

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, MUMBAI**

**BEFORE SHRI NARENDER KUMAR CHOUDHRY, JM &
MS PADMAVATHY S, AM**

**I.T.A. No. 2628/Mum/2023
(Assessment Year: 2018-19)**

Tirupati Developers, Ground Floor, MAT Cornel Heights, Marian Colony, Borivali West, Mumbai- 400103 PAN : AAGFT7632K	Vs.	Additional Joint Deputy Assistant Commissioner of Income Tax, ITO, National e- Assessment Centre, Delhi.
assessee)	:	Respondent)

assessee/Assessee by : Ms Zarna Chandwani, CA
Revenue/Respondent by : Shri Srinivas, DR

Date of Hearing : 10.01.2024
Date of Pronouncement : 16.01.2024

ORDER

Per Padmavathy S, AM:

This appeal is against the order of Commissioner of Income Tax, Appeals, / National Faceless Appeal Centre [In short ‘the CIT(A)’] dated 30.05.2023 for the Assessment Year (AY) 2018-19.

2. The assessee is a partnership firm engaged in the business of builders and developers. The assessee filed the return of income for assessment year 2018-19

declaring income at nil. The case was selected for scrutiny for the reason that specific information was received from sub registrar office that the assessee has sold immovable property on 29.07.2017 for consideration of Rs.10,00,000/- whereas the market value of the said property is Rs.40,42,000. The assessee submitted before the assessing officer the copy of redevelopment agreement between assessee and Sterling Apts CHS Ltd by virtue of which the assessee has the right to sell the saleable area after redevelopment of the society. The assessing officer held that the assessee has sold Flat No. Sadnika KRA 202, Dusara Majala, Sterling Co-op Housing Society, Borivali, Mumbai for a sale consideration of Rs.10,00,000 whereas the stamp duty value of the property is Rs.40,42,000. Therefore the assessing officer proceeded to make an addition under section 50C of the income tax act (the Act) for the difference of Rs.30,42,000.

3. Aggrieved assessee filed the appeal before the CIT(A). The CIT(A) dismissed the appeal of the assessee by holding that-

“7.11 As it is apparent from records that the appellant firm was given sufficient time and opportunities to file the relevant documents/evidences in support of its claim. The appellant failed to provide the relevant documents at the assessment stage. Although the appellant firm entered into the agreement prior to the assessment proceedings, still the appellant firm has not furnished the relevant documents related to the appellant's case even though a response has been filed and the appellant had a chance to file all the relevant documents along with such reply. The additional evidence submitted by the appellant at the appellate stage are therefore, not accepted and admitted. It is held that the appellant has not been able to demonstrate how its case falls under rule 46A. The appellant was given ample opportunity to submit all evidences by the AO and the appellant failed to furnish such evidences by his own default.

7.12 On the basis of information received from the sub Registrar of properties and based upon the submissions of the appellant the AO has rightly held the

transfer to be assessable u/s 50C of the Act. The addition made by the AO is upheld and the grounds in this respect are dismissed.”

4. The assessee is in appeal before the Tribunal raising the following grounds of appeal -

“1 The learned Commissioner of Income Tax (Appeals)-NFAC (hereinafter referred to as "CIT(A)") erred on facts and in law in upholding the addition made by the Income Tax Officer, National e-assessment Centre, Delhi (hereinafter referred to as "the Assessing Officer") amounting to INR 30,42,000/- as per the provisions of section 50C of the Act under the head capital gains. Your appellant prays that under the facts and circumstances of the case and in law, the addition amounting to INR 30,42,000/- to the income of the appellant is bad in law and be deleted.

2 The Learned CIT(A) erred in not accepting and admitting the additional evidence being the copy of the agreement which has a direct bearing on the issues involved in the appeal. Your appellant prays that under the facts and circumstances of the case, the additional evidence being the copy of the agreement should be accepted as such and be placed on record.

3 Your assessee craves leave to add, alter, amend, delete or withdraw any or all grounds of appeal and to submit such statements, documents and papers as may be considered necessary either at or before hearing of the appeal.”

