

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND  
SHRI ASHWANI TANEJA, ACCOUNTANT MEMBER**

**ITA No.1062/M/2014  
Assessment Year: 2010-11**

M/s. Dikson & Company, 380-D, Shanker Seth Wadi, JSS Road, Chirabazar, Mumbai-400 002 <b>PAN: AAAFD2743B</b>	Vs.	Income Tax Officer 14(1)(3), Earnest House, Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri Neel Khandelwal, A.R.  
Revenue by : Shri B.S. Bist, D.R.

Date of Hearing : 19.10.2016  
Date of Pronouncement : 09.12.2016

**ORDER**

**Per Sanjay Garg, Judicial Member:**

The present appeal has been preferred by the assessee against the order dated 31.01.2014 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2010-11.

**2. The assessee has taken the following grounds of appeal:**

"The ground or grounds of appeal are without prejudice to one another.

1.a) On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the addition to the extent of Rs.38,14,560/- made by the AO to the income of Appellant on account of Income from other sources in respect of consideration received on sale of development rights in the piece of lands on 29-6-2001.

b) The Id. CIT(A) failed to appreciate that:-

(i) the Appellant had sold development rights in the piece of lands to M/s. Darshan Builders on 29-6-2001 and thereby permitted the developers to develop residential buildings at their own cost, risk and expenses;

- (ii) the transfer of the piece of lands was completed during the previous year relevant to A.Y. 2002-03 since the possession was given in part performance of contract in the nature of development agreement dated 29-6-2001;
- (iii) the Appellant has passed domain and control of the immovable property by grant of an irrevocable authority and licence and as such the date of agreement of development dated 29-6-2001 would be constitute the date of transfer of the capital asset; and
- (iv) no consideration was received by the Appellant from Tulsi Gruh Nirman & Associates during the previous year and as such no income has accrued or arised to the Appellant during the previous year.
- (v) In reaching to the conclusion and confirming such addition the Id. CIT(A) omitted to consider relevant factors, considerations, principles and evidences while he was overwhelmed, influenced and prejudiced by irrelevant considerations and factors.

2.a) On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in holding (without prejudice) that:-

- (i) In case it is being held that the said income of the Appellant is to be taxed as Long Term Capital Gain with Indexation of the cost, the
- (ii) in case it is being held that the said income of the Appellant is to be taxed as Long Term Capital Gain with Indexation of the cost, the indexation should be made only up to A.Y.2002-03; and
- (iii) in case it is being held that the said income of the Appellant is to be taxed as Long Term Capital Gain with Indexation of the cost up to A.Y.2010-11, the sale consideration should be assessed on the market value of said land by invoking the provisions of Section 50C of the Act.

b) In reaching to such conclusion and holding so, the id. CIT(A) omitted to consider relevant factors, considerations, principles and evidences while he was overwhelmed, influenced and prejudiced by irrelevant considerations and factors.

3 The Id. CIT(A) erred in not passing any order on the Ground No.3 raised by the Appellant disputing the levy of interest u/s.234B of the Income Tax Act, 1961.

4.The Id. CIT(A) erred in not passing any order on the Ground No. 4 raised by the Appellant disputing initiation of penalty proceedings u/s.271(1)(c).

The Appellant craves leave to add, alter, amend or delete any or all of the above grounds of appeal.”

3. The brief facts of the case as derived from the impugned order are that the assessee is a partnership firm. The assessee filed the return of income declaring total income as nil. The case was selected for scrutiny assessment

