



IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.5/Mum./2017
(Assessment Year : 2010-11)

Dy. Commissioner of Income Tax
Central Circle-8(1), Mumbai

..... Appellant

v/s

M/s. Crescent Realtors Pvt. Ltd.
21, Nirmal Nariman Point
Mumbai 400 021
PAN - AACCC4894R

..... Respondent

ITA no.7614/Mum./2016
(Assessment Year : 2010-11)

M/s. Crescent Realtors Pvt. Ltd.
21, Nirmal Nariman Point
Mumbai 400 021
PAN - AACCC4894R

..... Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle-44, Mumbai

..... Respondent

Revenue by : Shri Neil Phillip
Assesseeby : Shri Pankaj Toprani

Date of Hearing - 16.05.2019

Date of Order - 22.05.2019

ORDER**PER SAKTIJIT DEY. J.M.**

The aforesaid cross appeals arise out of order dated 27th September 2016, passed by the learned Commissioner (Appeals)-50, Mumbai, for the assessment year 2010-11.

ITA no.5/Mum./2017
Revenue's Appeal

2. The grounds raised by the Revenue are against the decision of learned Commissioner (Appeals) in holding the gain derived from sale of properties as long term capital gain.

3. Brief facts are, vide separate registered sale deeds executed on 22nd December 2005 four companies, including the assessee, purchased four commercial properties, the details of which are as under:-

<i>Sl.no.</i>	<i>Name of Owner Company</i>	<i>Address</i>	<i>Carpet Area (Sq.Ft.)</i>	<i>Date of Acquisition</i>	<i>Purchase Consideration (₹)</i>
1.	Imperial Realtors Pvt. Ltd.	Unit no.1A, 1 st Floor, KempShoppe Commercial Premises, Cadastral, Survey Nos. 603 & 569 of Malabar &Cumballa Hill, Mumbai 400 038	633.84	23/12/2005	60,84,880
2.	Columbia Realtors Pvt. Ltd.	Unit no.1A, 1 st Floor, KempShoppe Commercial Premises, Cadastral, Survey Nos. 603 & 569 of Malabar &Cumballa Hill, Mumbai 400 038	720.30	23/12/2005	69,14,880

3.	Cambridge Realtors Pvt. Ltd.	Unit no.1A, 1 st Floor, KempShoppe Commercial Premises, Cadastral, Survey Nos. 603 & 569 of Malabar &Cumballa Hill, Mumbai 400 038	897.25	23/12/2005	86,13,600
4.	Crescent Realtors Pvt. Ltd.	Unit no.1A, 1 st Floor, KempShoppe Commercial Premises, Cadastral, Survey Nos. 603 & 569 of Malabar &Cumballa Hill, Mumbai 400 038	965.22	23/12/2005	92,66,080

4. Subsequently, the other three companies amalgamated with the assessee and the assessee ultimately became the owner of all the four properties. All these properties were sold by the assessee to the Bank of India on 22nd January 2010 for a total sale consideration of ₹ 26 crore. In the return of income filed for the impugned assessment year the assessee offered the gain derived from the sale of the aforesaid properties as long term capital gain. The Assessing Officer, however, did not accept the claim of the assessee, since, the completion/occupation certificate of the properties was issued by the competent authority on 23rd March 2009. The Assessing Officer, therefore, held that the gain derived from sale of the properties have to be treated as short term capital gain. Further, he also did not allow deduction claimed by the assessee towards cost of improvement and brokerage payment. Thus, ultimately, the Assessing Officer added the amount of ₹ 26 crore to the income of the assessee as short term

capital gain. The assessee challenged the aforesaid decision of the Assessing Officer before the first appellate authority.

5. After considering the submissions of the assessee and relying upon the decision of the Tribunal, Delhi Bench, in Pravin Gupta v/s ACIT, ITA no.2558/Del./2010, dated 13th August 2010, learned Commissioner (Appeals) held that since the assessee was holding the properties since December 2005, i.e. more than three years, the gain derived from transfer of such property has to be assessed as long term capital gain. Learned Commissioner (Appeals) observed, occupancy certificate is not relevant to construe the period of holding of the property. Accordingly, he reversed the decision of the Assessing Officer in treating the gain from sale of property as short term capital gain.

