

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI**

**BEFORE
SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 3314/Del/2023
Asstt. Year: 2021-22

Shri Sunil Kapoor, K-77, Lajpat Nagar-II, New Delhi-110 024 PAN AOIPS5698J	Vs.	ACIT Circle Intt. Taxation 2(1)(2) New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Rajiv Tyagi, Advocate
Department by:	Shri Vizay B. Vasanta, CIT-DR
Date of Hearing:	05.03.2024
Date of pronouncement:	08.04.2024

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the assessee is directed against the final assessment order of Ld. Asstt. Commissioner of Income Tax, Circle Int. Tax (2)(1)(2) New Delhi ("**AO**") dated 25.09.2023 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (**the "Act"**) pursuant to the directions of Ld. Dispute Resolution Panel ("**DRP**") pertaining to the Assessment Year ("**AY**") 2021-22.

2. The assessee has raised the following grounds of appeal:-

- "1. *The Learned A.O. and DRP-2 while disallowing the Brokerage expense of Rs. 45 Lakh failed to appreciate that the Brokerage Commission paid by the Appellant to the 3 Brokers was duly supported by the Tax invoices issued by the 3 Brokers which contained their full addresses amongst other details. During the course of the Assessment proceedings the 3 Brokers had again issued Confirmation Letters with regard to the Brokerage paid to them by the the Appellant. The Appellant had placed on record the PAN details of the 3*

Brokers. Thus all the primary facts relating to the payment of the Brokerage Commission paid by the Appellant to the 3 Brokers, had been brought on the record of the Assessing Authority by the Brokerage Commission paid by the Appellant to the 3 Brokers in the relevant FY 2020 and the corresponding payment were made through cheques by Appellant. Thus both the source of payment as well as payment documented.

2. *The Learned A.O. and DRP-2 while disallowing the brokerage expense of Rs. 45 Lakh erred in appreciating the fact that Appellant providing the by the payment details of the respective brokers against the invoices issued to him and their PAN details, confirmation letter discharge its burden of payment being genuine. The onus was thereafter upon the revenue to corroborate the same by calling upon the respective brokers, their Income Tax returns, MoA, AoA of companies and verifying the veracity of the alleged transaction payment of 45Lac.*
3. *The Learned A.O. and DRP-2 while disallowing the brokerage expense of Rs. 45 Lakh by insisting upon agreements between brokers and assessee erred in appreciating the fact that there is trade practice in the market for such kind of transaction in real estate of commission agents to act upon oral instructions to look for prospective buyers as no party wants to remain bound or committed to one commission agent. Moreover, as a matter of practice, the property dealers do not sign formal Contract documents and the brokerage paid i.e. 3% in present case was within the accepted trade practice of property dealer charging 4% of sale consideration. The immovable property being high ticket priced property was sold through the assistance of stated brokers*
4. *The Learned A.O. and DRP-2 while disallowing the brokerage expense of Rs. 45 Lakh failed to appreciate that the proof of payment of brokerage of Rs. 45 Lakh by the Appellant in the sale of immovable property in year 2020 submitted to revenue went un rebutted as the revenue failed to rebut the same by cogent evidences in the form of any statement beneficiaries of documentary the or evidence thus the same should have been allowed.*
5. *The Learned A.O. and DRP-2 while disallowing brokerage the expense of Rs. 45 Lakh failed to appreciate that the brokerage cost incurred and claimed was the reasonable cost incurred in the sale transaction of the immovable property in ordinary business practice.*
6. *The Learned A.O. and DRP-2 while disallowing the construction and improvement cost incurred by the Appellant to the extent of Rs. 31,86,363 in the F.Y 2010-11 on the Agriculture Land purchased in year 2009 despite the documentary evidence in the form of property tax receipt and sale deed supporting the existence of 2½ storey structure (Farm land of 2374 sq. Mtrs. Having built up area on GF, FF and terrace of 626 Sq. Mtrs., existing on the sold property in the year 2020.*