under section 143(3) of the Act. The Assessing Officer (hereinafter referred to as the AO) noted that as per the AIR information, during the F.Y. 2009-10 relevant to A.Y. 2010-11, the assessee sold land property situated at Karjat for a total consideration of Rs.1.71 crore. On perusal of various details filed by the assessee, the AO observed that the assessee had entered into a development agreement on 29.06.2001 with M/s. Darshan Developers for a total consideration of Rs.45,50,000/-. The AO further observed that in the A.Y. 2010-11 under consideration in which the assessee had entered into Deed of Conveyance dated 27.10.2009, the assessee had fully set off the receipt of Rs.45,50,000/- against the indexed cost of Rs.46,47,981/- for A.Y. 2010-11 resulting in capital loss of Rs.97,981/-. The assessee explained that the development rights in the land were sold by the assessee to M/s. Darshan Builders in the year 2001 itself against consideration of Rs.45,50,000/-. However, in the F.Y. 2009-10, the said M/s. Darshan Builders has sold the land to M/s. Tulsi Gruh Nirman for Rs.1.71 crores and the said M/s. Darshan Builders has offered the capital gains on the entire amount of Rs.1.71 crores. The AO, however, stated that since the assessee had transferred the entire rights in the property by virtue of development agreement dated 29.06.2001, the Long Term Capital Gain should have been offered to tax in A.Y.2002-03, calculated at Rs.14,17,026/- Alternately, in case the capital gain was to be offered to tax in A.Y. 2010-11 on execution of Deed of Conveyance, since the assessee received only 27% of total sale consideration of Rs.1.71 crores, and in such case the Long Term Capital Gain would be worked out at Rs.45,50,000 -- 27% of Rs.46,47,981 = Rs.32,95,045/-. However, since the assessee had not returned the capital gains in A.Y. 2002-03 even as the property had been transferred in that year as per sec. 2(47) of the Act, the question had arisen as to whether the sale consideration of Rs.45,50,000/- was to be taxed in A.Y. 2010-11 as capital gains or not. The AO opined that the final sale consideration should not be treated as capital receipt in F.Y. 2010-11, and it can only be treated as Income from Other Sources. Therefore, the AO treated the entire

sum of Rs.45,50,000/- as Income from Other Sources and added to the income of the assessee. The AO without prejudice stated that if at all the consideration of Rs.45,50,000/- received by the assessee needs to be considered as capital gains for A.Y.2010-11, the assessee is not at all entitled for the entire benefit of indexed cost as the assessee had received only 27% of the total consideration out of Rs.1.71 crores. Being aggrieved by the order of the AO the assessee preferred appeal before the Ld. CIT(A).

4. In appeal, the Ld. CIT(A) also held that the land in question was transferred by the assessee to M/s. Darshan Builders vide agreement dated 29.06.01 and that the assessee should have returned the capital gains in the assessment year 2002-03. He also observed that the assessee himself has offered the capital gain/loss in the assessment year 2010-11. He held that the assessee was not entitled to the indexation benefit up to assessment year 2010-11 but only up to assessment year 2002-03. He therefore upheld the order of the AO that the amount of Rs.45,50,000/- shown by the assessee as receipt on account of sale of land under the head 'Long term capital gains' was to be treated as income from other sources for the assessment year under consideration i.e. assessment year 2010-11. He, however, held that the assessee was entitled to get deduction of the deemed cost of the land as on 01.04.1981 at Rs.7,35,440/- as an expenditure under section 57(iii) of the Act. He also held that in case the consideration received by the assessee is to be taxed as capital gains then the assessee would not be entitled to indexation after assessment year 2002-03 and further that the deemed sale consideration should be considered as per the market value of the said land in the assessment year 2010-11 at Rs.1,39,74,500/- under section 50C of the Act. The relevant part of the observations made by the Ld. CIT(A) for the sake of reference is reproduced as under:

"6.1 The appellant has admitted that since the development rights in the property were transferred to the developer vide Development Agreement dated 29-06-2001, capital gain arising from such transfer was taxable in A.Y. 2002-03, relying upon the judgment of Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas

Kapadia v. CIT 260 ITR 491 (Bom) wherein it was held that in case of passing of domain and control of the immovable property by grant of an irrevocable authority or licence, the date of agreement of development will constitute the date of transfer of the capital asset. I find that the AO is also not averse to said contention of the appellant since he himself has stated that ideally the assessee should have returned the capital gain during the A.Y. 2002-03 only. However, it is a fact that the appellant failed to offer the income to tax in the A.Y. 2002-03 on the pretext of wrong advice received by appellant from his Tax Consultant at that time.

6.2 In the present A.Y. 2010-11, the assessee offered the income to tax on execution of Deed of Conveyance dated 27-10-2009, wherein admittedly the appellant became a party to the Agreement in accordance with the terms of Development Agreement dated 29-06-2001 only for the sake of convenience because in the Government records the piece of land still remained in the name of the appellant, though the Development rights had already been sold in 2001. The appellant further contended that the entire consideration of Rs.1,71,00,000/- vide the Deed of Conveyance was received by M/s Darshan Builders (the developer) from M/s Tulsi Gruh Nirman and Associates (purchaser of land), and also the entire consideration of Rs. 1,71,00,000/- was assessed in hands of M/s Darshan Builders in A.Y. 2010-11, as per copy of their assessment order submitted by the appellant.

