

आयकरअपीलीयअधिकरण" B " न्यायपीठमुंबईमें।

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

श्रीमहावीरसिंह, उपाध्यक्ष एवं श्रीमनोजकुमार अग्रवाल, लेखासदस्यकेसमक्ष।

BEFORE SRI MAHAVIR SINGH, VP AND SRI MANOJ KUMAR AGGARWAL, AM

आयकरअपीलसं./ ITA No. 2279/MUM/2017

(निर्धारणवर्ष / Assessment Years 2012-13)

M/s. Network Construction Company, 109-111, Goyal Shopping Centre, Opp. Railway Station, Borivali (W), Mumbai 400 092	बनाम/ Vs.	ACIT, Circle - 2, Thane
(अपीलार्थी/ Appellant)		(प्रत्यर्थी/ Respondent)
स्थायीलेखासं./PAN No. AAGPN1497A		

अपीलार्थीकीओरसे/Appellant by	:	Shri Dr. K. Shivram, AR
प्रत्यर्थीकीओरसे/Respondent by	:	Ms. Kavita P. Kaushik, DR

सुनवाईकीतारीख/ Date of hearing:	28.07.2020
घोषणाकीतारीख/ Date of pronouncement:	11.08.2020

आदेश / ORDER

महावीरसिंह, उपाध्यक्ष /

PER MAHAVIR SINGH, VP:

This appeal of Assessee is arising out of the order of the Commissioner of Income Tax (Appeals)-3, Mumbai, [in short CIT(A)], in ITA No. CIT(A)-98/16-17/ NSK (Old 89/15-16/THN) dated 28.02.2017. The assessment was framed by the Asst. Commissioner of Income Tax, Circle-2, Thane (in short ACIT/ITO/ AO) for the A.Y. 2012-13 vide order



dated 30.03.2015 under section 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The first issue in the appeal of assessee is against the order of CIT(A) confirming the action of Assessing Officer in making addition by invoking the provisions of Section 50C of the Act whereas the transaction under consideration is between the members of AOP, which is governed by the special provisions of Section 45(3) of the Act. For this, assessee has raised the following ground of appeal: -

"1) The learned CIT(A) erred in confirming the additions made by the then AO to the tune of Rs.5,10,47,000/- by invoking the provisions of section 50C without appreciating the fact that the transaction under review is between member of the AOP and AOP which is governed by the special provisions u/s 45(3) and not by section 50C and hence the provisions of section 50C are not applicable to such transfer."

3. The assessee has also raised Additional grounds but pressed only ground No. 2 as raised vide additional grounds, which is as under: -

"2) Without prejudice to the above, assuming that the transfer is of capital asset, the Ld. CIT(A) erred in law and in



facts by holding that the provisions of section 50C of the I.T. Act, 1961 are applicable to transfer of development rights and TDR which are entirely different from land or building or both, to which such provisions are applicable.”

4. Briefly stated, facts are that assessee purchased development rights in respect of 7 buildings from Jayraj Devidas and others. This development right in respect of three buildings was shown on the asset side of the Balance sheet under the head 'Investments' as on 31.03.2010 relevant to assessment year 2010-11. Subsequently, assessee entered into a Joint Venture agreement and agreed to contribute the said development right as 'capital contribution' at an agreed consideration of Rs. 5 crores to Benchmark Properties, i.e. the AOP. The relevant Joint Venture agreement is enclosed in assessee's paper book at pages 42 to 52. The assessee filed its return of income for assessment year 2012-13 and disclosed the amount of Rs. 5 crores as 'capital contribution'. The assessee has disclosed development rights in respect of 3 buildings under the asset side of the Balance sheet under the head 'Investments' and vide the Joint Venture agreement dated 01.07.2010, assessee has agreed to contribute the said remaining development right as 'capital contribution' for an agreed consideration of Rs. 5 crores to the AOP, M/s. Benchmark Properties. The Assessing Officer while framing assessment treated transfer of the development right in the three buildings under Section 50C of the Act inspite of claim made by assessee that provisions of

Section 45(3) of the Act will apply. The Assessing Officer accordingly treated the same as 'capital asset' and computed the value as per Stamp Valuation authority at Rs.10,10,47,000/-, thereby assessing the long term capital gains at Rs.5,10,47,000/-.

5. Aggrieved, assessee preferred appeal before the CIT(A). The CIT(A) also confirmed the action of the Assessing Officer by holding that this is transfer of capital asset covered by provisions of Section 50C of the Act by relying on the decision of ITAT, Lucknow Bench in the case of Carlton Hotels Pvt. Ltd. by observing in Para 7.5 as under :-

"7.5 Another ground taken by the appellant that the transaction under review is covered by section 45 which is a special provision whereas section 50C has been introduced with a different intention to cure malpractices prevailing in property market and is a fictional provision and not wide enough to cover all short of transaction. This issue was examined by ITAT Lucknow in the case of Carlton Hotels Pvt. Ltd. which is infact relied upon by the assessee. The relevant para from the judgment are reproduced below.