5. During the course of hearing the Ld. AR submitted that Ground No.2 raised by the assessee for CIT(A) not admitting the additional evidence is not correct since the documents submitted by the assessee before the CIT(A) are not additional evidences since they have already been submitted before the assessing officer. The Ld. AR further submitted that the assessee has erroneously made an application under section 46A of the act for admission of additional evidence before the CIT(A). Accordingly the Ld. AR prayed that the said ground can be considered as not pressed and that the appeal may be adjudicated on merits based on Ground No.1.

6. Before us the Ld. AR submitted that the assessee has entered into re-development agreement whereby the assessee is to provide the accommodation to the members in the redeveloped building with certain agreed area. The members who had lesser area had to pay to the assessee towards the additional area they received in the redeveloped building. The ld AR further submitted that the addition is made on the basis of a misunderstood fact that the assessee has sold flat whereas the assessee has sold only the additional area of the flat purchased by the member of the society as per the agreement. The Ld. AR also submitted that the stamp duty value of the entire flat has been considered instead of the additional area sold while making the addition under section 50C of the act. The Ld. AR in this regard drew our attention to the relevant clauses in the agreement to substantiate the claim that the consideration received is only towards the additional area of the flat sold to members. The Ld. AR also submitted that the assessee is engaged in the business of builders and developers and declares the profit on sale of flats as income from business the provisions of section 50C of the Act are not applicable to the assessee. Accordingly it was submitted that the addition made by the assessing officer under section 50C is not tenable. The Ld. AR in this regard placed reliance on the decision of the Bombay High court in the case of CIT vs Neelkamal Realtors and Erectors India (p) Ltd ([2017] 79 taxmann.com 238 (Bombay)).

7. The Ld. DR on the other hand relied on the orders of the lower authorities.

8. We heard the parties and perused the materials on record. Before proceeding further we will first recapitulate the facts pertaining to the issue under consideration. The assessee engaged in the business of builders and developers and has entered into an agreement date 30.12. 2011 with Sterling Co operative Housing Society and its members for redevelopment of the property located at I.C. Colony,

Borivali West. The said agreement was amended via a Supplementary Agreement dated 30 August 2014 (Page 65 to 111 of Paper Book 1). The Supplementary Agreement entered between Sterling Co-operative Housing Society and its members inter alia among other items fixed the flat wise total carpet area to be provided to the existing members of the said society (page 89 of Paper Book 1). The assessee entered into Agreement for Permanent Alternate Accommodation with the members of society and as per the terms of the agreement in case where the member is receiving additional space in the alternate accommodation, the member would pay a consideration to the assessee towards the additional space. The assessee has entered in the said agreement with one Mrs Priscilla Valerina Fernandes one of the members of the society for dated 30.03.2017 which was registered on 29.07.2017 with the stamp duty authorities.

The basis on which the assessing officer has made the addition is that the assessee has received a consideration of Rs.10,00,000 while the market value of the said Flat is at Rs.40,42,000 and therefore the differential is to be taxed under section 50C of the Act. Therefore it is relevant here to look the following clauses the said agreement in order to understand whether the assessee received the consideration towards the sale of the entire flat or the additional space received by the member –

(t) The Member herein is occupying the premises being Flat No. 02 admeasuring 594 sq.fts. (carpet area) inclusive of the door jams, on Ground Floor in the said old building known as 'Sterling' standing on the said property (hereinafter referred to as 'the said old Flat'), being the bonafide member of the said Society i.e. Sterling Co operative Housing Society Ltd.. And the Member has agreed to consented to participate in the said scheme, in order to avail the benefit of the redevelopment of the said property, in accordance with the terms and conditions as set out in the aforesaid Development Agreement dated 31.12.2011 read with Supplemental agreement dated 30th August 2014 executed and entered into

between the said Society/Confirming Party herein and the Developers herein as stated above.

