that no exercise

was undertaken for determining the costs of acquisition of land as on 1st April 1981.

Conclusion

31. Question (i), as framed in the Assessees' appeals, is answered in the negative, i.e. in favour of the Revenue and against the Assessee. Consequently, Question (ii) is also answered in the negative, i.e. in favour of the Revenue and against the Assessee.

32. As far as Question (iii) in the Assessees' appeals is concerned, the ITAT did commit an error by not reducing the land and development charges from the sale consideration received by the Assessee while working out the capital gains. There is, however, no need to remand the matter to the ITAT for deciding Question (iii) particularly since it can be done straightway. Question (iii) is therefore answered in the affirmative i.e. in favour of the Assessee and against the Revenue. The AO is directed to give appeal effect to this order in light of the above answers.

33. ITA Nos. 159 and 205 of 2005 are dismissed and the ITA Nos. 786 and 806 of 2005 are disposed of in the above terms. No costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 23, 2017/*rd*