7. *The Learned A.O. and DRP-2 while disallowing the construction/ improvement incurred by the Appellant to extent of Rs. 31,86,363 by disbelieving the cash vouchers signed by Shri C. Prasad, Civil Contractor in year 2011 paid in cash for Labourers with source of fund from relative and friends, when the same could have been verified by calling Shri C. Prasad, Contractor for corroboration by scrutinizing his business returns.*
8. *The Learned A.O. and DRP-2 while disallowing the in disallowing the construction and improvement cost of Rs. 31,86,363 when the same could have been corroborated by the return filed by Shri C. Prasad, Civil Contractor in his returns when the Appellant provided also the business address, contact details, payment confirmation letter, quotation building covered area with material rates of year 2010 of him.*
9. *The Learned A.O. and DRP-2 while disallowing the in disallowing the brokerage and construction cost of Rs. 31,86,363 when the revenue could have alternatively valued the cost of construction through the Department, Valuation Officers as the immovable build up structure (Farm) land of 2374 sq. Mtrs. Having built up area on GF,FF and terrace of 626 Sq. Mtrs or 6,817.14 Sq. Ft.) is still in existence or ought to have applied the CPWD rate of construction for 'A' class construction of Rs. 1500 Sq. Ft. in year 2010-11.*
10. *The Learned A.O. and DRP-2 while disallowing the in disallowing brokerage the and construction cost was in-effect re-opening the assessment of years 2011-12, which was time barred under Section 153 of I.T.A., 1963 and thus could not be called upon to verify the 10 year old transaction through Appellant to the extent of beyond reasonable doubt. Even under Section 149(1) (b) of Income Tax Act, 1961, the assessee cannot be called upon to furnish the particulars income beyond a period of 10 years.”*

3. In brief, the facts are that the assessee is a non-resident individual. He filed his revised return for AY 2021-22 on 31.03.2022 declaring income of Rs. 24,38,350/-. His case was selected for complete scrutiny for the reason that large deduction/exemption has been claimed under section 54 etc. Statutory notice under section 143(2) of the Act was issued on 28.06.2022 through ITBA portal electronically which was duly served upon the assessee. Subsequently three notices under section 142(1) along with questionnaire were issued electronically to which the assessee responded by submitting replies from time to time.

4. The Ld. AO found from the ITR that the assessee has computed capital gain as under:-

<i>C. Capital Gains</i>		
<i>Long Term Capital Gain</i>		
<i>(ii) Sale of Property</i>		
<i>Sale Consideration</i>		<i>15,00,00,000.00</i>
<i>Less: Expenses on transfer-Commission on sales</i>		<i>45,00,000.00</i>
<i>Net consideration</i>		<i>14,55,00,000.00</i>
<i>Less: Index cost of acquisition</i>		
<i>Cost of acquisition f/y 2009-10</i>	<i>85,47,364.00</i>	<i>1,73,83,490.30</i>
<i>Cost of Improvement in 2010-11</i>	<i>73,00,000.00</i>	<i>1,31,57,485.03</i>
<i>Long term capital gain</i>		<i>3,05,40,975.33</i>
<i>Less: Deduction U/S 54 Capital gain account scheme bank deposit</i>		<i>11,49,59,024.67</i>
		<i>11,50,00,000.00</i>

5. The Ld. AO issued show cause notice to the assessee to explain why in the absence of documentary evidence the indexed cost of improvement of Rs. 1,31,57,486/- and transfer expenses of Rs. 45,00,000/- be not disallowed. Additionally, in the absence of copy of capital gains account scheme statement evidencing investment of Rs. 11,50,00,000/- be not disallowed. The assessee submitted replies on 23.12.2022 and 26.12.2022 the relevant extracts of which are reproduced by the Ld. AO in para 3.7.1 of the assessment order. It was stated therein that the assessee purchased a plot of land in AY 2010-11 for Rs. 85,47,364/- inclusive of stamp duty of Rs. 57,47,364/-. He constructed residential house thereon and spent Rs. 73,00,000/- on construction. The details of payment amounting to Rs. 41,13,637/- to Mr. C Prasad, Civil Contractor and other vendors out of assessee's J&K bank account were given. It was stated that balance payment of Rs. 31,86,363/- were made to the labourers in cash towards labour charges. The source of cash was explained as receipt from relatives, friends and cash in hand with the assessee. Regarding transfer expenses of Rs. 45,00,000/- towards sales commission it was stated that Rs. 15,00,000/- each was given through cheque to Mr. Tanishq Sawhney F. 3/18, Vasant Vihar, New Delhi; Sunshine Buildpro Pvt. Ltd. 14 Sainik Farm, C-3 lane Khanpur, New Delhi and Chinar Farms Pvt. Ltd. 61 Ghitorin, New Delhi. Copies of invoices and bank statement of assessee were provided as proof. It