In this regard, I find that the appellant at one hand has contended that the land was registered in its name till the date of execution of the Deed of Conveyance in A.Y. 2010-11 only for name sake, as actual transfer had already taken place in the A.Y. 2002-03; while at the other hand, the appellant has calculated the Long Term Capital Gain in A.Y. 2010-11 by indexing the Deemed Cost of Land as on 01.04.1981 of Rs. 7,35,440/- by Cost Inflation Index of "632" declared for A.Y. 2010-11 (F.Y. 2009-10), thereby arriving at Indexed Cost at  $\text{Rs. } 7,35,440 \times 632 / 100 = \text{Rs. } 46,47,981/-$ , and Long Term Capital Gain/ (Loss) at  $\text{Rs. } 45,50,000 - \text{Rs. } 46,47,981 = \text{Rs. } (97,981/-)$ . This is clearly not acceptable due to following reasons:

- i) Had the appellant offered the long term capital gain to tax in A.Y. 2002-03, which was ideally required and accepted as such by the appellant, the Long Term Capital Gain, would have been worked out at  $45,50,000 - 7,35,440 \times 426 / 100 = \text{Rs. } 14,17,026/-$  and the appellant was liable to pay tax on such amount at that time itself.
- ii) Instead of recouping the loss to the revenue (tax + interest) on account of withholding the offering of above income of Rs. 14,17,026/- to tax for 8(eight) long years (since A.Y. 2002-03 to A.Y. 2010-11), the appellant has on the contrary converted the income into loss, by claiming indexation benefit up to A.Y. 2010-11, even though clearly admitting itself that the land was held by it only for the name sake.

6.3 It is proved by the aforesaid discussions that the stand taken by the appellant cannot be accepted under any circumstances. Now, the question arises whether the treatment given by the AO to tax the said receipt of Rs.45,50,000/- as Income from Other Sources without granting any deduction of cost there from was justified. In this regard, I am of the opinion that firstly the appellant should get deduction of the deemed cost of Rs.7,35,440/-, as it would be an allowable expenditure even u/s 57(iii) of the Act. Secondly, as regards the Indexation of said cost and treatment of net consideration as Long Term Capital Gain (instead of Income from Other Sources),

I am of an opinion that in view of the appellant's act of trying to conceal its income on several counts as stated above, and also to recoup the loss of revenue for late offering of the assessable income to tax for 8(eight) long years, the appellant should not be granted any such benefit. Therefore, the appellant is entitled to get a relief of Rs.7,35,440/-.

6.4 Without prejudice, in case it is held that the said income of the appellant is to be taxed as Long Term Capital Gain with Indexation of the cost, the indexation should be made only up to A.Y. 2002-03, since after that the appellant was the owner only for the name sake, as admitted by the appellant itself.

6.5 Further, without prejudice, in case it is held that the said income of the appellant is to be taxed as Long Term Capital Gain with Indexation of the cost up to A.Y. 2010-11, the sale consideration should be assessed on the market value of said land, by invoking the provisions of Sec. 50C of the Act. The appellant has offered the income to tax in A.Y. 2010-11 based on execution of the Deed of Conveyance. The said Deed of Conveyance dated 27.10.2009 shows the Market Value of said land at Rs.1,39,74,500/-. As per Sec. 50C [as amended by Finance (No. 2) Act, 2009, w.e.f 1-10-2009, i.e. effective as on the date of execution of said deed of conveyance], even the sale consideration "assessable" shall be deemed to be the full value of consideration received.

6.6 In nutshell, the appellant gets relief of Rs.7,35,440/- and the grounds of appeal are partly allowed.”

5. Being aggrieved by the above order of the Ld. CIT(A), the assessee has come in appeal before us.

6. A perusal of the assessment order as well as order of the Ld. CIT(A) gives impression that the lower authorities themselves are not sure as to the taxability of the year regarding the sale receipts of the land received by the assessee. Admittedly, the development agreement was executed with M/s. Darshan Builders by the assessee and the possession was also handed over in the year 2001 itself. The assessee had also executed an irrecoverable power of attorney in favour of M/s. Darshan Builders. Therefore, the ‘transfer’ as per the provisions of Income Tax Act was completed in the year 2001. However, the registered sale deed was not executed. Hence, in the records, the land was recorded in the name of the assessee till the execution of the sale deed in the financial year 2009-10 relevant to assessment year 2010-11. The assessee has

offered the capital loss by computing the cost of indexation up to the assessment year 2010-11.