On the other hand, where a transfer covered under s. 45(3) is sought to be

registered by the firm and stamp duty is paid by the parties then provisions of s. 50C could still be invoked even that case may be covered under s. 45(3). In our considered view, in that case, provisions of s. 45(3) would not be applicable but it is only s. 50C which can alone be invoked as there is a registration of sale deed under Registration Act. Thus, where a sale transaction is registered by paying stamp duty then it is only s. 50C which can operate. In that situation, s. 50C would override s. 45(3). Sec. 45(3) is a general provision and s. 50C is a special provision which would override s. 45(3) if the sale deed is sought to be registered by paying stamp duty. But where such registration does not takes place by paying stamp duty that case would only be covered under s. 45(3) and therefore, value recorded by the firm in its books would only be the full value of consideration for the purposes of computing capital gains.

In view of this discussion, section 50C is applicable as the market value of land at TDR is Rs.10,10,47,000/- as against



Rs.5,00,00,000 taken by the assessee. So far as the computation of capital gains in respect of the plot sold by the appellant through TDR is concerned, provisions of section 50(C) entitle the assessee to object to the valuation adopted by the Stamp Duty Authority. The appellant has disputed the same and furnished a report of Registered Valuer in this regard. The AO has accordingly referred the matter to the Departmental Valuation Officer. The market value of the plot as on the date of transfer as determined by the DVO has been accepted by the AO and has computed the capital gains. The various grounds raised by the assessee regarding non-applicability of 50C are rejected. The addition made by the AO is confirmed.

Aggrieved, assessee preferred appeal before the Tribunal.

6. Before us, the learned counsel for the assessee, Dr. K. Shivram argued that as per the agreement, assessee has acquired total development rights to develop 7 buildings out of which assessee-firm had developed and sold 4 buildings on its own and disclosed the profit earned as business profit in its return of income. The development right in respect of the remaining 3 buildings were shown in the asset



side of the Balance sheet under the head 'Investments' as on 31.03.2010 relevant to assessment year 2010-11. Thereafter, assessee entered into Joint Venture agreement with M/s. Benchmark Properties, an AOP, vide agreement dated 01.07.2010 and assessee had agreed to contribute the remaining development rights as 'capital contribution' at an agreed consideration of Rs. 5 crores. Accordingly, the amount was credited the same to Capital Gains account in the books of M/s. Benchmark Properties and claimed the said amount by way of 'capital contribution' under the special provisions of Section 45(3) of the Act. The learned counsel for the assessee argued that under the provisions of Section 45(3) of the Act, the difference between the amount credited to the Capital account, i.e. deemed consideration, and the indexed cost of acquisition and improvement was to be taxed as 'capital gains'. Accordingly, the assessee-firm had offered long term capital gains amounting to Rs.1,28,935/- in its return of income for the relevant assessment year 2012-13. For this proposition, the learned counsel relied on the following case laws: -

"i) Shri Sarrangan Ashok vs ITO, ITA No. 544/Chny/2019 dated 19.08.2019 for assessment year 2015-16;

ii) ACIT vs Moti Ramanand Sagar, ITA No. 2049/Mum/2017 dated 28.02.2019 for assessment year 2012-13; and,

iii) DCIT vs Amartara Pvt. Ltd., ITA No. 6050/Mum/2016 dated 29.12.2017 for assessment year 2012-13."

7. The learned counsel stated that even the provisions of Section 50C of the Act are not applicable as there is no transfer of land and building, but merely transfer of development rights which were acquired by entering into Development Agreement dated 11.12.2006 and 28.06.2007 with Jayraj Devidas and others and assessee was never the owner of the land and building and had only acquired simple development rights which was transferred by it to the AOP, M/s. Benchmark Properties. The learned counsel submitted that the assessee has rightly declared the transaction in terms of Section 45(3) of the Act instead assessed by Assessing Officer and confirmed by CIT(A) under Section 50C of the Act.

8. On the other hand, the Id. Senior DR, Ms. Kavita Kaushik heavily relied on the decision of ITAT, Lucknow Bench in the case of Carlton Hotels Pvt. Ltd. (supra). She also relied on the orders of CIT(A) and Assessing Officer.

9. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted that assessee had acquired development rights emanating from land bearing Serial No. 24 Hissa No. 1 and 2 situated at Mirra Road District, Thane from Mr. Jayraj Devidas and others vide development agreement dated 11.12.2006 and 28.06.2007. We also noted from the agreements that the assessee has acquired total development rights to develop about 7

(seven) buildings. Out of which, the assessee firm has developed 4 buildings on its own and sold the same and also disclosed the profit earned from this as business profit. The development rights in respect of remaining 3 buildings were disclosed in the balance sheet under the head investments on the assets side as on 31.03.2010 relevant to Assessment Year 2010-11. The assessee thereafter entered into joint venture agreement dated 01.07.2010 and agreed to contribute the said development rights as capital contribution at an agreed contribution of ₹5 crores to M/s Benchmark Properties and AOP. Accordingly, this same was credited in the assessee's capital account in the books of M/s Benchmark properties. We noted that the Assessing Officer treated this as transferred and assessed the same under section 50C of the Act by treating the consideration received as per circle rates and assessed the amount of `5,10,47,000/- as a long term capital gain under section 50C of the Act instead of declared by assessee as long term capital gain amounting to ₹1,28,953/- under section 45(3) of the Act. Now before us, the learned Counsel for the assessee drew our attention to the provision of section 45(3) of the Act which read as under: -

"45(3) The profits or gains arising from the transfer of a capital asset by a person to a firm or other association of persons or body of individuals (not being a company or a co-operative or otherwise, shall be chargeable to tax as his income of the previous year in which such transfer takes

place and, for the purpose of section 48, the amount recorded in the books of account of the firm, association or body as the value of the capital asset shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset."