was further submitted that the assessee opened an account with Punjab National Bank on 26.11.2021 under Capital Gain Account Scheme, 1988 vide Account No. 0992001000400429 for sum of Rs. 11,50,00,000/- in the name of the assessee and produced bank certificate as also bank account statement.

6. The submissions of the assessee were not acceptable to the Ld. AO who disallowed the expenses claimed at Rs. 73,00,000/- being cost of improvement (Indexed cost of improvement Rs. 1,31,57,486); transfer expenses of Rs. 45,00,000/- for the reasons given in para 9.9 and 9.10 of the assessment order. The Ld. AO also disallowed Rs. 11,49,59,024/- being assessee's claim of deposits of Rs. 11,50,00,000/- into Capital Gain Account Scheme for the reason given in para 3.11. Accordingly, the total income was proposed to be assessed at Rs. 13,50,54,860/- vide draft assessment order dated 27.12.2022 under section 144C(1) of the Act.

7. The assessee objected to the proposed aforesaid disallowances before the Ld. DRP. The written objection filed before the Ld. DRP has been reproduced in para 4.2 of Ld. DRP's directions under section 144C(5) of the Act dated 17.08.2023. Regarding the disallowances of Rs. 73,00,000/- incurred on the construction of the residential house on the Farm land, it was submitted that during the relevant AY 2011-12 the Ld. AO after duly considering the same, allowed it. No disallowance was made by him in this regard. It was also submitted that purchase of Farm land has been accepted by the Ld. AO but he doubted the cost of construction/indexed cost of improvement carried out on the land of an expense of Rs. 1,31,57,487/-, though Rs. 19,00,000/- was paid to Mr. C. Prasad, Civil Contractor through proper banking channels and Rs. 18,48,637/- was paid through bank to various vendors. The Ld. AO disbelieved payments aggregating to Rs. 31,83,363/- made in cash to the contractor for civil construction. Regarding transfer expenses of Rs. 45,00,000/- paid to three entities for services rendered in arranging the buyer for sale of property, it was submitted that

disallowance has been made only for the reason of want of copy of agreement with the recipients of the commission. The deposit of Rs. 11,50,00,000/- under section 54 of the Capital Gains Account Scheme, 1988 has been disallowed for no reason at all.

8. The Ld. DRP rejected the assessee's claim of brokerage and transfer expenses of Rs. 45,00,000/- for lack of supporting document, e.g. agreement etc. The Ld. DRP further observed that just because payment has gone from assessee's bank account does not qualify it, ipsofacto as transfer expenses for the property. The Ld. DRP gave direction to the Ld. AO for further verification regarding claim of Rs. 41,13,637/- and allow if found by him to be bonafide expenses. The Ld. DRP directed the Ld. AO to consider CBDT Circular No. 01/2022 in allowing relief for deposit in Capital Gain Account Scheme.

9. Pursuant to the directions of the Ld. DRP, the Ld. AO completed the final assessment on 25.09.2023 under section 143(3) r.w.s. 144C(13) of the Act on total income of Rs. 1,26,40,460/- including therein the disallowance of transfer expenses of Rs. 45,00,000/- and the indexed cost of improvement of Rs. 57,43,085/- being expenditure incurred in cash of Rs. 31,86,363/- on civil construction against which the assessee is in appeal before the Tribunal and all grounds of appeal relate thereto.