The first question for determination before us is as to the nature of the amount received by the assessee as to whether the income or loss arising thereof is to be computed under the head 'Capital Gains' or as 'Income from other sources'. Admittedly, the amount in question was received by the assessee on account of sale of land and further that the assessee is not in the business of sale and purchase of lands. Hence, under the circumstances the income of the assessee is to be computed under the head 'Capital gains'.

7. So far as the question of year of taxability is concerned, though the lower authorities have themselves held that in fact such an income was required to be taxed in the assessment year 2002-03 itself, yet, the fact remains that the transfer of the land was not affected in the records. The ownership of the land was standing in the name of the assessee up to the assessment year 2010-11. There was no means or ways for the Revenue Authorities to note that the assessee has sold the land in the year 2001. It was only when the assessee himself disclosed the sale in the assessment year 2010-11 on execution of the sale deed that the matter came to the knowledge of the Revenue Authorities. The assessee himself has shown the capital gain/loss treating that the transfer has taken place in the assessment year 2010-11. Now the assessee is estopped from his own act and conduct to say that the transfer has taken place in the year 2001 relevant to assessment year 2002-03. Moreover, no one can be allowed to take the benefit of his own wrong.

8. Now the second question arises as to what should be the amount of sale consideration which should be taxed in the hands of the assessee as capital gains. Admittedly, the assessee has received only a sum of Rs.45,50,000/- as per the agreement dated 29.06.01. It is not the case of the Revenue that the assessee has received any amount over and above the said amount of Rs.45,50,000/-. Hence, we do not find any merit in the findings of the Ld.

CIT(A) that the sale consideration of the land should be taken as market value of the said land under section 50C of the Act.

9. So far as the indexation benefit is concerned, if the transfer is to be treated as dated back to year 2001, no tax can be levied on the assessee for the year under consideration neither on account of capital gains nor under the head 'Income from other sources'. As observed above, if we treat the transfer being done in the financial year 2009-10 relevant to assessment year 2010-11, then the assessee is entitled to the indexation cost up to the date of transfer.

10. Now the next question raised by the AO is that the assessee had received only 27% out of the total consideration of Rs.1.71 crores on account of sale development land by M/s. Darshan Builders to M/s. Tulsi Gruh Nirman. The peculiar fact that is to be noted here that the said entire sale consideration has been received by the M/s. Darshan Builders and they have offered the said amount for taxation as per the provisions of law. So far as the consideration of Rs.45,50,000/- of land received by the assessee is concerned that was not on account of any part of sale of land. The assessee was the owner of the entire land which was transferred by the assessee as per the terms of the agreement dated 29.06.01. Under the circumstances it is not a case of single transaction of sale. It is in fact a case of two transactions of sale. The first sale transaction made by the assessee to the M/s. Darshan Builders is for a consideration of Rs.45,50,000/-. Second sale transaction is done by M/s. Darshan Builders to M/s. Tulsi Gruh Nirman & Associates for a sum of Rs.1.71 crores.

So far as the second transaction is concerned, the said M/s. Darshan Builders has already offered the entire consideration of Rs.1.71 crores for taxation as per the provisions of law. So far as the first transaction is concerned which was not relating to any part of the land but was in relation to the sale of rights of the assessee in the entire land, hence, the assessee was entitled to the indexed cost in relation to the entire land and not 27% of the



total consideration relating to the second transaction. Under these circumstances, we do not find any justification on the part of the authorities either taxing the sale consideration received by the assessee as income from other sources or in restricting the indexation benefit to the assessee up to assessment year 2002-03 or up to the 27% of the sale consideration.

11. In view of our findings given above, the appeal of the assessee is allowed and additions made by the lower authorities on the issue under consideration are hereby ordered to be deleted.

**Order pronounced in the open court on 09.12.2016.**

**Sd/-**  
**(Ashwani Taneja)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(Sanjay Garg)**  
**JUDICIAL MEMBER**

Mumbai, Dated: 09.12.2016.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.