(u) Accordingly, the Member has handed over peaceful and vacant possession of the said old flat to the Developers, in order to demolish the said old building and to facilitate the development of the said property and in lieu thereof, the Developers have agreed to provide and allot on ownership basis' permanent alternate accommodation to the Member. According to the Supplemental Agreement dated 30th August 2014, the entitlement of the Member is a self-contained flat admeasuring 832 sq. fts. (carpet area) inclusive of the door jams, however, due to planning requirements the area of the newly constructed flat proposed to be allotted to the Member is 957 sq. fts. (carpet area) inclusive of the door jams. **The Member herein has agreed to pay to the Developers a sum of Rs. 10,00,000/- (Rupees Ten Lakhs Only) being the price of the additional 125 sq. fts. (carpet area) included in the newly allotted flat.** The Developers shall thus allot to the Member Flat No. 202 admeasuring about 957 sq.fts. (carpet area) inclusive of the door jams, situated on the Second Floor of the New Building, to be known as Sterling CHSL which is shown in hatched theplan annexed and marked as Annexure 'D' hereto and more particularly described in the 2nd schedule to this Agreement.

6. As per the Supplemental Agreement dated 30th August 2014, executed by and between the said Society and the Developers herein, the Carpet area entitlement of the Member is 832 sq. fts., (carpet area) inclusive of the door firms whereas the Carpet area provided by the Developers in the said New Flat is 957 sq. fts. (carpet area) inclusive of the door jams. **The Member is agreeable to acquire and purchase this extra carpet area of 125 sq.ft in the new flat** and also, to flat and also to pay the Developers the monetary Consideration of Rs. 10,00,000/- (Ten Lakhs Only) and also to pay the proportionate stamp duty & registration charges on such extra carpet area, at the prevailing market rate fixed by the Government in Ready Reference and also, reimburse to the Developers at such stamp duty levies and charges pertaining to such extra area, including UST, etc. as applicable and payable to the concerned Authorities. It is agreed between the parties that Full and Final payment of Rs. 10,00,000/- (Rupees Ten Lakhs Only) for such extra area will be paid to the Developers on final completion and handing over of the said flat and allotted parking area\siot after obtaining all clearances and payment of all dues from the concerned authorities, occupation certificate issued by the MCCGM on date applicable and dues as per the terms set out in the aforesaid Re- development agreement dated 31 December 2011 read with Supplementary agreement dated 30 August 2014 executed and entered into by the concerned parties herein.”

(emphasis supplied)

9. From the perusal of the above clauses of the agreement it is clear that the consideration of Rs.10,00,000 is agreed to be paid by the member of the society to the assessee towards purchase of additional area of 125 Sq.ft and not towards the entire flat. The assessing officer by making the addition under section 50C as held that the Stamp Duty value of the impugned flat is Rs.40,42,000 and has made the addition by deducting the amount received by the assessee towards the additional area sold by the assessee to the member. Therefore there is merit in the contention of the Ld. AR that the entire addition is made on the misunderstood fact that the consideration is received for the sale of the flat whereas the assessee has received consideration towards only the additional area of the flat. Further it is also noticed that the assessee has received the consideration towards right in the saleable area additionally received by the member and not towards the sale of the flat. Therefore in our considered view the addition made by the assessing officer is not tenable.

10. On the alternate contention that section 50C cannot be applied to the assessee engaged in builders and development, we also noticed that in the case of Neelkamal Realtors and Erectors India (p) Ltd (supra) the jurisdictional High Court has held that the provisions of section 50 C of the act governs valuation of property to determine capital gains and has no application while determining profit and gains of business or profession. In assessee's case, the assessee being a Builder and Developer of property has offered the income from project of redevelopment under the head of and gains from business or profession following Project Completion Method and therefore on this count also we are of considered view that the addition made by the assessing officer is not sustainable. In view of this discussion we hold that the assessing officer is not correct in making the addition of

Rs.30,42,000/- under section 50C of the act and direct that the said addition be deleted.

10. In result the appeal of the assessee is allowed.

Order pronounced in the open court on 16-01-2024.

Sd/-

(NARENDER KUMAR CHOUDHRY)

Judicial Member

**SK, Sr. PS*

Sd/-

(MS. PADMAVATHY S)

Accountant Member

Copy of the Order forwarded to :

1. The assessee
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,
(Dy./Asstt. Registrar)
ITAT, Mumbai