10. The Ld. AR drew our attention to the copy of invoices/bill appearing at page 12-17 of Paper Book which were produced before the Ld. AO/DRP in support of transfer expenses paid to three parties. Details of payment e.g. names of the parties, their complete address, PAN, cheque No. and date with amount were also furnished. It is submitted that the assessee has discharged his burden of proving the genuineness of expenses incurred by him in connection with transfer of his property. The Ld. AR further submitted that there is no prevailing trade practice in real estate business to sign written agreement/contract documents for obtaining commission. The

agents act upon oral instructions to look for prospective buyers. He contended that proof submitted by the assessee towards payment through banking channel could not be controverted by the Ld. AO/DRP. The payment being reasonable is allowable. The Ld. AR relied on the decision of the Coordinate Delhi Bench in Ashwin Kapur vs. ACIT in ITA No. 474/Del/2023 dated 08.12.2023.

10.1 As to the disallowance of expenditure of Rs. 31,86,363/- incurred in cash for meeting construction/improvement cost, the Ld. AR submitted that cash was paid to the contractor Shri C Prasad for making payment to labourers. The source of cash was explained to be fund from relatives and friends as also his own cash in hand. Copies of cash vouchers signed by the contractor were submitted in support thereof. The Ld. AO doubted their authenticity for the reason that they had no cash voucher number printed on them and that the bank statements of the contractor did not reflect any cash deposit in his bank account. According to him these are not valid reasons for disallowance.

11. The Ld. CIT-DR supported the order of the Ld. AO/DRP.

12. We have considered the rival submissions and perused the records. The issue involved in this appeal concerns the mode of computation of capital gains enshrined in section 48 of the Act. Section 48 r.w. second proviso provides that capital gains shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the expenditure incurred wholly and exclusively in connection with such transfer; the indexed cost of acquisition and the indexed cost of any improvement thereto. During the year, the assessee sold a property vide sale deed dated 07.08.2020 in New Delhi for a total consideration of Rs. 15 crore and claimed deduction of transfer expenses of Rs. 45 lakhs on account of brokerage/commission of Rs. 15 lakhs each paid to three parties and the indexed cost of improvement of Rs. 1,31,57,486/-. In

the final assessment order passed pursuant to directions of the Ld. DRP, the Ld. AO negated the claim of deduction of transfer expenses in full and disallowed the claim of the indexed cost of improvement of Rs. 57,43,085/- out of Rs. 1,31,57,486/- claimed. This represents the amount of Rs. 31,86,363/- being expenditure in cash for making payment to labourers on civil construction.

13. It is manifest from the records that during assessment proceedings vide reply dated 20.12.2022 the assessee submitted details of payment regarding transfer expenses of Rs. 45,00,000/- towards sales commission in connection with transfer of property containing therein name of the party and address, PAN, Cheque No. and date and amount (page 2 of Paper Book). Copies of three invoices (page 12-17 of Paper Book) from the parties to whom commission is paid for the commission amount of Rs. 15,00,000/- each were also produced. Copy of J&K Bank statement of the assessee showing total payment of Rs. 45,00,000/- in three transactions/entries of Rs. 15,00,000/- each as per the bank statement was also submitted. It is observed from para 3.10 of the assessment order that the Ld. AO has accepted that the assessee has submitted vouchers in support of transfer expenses and that payments were made through assessee's bank account. It is therefore evident that genuineness of the impugned payment of Rs. 45,00,000/- as transfer expenses in connection with transfer of property is well established. Despite that disallowance is made only for the reason that copy of agreements with respect to commission services was not submitted. The contention of the assessee is that in real estate business there is no practice to enter into written agreement between the seller of the property and the commission recipients for rendering the services of arranging prospective buyers. The commission recipients act on oral instructions of the seller of the property. Undoubtedly, the commission has been paid through the bank account of the assessee with J&K Bank. We are, therefore of the view that the impugned disallowance is not justified. The Hon'ble Karnataka High Court has held in Govind Raju (N) vs. ITO (2015) 377 ITR 243 (Kar) and CIT vs. Venkat

Rajendran (2015) 373 ITR 424 (Kar) that brokerage in connection with transfer is deductible expenditure. Ground No. 1 to 5 are accordingly decided in assessee's favour.