6. The learned Departmental Representative relying upon the observations of the Assessing Officer submitted, prior to issuance of occupation certificate the building was not ready, hence, the period of holding of the property has to be reckoned from the date of issuance of occupation certificate. Thus, he submitted, the Assessing Officer was correct in treating the gain from sale of property as short term capital gain. He submitted, since the assessee could not have taken the possession prior to completion of the building, there cannot be any

transfer in terms of section 53A of the Income Tax Act, 1961 (for short "*the Act*") of the Transfer of Property Act, 1882.

7. The learned Authorised Representative submitted that the assessee had acquired the property on 23rd December 2005, through registered sale deeds, therefore, the assessee acquired the right over the property on the date of execution of registered sale deeds. In this context, he relied upon the decision of the Hon'ble Supreme Court in *Suraj Lamp and Industries Pvt. Ltd. v/s State of Haryana*, [2012] 340 ITR 001 (SC). The learned Authorised Representative submitted that once registered sale deed is executed title basis, hence, it cannot be said that the assessee has not acquired right, title, interest over the properties since the occupation certificate was issued at a subsequent date. He submitted that even Courts have gone to the extent in holding that on the issuance of allotment letter by the builder the buyer acquires right, title and interest over the property and holding period of the property as the date reckoned from the date of allotment letter. Thus, he submitted that the learned Commissioner (Appeals) was correct in holding that the gain from sale of properties is to be assessed as long term capital gain. In support of such contention, he relied upon the following decisions:—

- i) *CIT v/s Vina Indra Kumar*, [2015] 370 ITR 552; and
- ii) *PCIT v/s Vembu Vaidyanathan*, ITA no.1459/2016, dated 22.01.2019.

8. We have considered rival submissions and perused the material on record. From the facts and materials on record, it is evident that vide separate registered sale deeds executed on 23rd December 2005, the assessee along with three other companies acquired four commercial properties. Subsequently, the assessee became owner of all the properties upon amalgamation of other three companies with the assessee. Therefore, the issue which requires consideration is, whether on the date of execution of registered sale deeds, right, title and interest over the properties were transferred or not. In the case of Suraj Lamp and Industries Pvt. Ltd. (supra), the Hon'ble Supreme Court has held that immovable property can be legally and lawfully transferred / conveyed only by a registered deed of conveyance. Thus, as per the ratio laid down by the Hon'ble Supreme Court the aforesaid decision, upon execution of sale deeds on 23rd December 2005, right, title and interest over the properties were transferred to the assessee. Therefore, the assessee should be deemed to be the owner of the properties from the date of execution of the registered sale deeds. The definition of shortterm capital asset under section 2(42A) of the Act means a capital asset held by the assessee for not more than 36 months immediately preceding the date of its transfer. In the facts of the present case, the assessee having held the property from 23rd December 2005 till the date of transfer on 22nd January 2010, it has to be held as a long term capital asset. Merely because the occupation

certificate was issued by the competent authority at a later stage, for whatever may be the reason, it will not mean that the assessee was not held the property from the date of execution of the registered sale deeds. The Hon'ble Jurisdictional High Court in *Vina Indra Kumar (supra)* has held that even where the assessee has executed an agreement of sale, the date of holding of property has to be reckoned from the date of agreement of sale. While expressing such opinion, the Hon'ble Jurisdictional High Court did not accept the contention of the Department that the holding period of the property should be reckoned from the date of issuance of occupation certificate by the Municipal Corporation. The Hon'ble Jurisdictional High Court in *Vembu Vaidyanathan (supra)* has held that even on issuance of allotment letter by a builder the allottee gets title over the property and period of holding of the property has to be reckoned from the date of allotment letter. Thus, keeping in view the ratio laid down in the aforesaid decisions, the only conclusion one can draw is, the assessee was holding the properties from the date of execution of registered sale deeds i.e., 23rd December 2005. Hence, the assessee held the property for a period of more than 36 months prior to the date of transfer. That being the case, the gain derived from the sale of properties have to be assessed as long term capital gain. In view of the aforesaid, we do not find any infirmity in the order of the learned Commissioner (Appeals) on the issue. Grounds are dismissed.