10. The learned Counsel for the assessee also drew our attention to the provision of section 50C of the Act which read as under: -

"50C(1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed [or assessable] by any authority of a State Government (hereafter in this section referred to as the "Stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed [or assessable] shall, for the purpose of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer."

11. In view of the above, the learned Counsel stated that the introduction of development rights by way of capital contribution under

section 45(3) of the Act by the assessee is even though a transfer but it is not a sale because there neither any receipt nor any accrual of any consideration. For this, the learned Counsel for the assessee relied on the decision of Hon'ble Supreme Court in the case of Sunil Siddharthbhai Vs. CIT (1985) 156 ITR 509 (SC). The learned Counsel for the assessee relied on the following observations of Hon'ble Apex Court vide Para 17 as under: -

"17. What is the profit or gain which can be said to accrue or arise to the assessee when he makes over his personal asset to the partnership firm as his contribution to its capital. The consideration, as we have observed, is the right of a partner during the subsistence of the partnership to get his share of profits from time to time and after the dissolution of the partnership or with his retirement from the partnership to receive the value of the share in the net partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges, when his personal asset merges into the capital of the partnership firm a corresponding credit entry is made in the partner's capital account in the books of the partnership firm, but that entry is made merely for the



purpose of adjusting the rights of the partners inter se when the partnership is dissolved or the partner retires. It evidences no doubt due by the firm to the partner. Indeed, the capital represented by the notional entry to the credit of the partner's account may be completely wiped out by losses which may be subsequently incurred by the firm, even in the very accounting year in which the capital account is credited. Having regard to the nature and quality of the consideration which the partner may be said to acquire on introducing his personal asset into the partnership firm as his contribution to its capital, it cannot be said that any income or gain arises or accrues to the assessee in the true commercial sense which a businessman would understand as real income or gain."

12. The learned Counsel for the assessee specifically relied on the Mumbai Tribunal's decision in the case of *Voltas Ltd Vs. ITO* [2016] 74 taxmann.com 99 (Mumbai), wherein it is held that the provisions of section 50C of the Act could not be applied to sale development rights of land owned by the assessee. We noted that the provisions of section 45(3) provides that when a person transfer his capital asset to a firm



or a body of individual or to AOP by way of capital contribution for becoming a partner/ member therein, then for the purposes of section 48 of the Act, the amount recorded in the books of account of the assessee firm or AOP, the value of the capital asset shall be deemed to be full value of consideration received or accruing as a result of the transfer of capital asset. As per the deeming fiction an amount recorded in the books of account thereby the full value of consideration for the purpose of section 48 of the Act. We noted that the provisions of section 45(3) of the Act is a charging provision having two limbs joined by conjunction "AND". The first limb is a charging provision which levies capital gain tax on gains arising from contribution of capital asset in the AOP by a member and second limb is an essential deeming fiction for determining the value of consideration without which the charging provision would fail. We also noted that the provisions of section 50C of the Act also deeming fiction deems only the value of consideration for the purpose of calculating capital gains in the transfer of capital asset from one person to another. In view of the above, we are of the view that the provisions of section 50C of the Act are not applicable in the instant case and provision of section 45(3) of the Act will be applied. Hence, we reverse the orders of the lower authorities and allow the appeal of the assessee on this issue.

13. Coming to the additional ground raised by assessee, the same need no adjudication as we have already adjudicated the issue of applicability of provision of section 45(3) of the Act, hence there is no question of adjudication of provision of section 50(C) of the Act



because it will overlap with each other and moreover it is without prejudice to each other.

14. In the Result, the appeal of assessee is partly allowed.

Order pronounced in the open court on 11.08.2020

Sd/-

(मनोजकुमारअग्रवाल / MANOJ KUMAR AGGARWAL)

(लेखासदस्य / ACCOUNTANT MEMBER)

मुंबई,दिनांक/ Mumbai, Dated: 11.08.2020

सुदीपसरकार ,व .निजीसचिव/ Sudip Sarkar, Sr.PS

Sd/-

(महावीरसिंह /MAHAVIR SINGH)

(उपाध्यक्ष / VICE PRESIDENT)

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त)अपील (/ The CIT(A)
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि ,आयकरअपीलीयअधिकरण ,मुंबई/ DR,
ITAT, Mumbai
6. गार्डफाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापितप्रति //True Copy//

उप/सहायकपंजीकार (Asstt. Registrar)

आयकरअपीलीयअधिकरण ,मुंबई / ITAT, Mumbai