14. As regards disallowance of cost of improvement of Rs. 31,86,363/- the indexed cost of which is Rs. 57,43,085/- the relevant facts are that the assessee had purchased agricultural land measuring two bighas sixteen biswas situated in Mahrauli, New Delhi vide sale deed executed on 23.10.2009 (i.e. previous year relevant to AY 2010-11). It is claimed by the assessee that subsequently he spent a sum of Rs. 73,00,000/- on the construction of residential house and made payment of Rs. 41,13,637/- out of his J&K Bank account through Mr. C Prasad, Civil Contractor and other vendors. This expenditure of Rs. 41,13,637/- towards construction of residential house stands allowed by the Ld. AO after verification pursuant to direction of the Ld. DRP. In reply submitted by the assessee on 23.12.2022 and 26.12.2022 the assessee stated that balance payments of Rs. 31,86,363/- is made to the labourers over the period in cash towards labour charges for construction of house. It is this expenditure of Rs. 31,86,363/- incurred in cash which has been disallowed by the Ld. AO/DRP. The reasons assigned therefor are that such cash expenditure has been incurred through support of relative and friends. So source of cash payments is not proved; no cash withdrawals are reflected in assessee's bank statements; authenticity of copies of cash vouchers is doubtful as no cash voucher nos. are printed on them; no cash deposits are reflected in the bank statement of Mr. C. Prasad through whom the cash is allegedly disbursed. In the opinion of the Ld. AO/DRP the cash expenses of Rs. 31,86,363/- allegedly spent for improvement are not supported by proper documentation and hence are not allowable deduction.

15. We are inclined to agree with the view of the Ld. AO/DRP. We have perused the copy of sale deed dated 07.08.2020 placed at page 18 to 47 of the Paper Book. It describes the assessee as owner of land measuring 2

bighas and 16 biswas along with built-up house. No clear description of built-up house is given therein. Before the Ld. AO/DRP it was stated that on bare plot of land purchased in the year 2009 the assessee constructed during AY 2011-12 thereon two storey building having built-up area of 62659 meters on ground floor, first floor and terrace. There is thus no clarity about the house constructed on the land purchased. It was also stated before the Ld. AO/DRP that payments aggregating to Rs. 31,86,363/- were made to the contractor, Mr. C Prasad for civil construction. However, no details of cash paid to the contractor were given nor the Contractor has given any details of disbursement of cash to the labourers for work done by them. The source of availability of the impugned cash is also vague. If relatives and friends provided cash, the assessee ought to have brought on record details of such friends and relatives who gave monetary help. No supporting evidence has been brought on record. How much cash was available with the assessee at the relevant time with supporting evidence was also not given.

16. It is, hereby clarified that in ground Nos. 6 to 10 relating to the above disallowance the assessee has raised new/fresh pleas e.g. (i) that the Ld. AO could have called Mr. C. Prasad, Civil Contractor for verification, though initially it was stated before the Ld. AO that he was no more and hence confirmation from him cannot be obtained. It was on 26.12.2022 when limitation to frame assessment was about to expire, copy of receipt and cash vouchers allegedly signed by Mr. C. Prasad was submitted. There is no whisper in the assessment order or in the direction of the Ld. DRP that the assessee requested for verification of the receipt & cash vouchers by producing him before the Ld. AO. (ii) that the Revenue could have got the cost of construction valued through Departmental Valuation Officer. No such plea was ever taken before Ld. AO/DRP. (iii) that disallowance of brokerage and construction cost was in effect re-opening the assessment of AY 2011-12 which have since become time barred. Nothing of this sort of plea is forthcoming from the records.

17. It is evident that the aforesaid new/fresh pleas involved investigation of facts. Nothing has been stated by the Ld. AR why such pleas were not raised before the Ld. AO/DRP. In the absence of any reasonable cause for not raising new/fresh pleas before the Ld. AO/DRP we decline to entertain them.

18. We have perused the precedents relied upon by the assessee. These primarily concern addition on account of cash credits under section 68 of the Act. None of them, in our humble opinion, helps the assessee. These are clearly distinguishable on facts.

19. Consequently, the impugned disallowance of cost of improvement of Rs. 31,86,363/- (indexed cost Rs. 57,43,085/-) is justified and therefore sustained. Ground No. 6 to 10 are accordingly decided against the assessee.

20. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 8th April, 2024.

**sd/-
(G.S. PANNU)
VICE PRESIDENT**

**sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER**

Dated: 08/04/2024
Veena

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

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Date on which the fair order is placed before the Dictating Member for pronouncement	
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