9. In the result, Revenue's appeal is dismissed.

ITA no.7614/Mum./2016
Assessee's Appeal

10. The grounds raised by the assessee are with regard to disallowance of assessee's claim of deduction under section 48(1) of the Act in respect of cost of improvement and expenditure incurred in connection with the transfer of property.

11. Brief facts are, while computing the long term capital gain on the amount received from sale of properties, the assessee claimed deduction of ₹ 1,75,658, towards cost of improvement and brokerage of ₹ 68,25,000, and professional fee of ₹ 2,76,110, as expenditure incurred in connection with transfer of the property. Since the Assessing Officer did not allow the aforesaid deductions, assessee challenged the disallowance before the first appellate authority.

12. After considering the submissions of the assessee in the context of facts and material on record, learned Commissioner (Appeals) observed that out of the deduction claimed towards cost of improvement, an amount of ₹ 44,39,845, representing expenditure incurred towards labour work, rent, rates and taxes, the purchase of building materials, professional fee are not allowable as some of them

were incurred after the properties were sold by the assessee. Further, he observed that pre-operative expenditure cannot be treated as cost of improvement. Accordingly, he disallowed the amount of ₹ 44,39,845. Insofar as brokerage and professional fee are concerned, he disallowed the entire claim on the observation that the assessee could not produce any evidence to substantiate its claim.

13. The learned Authorised Representative submitted, though, the bills were raised after the sale of property, however, the work was done prior to such sale. Therefore, the disallowance cannot be made. To substantiate his claim that the work was done prior to the date of sale, the learned Authorised Representative drew our attention to certain bills / invoices showing purchase of material. As regards disallowance of brokerage and professional fee, the learned Authorised Representative submitted, the assessee had furnished the bills of the brokers along with their names and addresses, PAN, etc. He submitted, all the evidences relating to the professional fee were also furnished before the Departmental Authorities. Thus, he submitted, assessee's claim of deduction should be allowed.

14. The learned Departmental Representative submitted, before the Departmental Authorities the assessee had not furnished supporting evidence to substantiate its claim. Therefore, assessee's claim of deduction cannot be allowed.

15. We have considered rival submissions and perused the material on record. It is evident, out of the amount claimed towards cost of improved, learned Commissioner (Appeals) has made part disallowance of ₹ 35,00,045, since they were debited after the date of sale of property. However, in the course of hearing before us, learned Authorised Representative drew our attention to certain evidences including bills showing purchase of material, etc. to demonstrate that the work relating to such expenditure was done prior to the date of sale. In our view, the aforesaid claim of the assessee requires verification on the basis of evidences furnished by the Assessing Officer. If the assessee can demonstrate through supporting evidences that the expenditure of ₹ 35,00,045, was incurred prior to the date of sale of property, the deduction claimed can be allowed. Accordingly, we restore this issue to the Assessing Officer for fresh verification. As regards the pre-operative expenditure of ₹ 9,39,800, after verifying the details of such expenditure has submitted before us by the learned Authorised Representative, we are of the view that such expenditure is not in connection with the transfer of property but are routine expenditure related to the business of the assessee. Therefore, we agree with learned Commissioner (Appeals) that pre-operative expenditure of ₹ 9,39,800, is not allowable. Insofar as payment of brokerage and professional fee are concerned, assessee's claim was

disallowed mainly due to lack of any supporting evidence. Before us, learned Authorised Representative has submitted that all the bills relating to such expenditure were filed before the Departmental Authorities. Without entering into the controversy whether supporting evidences relating to these expenditures were filed or not, we are inclined to restore the issue to the Assessing Officer for enabling the assessee to justify its claim by furnishing supporting evidence. The Assessing Officer must afford reasonable opportunity of being heard to the assessee to justify its claim. Grounds are partly allowed for statistical purposes.

16. In the result, appeal is partly allowed for statistical purposes.

17. To sum up, Department's appeal is dismissed and assessee's appeal is allowed for statistical purposes.

Order pronounced in the open Court on 22.05.2019

Sd/-
MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 22.05.2019

Copy of the order forwarded to:

- (1) The Assessee;*
- (2) The Revenue;*
- (3) The CIT(A);*
- (4) The CIT, Mumbai City concerned;*
- (5) The DR, ITAT, Mumbai;*
- (6) Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai