

The Statesman Ltd. Vs. Assistant Commissioner of Income

The Statesman Ltd. Vs. Assistant Commissioner of Income

SooperKanoon Citation : sooperkanoon.com/75432

Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Jan-31-2007

Reported in : (2007)112TTJ(Kol.)593

Judge : N Dash, J Kishore

Appellant : The Statesman Ltd.

Respondent : Assistant Commissioner of Income

Judgement :

1. The appeal filed by the assessee is directed against the order passed by the Id. CIT(A)-VII, Kolkata dated 23.08.2006 for the assessment year 2003-04 on the following grounds: (1) That the Id. CIT(A)-VII, Kolkata erred in arbitrarily confirming the inclusion and assessment of Rs. 14,49,14,951/-, as alleged short term capital gains arising to the appellant company on sale of 4th, 5th, 6th, & 7th floors of Wing 'A' of the premises, being land & building situate at B-148, Barakhamba Road, New Delhi, in terms of four separate and distinct agreements for sale, all executed on 22nd October, 2001 in favour of M/s. Prity Portfolio Pvt. Ltd., Nahid Finlease Pvt. Ltd., Bist Hotels Pvt. Ltd. and Sagari Secfin Pvt. Ltd. respectively.

(2) That the Id. CIT(A)-VII, Kolkata erred in arbitrarily alleging and/or holding that it was impossible to bifurcate the aggregate sale consideration of Rs. 16,99,85,636/- received by the appellant company in respect of the aggregate area of 1656.79 square meter of office space along with proportionate undivided indivisible share in the land underneath, as also the proportionate share in all common areas and

facilities etc. sold by the appellant company to the said four buyer companies named in Ground No. 1 herein above.

(3) That the Id. CIT(A)-VII, Kolkata erred in arbitrarily alleging and/or holding that by virtue of the Development Agreement dated 24th February, 1988 entered into between the appellant Company, the owners, and M/s. Ansal Properties & Industries Pvt. Ltd., the Developers, the appellant company's rights in the whole of the land measuring about 1.805 acres equivalent to 7307 square meters or 78,645 sq. feet, and in the two Wings 'A' & 'B' situate at premises No. B-148, Barakhamba Road, New Delhi got extinguished, and that even the so called purchase consideration, being the development costs of 43.2% of the newly built aggregate office area, being the owner's share/allocation forming part of Wing 'A' therein, was impossible to bifurcate.

(4) That the Id. CIT(A)-VII, Kolkata erred in arbitrarily alleging and/or holding that in absence of any separate agreement for sale of land & buildings/ structures thereon, the bifurcation of aggregate sale consideration of Rs. 16,99,85,636/- receivable by the appellant company from the said four buyers into Rs. 12,31,42,645/- for land and Rs. 4,68,42,991/- for buildings, as carried out by the appellant company for the purposes of computing its tax liability, for the year under appeal, was wholly hypothetical, imaginary and artificial.

(5) That the Id. CIT(A) VII, Kolkata should have held that the aggregate gains in the sum of Rs. 6,55,59,433/- arising on sale of 1656.79 sq. mtrs. of the aforesaid office premises, were assessable as long term capital gains, as the same were attributable to the proportionate share of land underneath the super structures in terms of the said four agreements for sale, and the balance sum of Rs. 2,49,38,557/- only was chargeable to tax in the hands of the appellant company as short term capital gains, in terms of the computation of capital gains filed by it along with its return of total income for the year under appeal.

(6) That the Id. CIT(A)-VII, Kolkata, erred in confirming the levy of interest under Section 234B in the sum of Rs. 6,46,584/- and under Section 234D in the sum of Rs. 1,97,933/- for the year under appeal, in terms of the order dated 25.1.2006 passed by the Id. ACIT, Circle-7, Kolkata under Section 154/143(3) of the said Act.

(7) That the impugned appellate order dated 23rd August, 2006 as well as the impugned assessment order dated 21st November, 2005 passed by the Id. CIT(A)-VII, Kolkata and the Id. ACIT, Circle-7, Kolkata respectively, are wholly against the facts and evidences on record, illegal, invalid, unreasonable and/or otherwise perverse in respect of the matters covered by Grounds No. 1 to 6 herein above.

2. The main issue involved in this appeal filed by the assessee-company relates to the question as to whether the capital gains arising on sale/ transfer of assessee-company's rights, title and interests in the 4th, 5th, 6th, and 7th floors of the newly constructed multistoried building situated at B-148, Barakhamba Road, New Delhi, should be bifurcated, in between the proportionate undivided portion of land underneath the said building on the one hand, and the superstructure forming part of the said four floors on the other, so that the gains attributable to the transfer of proportionate undivided land, can be assessed to tax as long term capital gains, and the gains attributable to the transfer of the super structure forming part of the said four floors, can be assessed to tax as short term capital gains.

3. The relevant facts relating to this case are that the assessee-company is engaged, inter alia, in the business of printing and publishing the renowned daily newspaper named "The Statesman" from both Kolkata and New Delhi for a very long time. The assessee-company owned and held on perpetual lease, an immovable property situated at B-148, Barakhamba Road, New Delhi measuring in all about 1.805 acres i.e. equivalent to 7307 sq. metres. The assessee got the said property developed through M/s. Ansal Properties & Industries Pvt. Ltd., a reputed builder and developer of New Delhi, vide an Agreement Deed dated 24.02.1988. In pursuant to the agreement, M/s. Ansal Properties & Industries Pvt. Ltd. constructed super structures on such land in two blocks called Wing 'A' and Wing 'B'. Wing 'A' was handed over to the assessee-company on 24.08.2001 and Wing 'B' was retained by the developers in terms of the said Development Agreement dated 24.02.1988.

The newly constructed two Wings contained in all 25,835.82 sq. mtrs. of built up area
as

under:_____

of Total newly Wing 'A' allotted/ Wing 'B' allotted /construction constructed/
belonging to the belonging to the built up appellant assessee developers, M/s.

area in Sq.

company (sq.

Ansal Properties & mtrs. (100%) mtrs.)(43.2%) Ind. Pvt. Ltd. (sq.

mtrs.)

(56.8%)_____

to	16	floors	14,866.70	6,422.55
8,444.15				
floor		376.51		162.65
213.86				
Basements		10,592.61		4,575.00
6,016.62				
25,835.82				11,161.19
14,674.63				

The assessee apart from above 'A' Wing also received Rs. 6.95 crores through Bank drafts from M/s. Ansal Properties & Industries Pvt. Ltd. apart from additional charge for the newly constructed area forming part of Wing 'A' of Rs. 45,44,000/- for the transfer of 56.8% of the said land to the Developers, M/s. Ansal Properties & Industries Pvt.

Ltd. 4. The assessee-company thereafter got the said land as also the newly built super structure valued by M/s. G.S. Mehendirata, Govt. approved Registered Valuer in terms of two valuation report, one dated 12.08.2002 and the other dated 26.08.2002, which are also appearing at pages 109 and 115 respectively in the paper book filed by the assessee.

The above said valuation reports were obtained by the assessee-company both for the purposes of necessary accounting entries in its books of accounts and also for the purposes of filing of income-tax returns and as per such valuation report,

the fair market value of 43.2% of the land retained by the assessee-company as on 01.04.1981 came to Rs. 8,68,06,944/- and estimated market value of newly built superstructure forming part of Wing 'A' as allotted to the assessee-company on August, 2001 came to Rs. 14,76,04,000/-.

5. Based upon the aforesaid two valuation reports, the assessee-company filed its return for the financial year ending 31st March, 2002 corresponding to the assessment year 2002-03 declaring an assessable long term capital loss of Rs. 28,99,11,595/- arising on transfer of 56.8% of the said land to the Developers, M/s. Ansal properties & Industries Pvt. Ltd., which was transferred in terms of letter dated 24th August, 2001. While claiming such capital loss, the assessee-company valued the fair market value of 56.8% of the land transferred to M/s. Ansal Properties as on 01.04.1981 at Rs. 11,41,35,056/- on the basis of the valuation report by Shri G.C.Mahendirata and after claiming the benefit of indexation in terms of the second proviso to Section 48 of the Income Tax Act computed the indexed cost of acquisition of such 56.8 % land at Rs. 48,62,15,339/- (Rs. 11,41,35,056 x 426/100).

6. The A.O. processed the said return filed by the assessee-company for the assessment year 2002-03 in terms of the intimation under Section 143(1) dated 11th February, 2003 by accepting the return filed by the assessee. The assessee in the meantime capitalized the fair market value of 43.2% of the said land at Rs. 58,28,71,000/- and the super structure at Rs. 14,76,04,000/-. However, no depreciation whatsoever was claimed by the assessee-company for tax purposes in respect of such capitalized value of building, save and except in respect of Rs. 3,84,211/-, which related to the office portion of the said building.

7. During the current financial year, i.e. financial year 2002-03 corresponding to the assessment year 2003-04, the assessee-company sold/ transferred four floors, namely, 4th, 5th, 6th, and 7th floors forming part of the said newly constructed Wing 'A' by executing four distinct and independent agreements with four different buyer companies, a copy of which of the said four agreements have been filed in the paper book by the assessee. The total area forming part of the said floors including 18 car parking garage space situated in the basements, as were sold

during the year under appeal came to 1656.79 sq. mtrs., which is 14.84% of the total area of 11,161.19 sq. mtrs.

allotted to the assessee-company in Wing 'A'. The aggregate consideration for such sale of said four floors came to Rs. 16,99,85,636/-.

8. While filing its income tax return for the assessment year 2003-04, the assessee-company declared the long term capital gains of Rs. 6,55,59,433/-, arising on transfer of 14.84% of the proportionate undivided portion of the said land attributable to the said four floors and another sum of Rs. 2,49,38,557/- by way of short term capital gains arising on transfer of the built up super -structures area measuring about 1656.79 sq. mtrs. forming part of the said four floors, as sold and transferred by the assessee-company during the year. The assessee-company while filing such return of income claimed set off of long term capital gains in the sum of Rs. 6,55,59,433/- attributable to the land against the long term capital loss of Rs. 28,99,11,595/- as was brought forward from the assessment year 2002-03 and included in its total taxable income, the short term capital gains of Rs. 2,49,38,557/-. It is important to note that while working out the proportionate land area, the assessee applied the ratio of 2.6288 :1.

9. The A.O. while completing the assessment, after taking into consideration the submission of the assessee and the deed of agreement between the assessee and M/s. Ansal properties & Industries Pvt. Ltd., observed that the assessee-company though previously owned land and structure thereon, the same was extinguished and a new property was constructed and in lieu of consideration of old land and building the assessee owned Wing 'A' including space at 4th floor to 7th floor.

The A.O. further observed that as soon as the multistoried building was constructed and sold to different parties, the right of earlier assets was extinguished and the assessee was no more the owner of the land but was in fact owner of the space received in lieu of consideration of old building structure vide Development Agreement with M/s. Ansal Properties & Industries Pvt. Ltd. The A.O. further observed that the assessee was claiming depreciation on the said building. Based on above observation the A.O. rejected the contention of the

assessee that as per terms of agreement 43.20% of the share of entire land would remain with the Company and the balance would be transferred to the Developer and it was not claiming depreciation on such said building observing that from the perusal of statement of depreciation, it was evident that the depreciation was being claimed on building and the assessee become the owner of 43.2% space of Wing 'A' only it was handed over to it after construction by M/s. Ansal Properties.

10. The A.O. also rejected the contention of the assessee that since land is a capital asset which was acquired much earlier, long term capital gain was rightly computed on the same and it had rightly made the apportionment of sale consideration between land and building on the basis of ITAT decision in the case of I.T.C. Limited reported in 86 ITD 135 (Kol.) (Third Member).

11. The A.O. has finally rejected the claim of the assessee to have long term capital gains on sale of such four floors so far as sale of proportionate land portion, which was eligible for set off against brought forward long term capital loss and has recomputed the profit on such sale of four floors by observing as under: The aforesaid fact of the assessee's submission is not applicable in the assessee case, as the assessee company apportioned share of land and building was extinguished as soon the same was handed over to developer for development of multistoried building and received the space at 4th to 7th floor. So the old assets extinguished and new assets in the form of building viz. office space at 4th to 7th floor came into existence. The assessee during the year owned office space in multistoried building at 4th to 7th floor, which was utilized by company as its own space. During the year the assessee sold entire 4th to 7th floor of the said business assets. It is clear from the facts that the purchaser who acquired the business space was acquiring the office space at 4th to 7th floor and not the land & building. Therefore, apportionment was not correct.

Therefore, as per Income Tax Act during the year the assessee company sold office space 4th to 7th floor at Delhi which is an business assets and, therefore, income arises thereon will be short term capital gain and claim of assessee as long term capital loss by taking the valuation as on 1.4.1981 and indexation thereon cannot be considered. Therefore, profit on sale of fixed assets as taken by

the company the profit & loss a/c. amounting to Rs. 14,49,14,951/- on account of sale of fixed assets, viz. office space at 4th to 7th floor at Delhi is assessed under the head short term capital gain.

The aforesaid detail of sale of building was submitted by A/R vide Annexure-12 dated 06.10.2005 which clearly shows as under:					Asset
Building					Description
4 th to 7 th floor of Delhi High Rise of asset and 18 Garage Spaces					Cost
Rs.					2,57,18,814/-
					Depreciation
Rs.					6,48,129/-
					Sale Rs.
16,99,85,636/-					

Profit on Rs. 14,49,14,951/- From the said detail it is clearly established that the assessee sold office premises viz. depreciable business assets and thereby on sale earned short term capital gain of Rs. 14,49,14,951/-.

Therefore, the said income is taxable under the head short term capital gain and accordingly considered thereof.

12. Aggrieved with such order of A.O., the assessee preferred an appeal before the Id. CIT(A), wherein it has placed reliance on the agreement and valuation report as discussed above and has contended that it had received a composite sum for the transfer/ sale of office premises and while computing the capital gains, the said amount has been apportioned as consideration received towards the sale of the building and the proportionate portion of land attributable to such four floors. The assessee has also filed the computation of capital gains on sale of such building before the Id. CIT(A), which is being re-produced hereunder for the sake of

reference:

of sale	of	building	Amount (Rs.)	Amount	(Rs.)	Amount
---------	----	----------	--------------	--------	-------	--------

(Rs.)					
169,985,636	received		for		sale
of					
of					indexed
200,942,000					
share					
86,806,944					
value					of
388,027,040					
of					
147,604,000					
2.6288					
Land					
Building					
(Split	in	123,142,645	46,842,991	the	ratio
above)					
of	acquisition	21,904,434	(147,604,000		x
14.84%					
cost					
of					
x		43.2%			x
57,583,213					
term					capital
24,938,557	gains				
term					capital
65,559,433					
:	set		off		against
65,559,433					

term capital 0 The assessee has further relied on the various decisions of different Courts and Benches of Tribunal including the decision of the Hon'ble Madras High Court in the case of CIT v. Dr. D.L. Ramchandran reported in 236 ITR 51 and the decision of jurisdictional Tribunal in the case of ITC Limited (supra).

13. The Id. CIT(A) after considering the order of A.O., submission of the assessee and case laws relied upon has upheld the order of A.O. by observing as under: The artificial manner of computation for tax calculation, in which efforts have been made to bifurcate the purchase and the sale consideration, is not amenable for scrutiny & verification. The ratio of indicated value of land to the value of building is based purely on the hypocritical grounds, which can not be accepted as a proper bifurcation. Since the appellant had sold 1656.79 sq. mtr. of building space at Rs. 16,99,85,636/-, the sale is to be treated as a composite sale. No separate agreement was entered for the building and for the land. The appellant had claimed that it has received Rs. 12,31,42,645/- for land and Rs. 4,68,42,991/- for the building by bifurcating the sale consideration received purely on imaginary & hypothetical ratios. This is not admissible under the Income -Tax Act. Obviously, the land in question is not capable of being sold for Rs. 12,31,42,645/-. In fact, if the appellant wants to sell the land independently, it may not get any value because undivided interest in land is having no market value. In view of this, the A.O. has rightly rejected the methods of computation. The cases cited by the appellant are not applicable in the appellant's case, as discussed above.

In view of the above, I do not find any infirmity in the order of the A.O. in treating the whole capital gain as short term capital gain. I do not find any merit in the appellant's submission.

Therefore, Ground No. 1 is dismissed and A.O.'s action in treating Rs. 14,49,14,951/- as short term capital gain is confirmed".

14. The assessee is aggrieved with such order of Id. CIT(A) and has now come in appeal before us by taking the abovementioned grounds of appeal.

15. In appeal before us, the Id. Senior counsel Shri N.K. Poddar appearing for the assessee-company has assailed the order of Id. CIT(A) and has first narrated the facts of the case before us, which has already been discussed in the above mentioned paragraph of this order.

Shri Poddar has submitted that the entire order of A.O. and CIT(A) is based on misappropriation of the facts of the case and has submitted that it is important to

note that while filing its return of income for the immediately preceding year, i.e. for the assessment year 2002-03, the assessee-company computed the capital gain/loss arising on sale/ transfer of 56.8% of the said land in favour of the developer M/s.

Ansal Properties & Industries Pvt. Ltd. and the sum of Rs. 28,99,11,595/- i.e. loss based on the said valuation reports, as per details given in the computation of total income was filed by the assessee-company along with its income tax return for the assessment year 2002-03, which was duly proceeded by the A.O. under Section 143(1) vide intimation dated 12.02.03. He has filed a copy thereof, which is available in the paper book. Id. Senior counsel Shri Poddar has thereafter pointed out that during the year under consideration, the assessee-company sold an aggregate area of 1659.79 sq. mtr. of the office space forming part of 4th to 7th floor of the said premises in 'A' Wing along with the proportionate undivided individual shares in the land underneath as also the proportionate share in the common areas and facilities and 18 car parking space in the basement in terms of four separate and distinct agreement for sale, all executed by the assessee-company vide agreement for sale dated 22.10.2001 in favour of M/s. Pritty Portfolio Pvt. Ltd., M/s. Nahid Finlease Pvt. Ltd., M/s.

Bist Hotels Pvt. Ltd. and M/s. Sagari Secfin Pvt. Ltd., all of New Delhi for an aggregate consideration of Rs. 16,99,85,636/-, a copy of which of the said four agreements was also placed by Shri Poddar claiming that the same were filed before the A.O. in the course of impugned assessment proceedings.

16. Shri Poddar has thereafter contended that since the said four floors sold by the assessee came to 14.84% of the total area allotted to the assessee in Wing 'A' by way of owned shares, the assessee bifurcated such aggregate consideration of Rs. 16,99,85,636/- into land and building in the ratio of 2.622 : 1 on the basis of the aforesaid valuation report by Shri G.S. Mendiratta as under: Land - Rs. 12,31,42,645/- Building - Rs. 4,68,42,991/- Shri Poddar thereafter has stated that the assessee has computed the long term capital gain and short term capital gain on the basis of valuation report and by taking the indexation cost on the basis of such valuation report and worked out such long term capital gain attributable to the

said four floors at Rs. 6,55,59,433/- and short term capital gain against the sale of super structure on such land comprising of 4th to 7th floor at Rs. 2,49,38,557/-.

17. Shri Poddar has pointed out that the A.O., however, while completing the assessment has not appreciated the above computations of long term and short term capital gain by the assessee and has basically observed that the rights of the assessee company in the land and building forming part of the said property situated at B-148, Barakhamba Road, New Delhi were extinguished as soon as the same were handed over to the developer for development through construction of new multistoried building and the assessee-company received new assets in the form of its space forming part of Wing 'A'. Shri Poddar has submitted that the A.O. has basically treated such agreement for development of such land and construction of new building thereon as sold by the assessee to M/s. Ansal Properties & Industries Pvt. Ltd., against which the assessee has got 43.2% share on the old land plus some payment by bank accounts and accordingly the A.O. has observed that such assets were acquired by the assessee only in August, 2001 by the developer and such four floors sold by the assessee during the year under consideration were wholly assessable to tax as short term capital gains since all the four purchasers purchasing office space at 4th to 7th floor had only acquired office space and not the land and building and, therefore, the apportionment made by the assessee was not proper and the assessee could not be allowed the benefit of indexation with effect from 1.4.1981 as such asset was only acquired by the assessee in August, 2001.

18. Shri Poddar has assailed such observation of A.O., which has been confirmed by the Id. CIT in appeal, basically agreeing with the observation of A.O. while making the impugned addition. Shri Poddar pointed out that the Id. CIT(A) has endorsed the view of A.O. on the basis of same analogy as observed by A.O. that the assessee only received such assets against sale of old land and building to M/s.

Ansal Properties & Industries Pvt. Ltd. 19. Shri Poddar has stated that both the A.O. as well as CIT(A) erred in arbitrarily treating the said sum of Rs. 14,49,14,951/- as short term capital gain arising to the assessee on sale of 4th,

5th, 6th & 7th floor of the premises and has assailed their observation in holding that the assessee-company's right in the whole of the said land got extinguished and in further holding that allocation of consideration between land and building was not proper as the same was impossible to bifurcate.

20. Ld. Senior Counsel Shri N.K. Poddar has pleaded that the tax authorities has erred in treating the said sum of Rs. 14,49,14,951/- as short term capital gain without appreciating the facts and the terms of agreement for developing super structure of such building between the assessee-company and the developer M/s. Ansal Properties & Industries Pvt. Ltd. Shri Poddar has pointed out that the assessee has computed the capital gain in this case in terms of paragraph 4B of the Development Agreement dated 24.02.1988 executed by the assessee with the said developer M/s. Ansal Properties, wherein the assessee-company has agreed to assign only 56.8% share in the entirety of the said plot of land and such transfer eventually took place in favour of said developer in August, 2001 when the completion certificate in respect of the newly constructed multistoried building, which Wing 'A' and Wing 'B', had been obtained from the New Delhi Municipal Committee and thereupon allocation of the developer's portion i.e. Wing 'B' and of the owner portion i.e. Wing 'A' was accordingly made in between the assessee-company and the said developer M/s. Ansal Properties. Shri Poddar continuing his argument has contended that on assignment of 56.8% shares in the said land by the assessee-company in favour of the said developer M/s. Ansal Properties in August, 2001, the assessee- company continued to hold 43.2% shares in the said plot of land and the right of the assessee-company in the said land stood extinguished only to the extent of 56.8% shares and no extinguishments whatsoever of the rights of the assessee-company in respect of 43.2% shares in the entirety of the said land took place in terms of the said development agreement.

21. Shri Poddar has submitted that the assessee-company's right in proportionate undivided individual shares in the land underneath with proportionate shares in all common area and facilities, etc. as were attributable to each of the said four floors as have been sold by it in pursuant to the said four separate and individual agreement for sale stood extinguished by way of transfer in favour of each of the

said four buyers, in pursuant to the said agreement for sale and not in pursuant to the development agreement dated 24.02.1988 and, therefore, it is not correct to say that four purchasers, to whom the said four floors were sold, acquired only the office space forming part of their respective allotted floors and not the proportionate land underneath, and as also the common facilities and structures attributable thereto, as wrongly and arbitrarily alleged by each of the said two tax authorities below, or otherwise at all.

22. Shri Poddar has thereafter pointed out that in fact on reading of each of the said four agreements for sale dated 22.10.2001, which are available in the paper book from pages 147 to 239, it was clearly evident that what was sold to each of the said buyers, was not only the area forming part of the respective office floors but also the proportionate undivided individual shares in the land underneath with proportionate shares in all common areas and facilities as detailed in Schedule 'C to the said agreement for sale as also in the equipment, plant and machinery, etc. as detailed in Schedule 'D\ 23. Ld. senior counsel Shri N.K. Poddar has thereafter assailed the observation of tax authorities in wrongly and arbitrarily alleging that these assets were treated by the assessee as business asset, on which the assessee was claiming depreciation. Shri Poddar has pointed out that the entirety of newly constructed Wing 'A', on reading of the agreement by the assessee-company from the developer, was all along treated as its capital asset and no depreciation whatsoever was either claimed in the assessment year 2002-03 or in the assessment year 2003-04 when the said four floors were sold by the assessee to the said four buyer company. Shri Poddar has thereafter pointed out from the perusal of depreciation chart, it is evident that the assessee has not claimed any depreciation on such capital asset except depreciation on office space arising out of previous year and filed a copy thereof, which is available at page No. 137 of the paper book. Ld. counsel has thereafter assailed the observation of tax authorities in disbelieving the valuation report by Shri G.S. Mendiratta and in further holding that it was not possible to bifurcate the aggregate sale consideration of Rs. 16,99,85,636/- received by the assessee-company on sale of said four floors between the structure and the proportionate area of land attributable to and/or underneath the same. Shri Poddar submitted that the Govt. Approved Registered Valuer Shri G.S. Mendiratta vide his valuation report dated 26.08.2002 has

actually carried out such bifurcation on reasonable basis and neither the A.O. nor the CIT(A) has found any defects whatsoever either in the said valuation report or the basis for bifurcation adopted by the valuer. It has, therefore, been urged by Shri Poddar that the observation of tax authorities in treating the valuation report as hypothetical, imaginary, artificial is wholly baseless, unreasonable and/or otherwise perverse.

24. Shri Poddar has thereafter assailed the further allegation made by tax authorities disputing the determination of purchase consideration and the construction cost of 43.2% considering the same as impossible to determine or bifurcate and has submitted that the same was determined on the basis of suggestion made by valuer and reiterated his submission that no defect whatsoever in the said valuation report and the basis of allocation as to the value of construction suggested by the valuer was found by the tax authorities.

25. It has, therefore, been stated by Shri Poddar that the Id. CIT(A) erred in observing and /or in holding that the undivided interest in the land along with super structure thereon, in ownership apartments, cannot be valued and/ or transferred and/or that such undivided interest in the land has no market value. Shri Poddar has stated that it is not correct to say that nobody would buy the rights over the undivided portion of the land and has contended that in the matter of transfer of ownership apartments, the undivided proportionate portion of land attributable to the structure has to be necessarily transferred and it is common knowledge that the market value of the ownership apartment varies according to the situation of land over which the same is constructed. He has thereafter submitted that many case laws fully support the case of the assessee which were also placed before the tax authorities and the same were distinguished by them without correctly appreciating them and has relied on the following judgments: (4) ITC Ltd. v. DCIT reported in (2003) 86 ITD 135 (Kol.) (Third Member).

Apart from above case laws, he has also relied on the following judgments contending that consideration received by the assessee should be bifurcated and the gains attributable to the transfer of undivided portion of the proportionate share in land should be separately assessed to tax as long term capital gains: CIT v. Smt.

Lakshmi B. Menon and Anr.

It has finally been pleaded by Shri Poddar that even when there is some difficulty in bifurcation/ apportionment that cannot be a ground for rejecting the claim of the assessee in view of the decision of the Hon'ble Supreme Court in the case of CIT v. Best & Company Pvt. Ltd. reported in 60 ITR page 11. He has further placed reliance on the decision of the Hon'ble jurisdictional High Court in the case of CIT v. Estate of Omprakash Jhunjunwala contending that the above decision of the Hon'ble jurisdictional High Court is on all four with the case of the assessee-company herein. He has submitted that it has been held by the Hon'ble High Court while upholding the decision of Tribunal that when the first floor of the newly constructed multistoried building was sold along with the proportionate interest in the land, the assessee had rightly claimed that the sale proceeds of the land should be assessed as long term capital gain and the sale proceeds attributable to the building structure should be assessed as short term capital gain. It has been submitted by Shri Poddar that the fact of the assessee's case is almost identical the fact of the above case in case of Estate of Omprakash Jhunjunwala (supra). It has, therefore, been pleaded by Shri Poddar while concluding his argument that the order of A.O. and CIT(A) should be set aside and the return filed by the assessee should be accepted.

26. In his rival submission, the Id. Departmental Representative for the Revenue has relied heavily on the order of A.O. and CIT(A). The Id.D.R. for the Revenue has also filed written submission, which is being re-produced hereunder for the sake of clarity: (a)The value of sale consideration for sale of undivided share or interest in land as at the time of transfer of the same is not available.

(b)There is no splitting of consideration in the sale agreements. No separate consideration for such land or undivided share or interest in land is available in the conveyance instrument itself. Merely writing in the agreement "undivided indivisible share" is not enough. Let us assume that the value of undivided indivisible share in land can be estimated only, still no bifurcation of the value of land and building is available in the sale agreement.

(c) Once the assessee is unable to give consideration for sale of undivided share or interest in land or the fair market value for land as on the date of transfer the claim for bifurcation of consideration has no leg to stand on its own.

2. There appears to be a very long time gap between the date of the development agreement dated 24.02.88 and that of the valuation reports of land and building dated 12.8.2002 & 26.8.2002 respectively. This is only indicative of the lack of perfection of the valuation report which shall be further elaborated in the forth coming paras. Secondly all sale agreements are of one single date i.e. 22.10.2001. Similarly, all receipts are dated 30.09.2002.

3. With reference to the valuation report of land page 114 of the paper book may kindly be perused. The basis of adoption of the value of plot @ Rs. 27,500/- per sq.m. is not clear, rather it is without any basis, if the first three paras of page 114 of the paper book are read conjointly. It may be argued here that no reasons have been given the valuer for not taking the value of Rs. 10,500/- as on 1.4.81. With reference to page 119 of the paper book, the prevailing market rate of the plot has been taken at Rs. 1,50,000/-, whereas the prevailing market rate was in the range of Rs. 1.25 lakh and Rs. 2 lakhs. It may be reiterated that the estimate made by the valuer in regard to the valuation of land is without any basis and tinged with arbitrariness.

4. With reference to page 124 of the paper book, the fair market value of land has been taken at Rs. 58,28,41,00/- but surprisingly this value has been ignored for the purpose of computation of capital gains. This is an admitted fact by the assessee [kindly refer to the written submission made by the appellant on 3.11.2006 -page 4,para (iii)].

5. The facts and circumstances of the case of Estate of Om Prakash Jhunhunwala reported in 254 ITR 152 (Calcutta) are distinguishable on the following counts: (a) It appears that whereas in the case of Estate of O.P. Jhunhunwala, the building was constructed on the vacant piece of land, in the instant case, the old building was demolished and the new building was constructed afresh.

(b) Unlike the case of Estate of O.P. Jhunjhunwala, the bifurcation or allocation of the sale price as well as the cost of acquisition as between land and building (superstructure) has not been done in the instant case.

(c) Kindly refer to the observations of the Hon'ble High Court of Calcutta on page 158 of 254 ITR 152 (supra) - "The burden will be on the assessee to satisfy how much of the sale proceeds should be apportioned for the land and how much of the sale proceeds pertained to the structure." In view of the fact that the bifurcation or allocation between the sale proceeds pertaining to land and building separately has not been done, it can be said that the burden has not been discharged by the assessee company.

(6). Reliance is placed upon the findings of. the A.O. and CIT(A) in their respective orders. Apart from the above, reliance is placed upon the decision of Kolkata Bench (Third Member) reported in 86 ITD 135 (Kolkata) (TM) in the case of ITC Limited v. DCIT, with special reference to the Hon'ble Accountant Member's observation made on page 166 (para 27).

(7) It is very important to mention that a report was called for from the A.O. concerned who has submitted a report vide his letter No. ACIT/Cir.7/K/2006-07/767 dated 08.11.2006 (copy enclosed herewith). Kindly refer to the paras (a) & (d) of the said report which reflects that pages 108 to 124 of the paper book volume I were not filed before the Assessing Officer during the course of assessment proceedings. In view of the facts & circumstances stated above, it is prayed that the Assessing Officer may be given opportunity of submitting a remand report in this connection.

Alternatively the assessment may kindly be set aside to the file of the A.O.27. In his rejoinder, Shri N.K. Poddar, Id. senior counsel for the assessee has also filed written submission countering the submission filed by the Revenue and has submitted as under: 1. It is not correct on the part of the revenue to submit and/or suggest that the value of sale consideration relating to the sale of undivided share or interest in the proportionate land attributable to the sale of fourth, fifth, sixth and seventh floors in the newly developed Barakhambha Road property at New Delhi, at the time of sale, is not available.

(i) From the four sale agreements, all dated 22nd October, 2001 read with the four separate agreements dated 30th September, 2002, relating to transfer of car parking space - copies whereof are already on the records of the tax authorities below - kindly see pages 147 - 239 of the paper book, volume II filed on behalf of the appellant assessee company before the learned Tribunal, it is clearly apparent that the appellant assessee company had received an aggregate consideration of Rs. 16,99,85,636/- for transfer of four floors viz. 4th, 5th, 6th & 7th floors together with 18 car parking garage space in the newly constructed multistoried building situate at B-148 Barakhamba Road, New Delhi.

(ii) The appellant assessee company bifurcated the said aggregate consideration in between land and super structure forming part of the said four floors in the ratio of 2.6288 : 1 taking into consideration the ratio in between the indexed value of assessee's share of 43.2% in the said land and the estimated fair market value of the entire super structure forming part of Wing A received by it from M/s. Ansal Properties & Industries Ltd., the developers. This fact was clearly disclosed and set out by the appellant assessee company in its computation of total income filed along with its income tax return for the year under appeal - kindly see annexure -2 being the computation of capital gains on sale of building appearing at page 41 of the said paper book, volume I. (iii) On the aforesaid basis, the aggregate consideration of Rs. 16,99,85,636/- was split up between land - Rs. 12,31,42,645 & the building (super structure attributable to the four floors) -Rs. 4,68,42,991.

(iv) In our submissions, the aforesaid splitting up was done on a reasonable and scientific basis, and the tax authorities below never challenged such splitting up of the aforesaid consideration at any time whatsoever.

2. It is true that the sale agreements do not give the split consideration for land and building separately, but here is nothing unusual in this respect. The agreements and the conveyance instruments normally give the consideration in the aggregate terms only. The said four sale agreements read with the possession letters / receipts make it quite clear that the aggregate consideration of Rs. 16,99,85,636/- had been received by the appellant assessee company for the sale/transfer of the said four floors and also along with proportionate share in the

land underneath as well as proportionate share in the common areas, facilities including in the plant, equipment, machinery, etc.

3. It is not correct on the part of the revenue to submit and/or allege that the appellant assessee company has not been able to give the bifurcated consideration for sale of undivided share or interest in land and/or the fair market value for the proportionate land attributable to the said four floors, as on the date of transfer, as alleged in paragraph 1(c) of their written submissions/ note, as alleged or otherwise or at all.

4. We say and submit that the aggregate sale consideration of Rs. 16,99,85,636/-, as evident from the said four sale agreements, is the correct market value of the said four floors including the proportionate land underneath, as well as the proportionate share in the common areas and facilities, etc., as aforesaid, and that the bifurcated sale consideration of Rs. 12,31,42,645 (land) and Rs. 4,68,42,991/- (super structure forming part of the four floors), as shown in the computation of total income at page 41 of the paper book, vol. I has been done on a reasonable basis as clearly indicated therein.

5. In paragraph 2 of the written submissions filed on behalf of the Revenue, it has been inter alia alleged/ submitted that there is a long time gap between the date of the development agreement dated 24.2.1988 (page 70 of PB- Vol. I) & that of the 2 Valuation Reports dated 12.8.2002 & 26.8.2002 respectively (pages 109-124 of PB - Vol.

I). The Revenue concludes that in view of the aforesaid fact the valuation report cannot be said to be perfect. It has been further stated that while all the four sale agreements are dated 22.10.2001, all possession letters and receipts are dated 30.9.2002.

6. It is not understood as to how an adverse inference is being drawn based upon the facts set out in paragraph 2 of the written submissions of the revenue, as aforesaid.

7. It may be appreciated that the development agreement was executed on 24.2.88, and the developers, M/s. Ansal Properties & Inds. Ltd., a reputed builder and developer of New Delhi had started construction activity soon after the sanction of the building plan by the New Delhi Municipal Corporation (NDMC) which was initially sanctioned on 13.12.89 and finally it was renewed on 1.11.97. The building completion certificate was granted by the NDMC vide its order passed on 19.3.2001 and dispatched to the developers on 20.8.2001 - the fact noted in each of the said four sale agreements - page 148,169,193 & 217 of PB - Vol. II. The allotment and allocation of respective areas in the newly constructed Block A & Block B in between the appellant assessee company herein and the said developer took place in August, 2001, as evident from the developers letters dated 24.8.2001 appearing at page 108 of PB- Vol.

I. 8. The valuation of the land giving the estimated value as on 1.4.1981 became relevant only for the purpose of computation of long term capital gains arising on sale of the said four floors. The sale agreements had been executed on 22.10.2001. At the relevant time, the buyer companies only paid certain amounts by way of advance. The balance consideration was paid by each of the said four buyers in 3 different instalments viz. 7.5.2002, 28.5.2002 & 30.9.2002, as noted on the respective receipts appearing at pages 163,187, 211 & 235 of PB, Vol.-II. As such, the actual possession of the said four floors along with proportionate share in the land underneath with proportionate share in the common areas and facilities, etc. had been handed over by the appellant assessee company to the respective buyers only on 30.9.2002, on receipt of final instalment of the aggregate consideration, as aforesaid. Since the appellant assessee company expected that the possession would be handed over to the respective buyers in or around September, 2002, the valuers had been engaged in or around July/ August, 2002, to give their valuation reports in respect of land as on 1.4.81 & in respect of super structures as on August, 2001, the time when the appellant assessee-company received its allocated portion of the super structure forming part of Block A. 9. From the aforesaid facts, it is clear that there is no long time gap as arbitrarily and wrongly alleged by the revenue in paragraph 2 of its said written submissions/ note or otherwise or at all.

Moreover, the 2 valuation reports give the value of land as on 1.4.81 and of the super structures as on August, 2001. In this view of the matter, the mere fact that the valuation reports were obtained by the appellant assessee company in August, 2001, it is respectfully submitted, is wholly irrelevant.

10. It may also be noted that the accounting entries based on the said valuation reports were made by the appellant assessee company in its audited books of accounts drawn for the year ending 31st March, 2002 corresponding to the assessment year 2002-03, since the allocated portion of appellant assessee company's share in the newly developed property was received by it only on 24.8.2001, the date falling within the financial year ending on 31.3.2002. The audit report was signed by the auditors on 2nd September, 2002 and the tax audit report for the said year was also given by the auditors on 30.10.2002 - page 129 of PB, Vol.-I. 11. It is not correct on the part of the revenue to now allege for the first time before the Id. Tribunal that the valuation of land as on 1.4.81 given by the valuer in his valuation report dated 12.8.2002 (pages 109-114 of PB, Vol.-I) is arbitrary and/or without any basis, as alleged or otherwise or at all. The Id. valuer at page 2 of his valuation report dated 12.8.2002 (page 114 of PB, Vol.-I) has referred to the rate of Rs. 10,550 per sqr. Mtr. fixed by L&D.O., Ministry of Urban Development, Government of India for Group II, Connaught Circus Commercial Areas for the period 1.4.81 to 31.3.83.

However, it is common knowledge that the market rate is always 2-3 times higher than the allotment rate fixed by the government authorities. The Id. Valuer has referred to the prevailing market rate to be in the region of Rs. 10,000 to Rs. 30,000 per sqr. Mtr.

The instant property belonging to the appellant assessee company is situated on Barakhamba Road, the most prime location for commercial purposes in New Delhi. Taking these factors into consideration, the valuer has fixed the market value of the land as on 1.4.81 at Rs. 27,500 per sqr. Mt., which in the submissions of the appellant assessee company, can neither be said to be unreasonable arbitrary and or without any basis whatsoever, as wrongly alleged by the revenue in paragraph 3 of its said written submissions.

12. Moreover, in the computation of total income filed by the appellant assessee company for the assessment year 2002-03 - page 127 of the paper book Vol.-I, the appellant assessee company had made specific references to the valuation report dated 12.8.2002 based upon which the total value of the land as on 1.4.81 had been taken by it at Rs. 20,09,42,000, and the proportionate share (43.2%) of the appellant assessee company therein was taken at Rs. 11,41,35,056, which was then indexed to Rs. 48,62,15,339 based upon the then prevailing capital gain index of 426.

13. A copy of each of the said 2 valuation reports dated 12.8.2002 & 26.8.2002 made by Mr. G.S. Mendiratta, Govt. Approved Registered Valuer, was duly filed by the appellant assessee company before the learned A. O. in course of the assessment proceedings for the assessment year 2003-04, and again in course of the appellate proceedings before the Id. CIT(A)-VII, Kolkata. The Id. CIT(A) 's order dated 23.8.2006 passed in respect of the assessment year 2003-04, page 5 of the said appellate order appearing at page 8 of PB, Vol.-I clearly record the filing of the said valuation reports.

14. It may also be noted that the appellant assessee company passed the accounting entries based on the approved valuers' report, and this fact is also mentioned in the fixed assets Schedule 5 - appearing at page 20 of the printed accounts for the year ending 31.3.2002 as well as in paragraph 11 of schedule 23 at page 32 of the said printed accounts. The aforesaid fact was again disclosed in the audited printed accounts drawn for financial year ending 31.3.2003 - at fixed assets schedule 5 at page 281 of PB as well as in Note No. 12 of schedule 18 at page 292 of PB, Vol.-II. Both the aforesaid printed accounts had been admittedly filed by the appellant assessee company along with its respective income tax returns for the two years viz. assessment year 2002-03 and 2003-04.

A copy of the printed accounts for the year ending 31.3.2002 is again annexed hereto for ready reference.

15. It is humbly and respectfully submitted that neither the said 2 valuation reports nor the accounting entries based thereon had been ever challenged by the tax authorities below in either of the said years.

16. The market value of the land as on 1.4.81 as estimated by the Govt. Approved Registered Valuer through its valuation report dated 12.8.2002 (pages 109-114 of PB, Vol.-I) was not relevant for passing accounting entries. This report was relevant only for capital gains tax computation, and, therefore, this report was specifically referred to by the appellant assessee company in each of its 2 computations of total income filed for the assessment years 2002-03 and 2003-04 at page 127 & 441 of PB, Vol.-I. 17. The market value of the land as well as the super structures as on August, 2001, as given in the valuation report dated 26.8.2002 (pages 115-224 of PB, Vol-I) was relevant for passing the accounting entries and therefore this report was specifically referred to in the audited printed accounts filed by the appellant assessee company for the said 2 years along with its respective returns of total income.

28. We have given our careful consideration to the rival submissions made before us and have perused the orders of tax authorities. We have also considered the paper book filed by the Id. counsel for the assessee and the case laws relied upon by both the parties. In this case, the Revenue has basically disputed the computation of capital gain by the assessee by apportioning the consideration received between the value of land and building on the basis of Registered Valuer's report and the A.O. has disputed such computation of capital gain by the assessee basically observing as under: (i) The rights of the assessee-company herein in the land & building forming part of the said property situate at B-148, Barakhamba Road, New Delhi were extinguished, as soon as the same were handed over to the Developer for Development through construction of new multistoried building, and the assessee company received new assets in the form of office space in the new multistoried building forming part of Wing 'A'. The assessee company became the owner of newly constructed office space received by way of consideration from the developers under the Development Agreement dated 24.2.1988, in lieu of its share in the old land & building. In fact, in lieu of its 43.2% share in the old land & building structures, the assessee company received by way of its entitlement, 43.2% share in the newly constructed multistoried building, which included inter alia the said four floors.

(ii) The four purchasers, who purchased the office space at 4th, 5th, 6th & 7th floors of the said Wing A, acquired the office space, and not the land and building. Therefore, apportionment made by the assessee company herein was not correct.

(iii) The said four floors were part of its business assets, and the assessee company had duly claimed depreciation thereon as part of buildings.

(iv) Since the said four floors, being depreciable business assets, which had been received by it from the developers only in August, 2001 had been sold by the assessee company during the year under appeal, the profits arising on such sale were wholly assessable to tax as short term capital gains. The assessee company cannot be allowed the benefit of taking the market value thereof as on 1.4.1981 and/or the benefit of indexation in respect thereof. As such, the entire profit of Rs. 14,49,14,951/-, as credited by it to its profit & loss account for the year under appeal, is assessable to income tax in its hands as short term capital gains.

(v) The decision of the Kolkata Bench of the learned Tribunal in the case of ITC Ltd. v. DCIT (2003) 86 ITD 135 (Kol.) (TM), is not applicable to the instant case of the assessee company herein.

29. The Id. CIT(A) in appeal has endorsed the finding of A.O. holding that it was impossible to bifurcate the aggregate sale consideration of Rs. 16.99 crores in respect of the office space forming part of the 4th to 7th floors, sold and transferred by the assessee-company during the year under appeal and has further approved the action of A.O. in holding that the assessee-company's rights in the whole of the land measuring about 1.805 acres got extinguished and that even the so-called purchase consideration being the development costs of 43.2% of the newly built aggregate office area, being the owner's share/ allocation therein was impossible to bifurcate. The Id. CIT(A) has further observed that the bifurcation of sale consideration between the land and super structures was wholly hypothetical, imaginary and artificial.

30. The assessee has disputed such action of A.O., as confirmed by the Id. CIT(A), contending that it is the absolutely owner of 43.2% of the land on which the building is constructed and only 14.84% of total area was sold in form of sale

of 4th to 7th floor along with the right of super structures and proportionate portion of land thereto. It has further been contended by the assessee that 14.2% of land was never sold by the assessee to the developer as alleged by the revenue and the super structure thereon was made available by the developer by virtue of an agreement and by transferring 56.8% of the land to them. It has further been contended by the Id. counsel for the assessee that the assessee has rightly apportioned the sales consideration of these four floors on the basis of Government Approved Valuer and by allocating the proportionate value of land and building sold to the respective purchasers on the basis of such report of valuer, which has not been doubted or contradicted by the Revenue at any stage.

31. We after carefully perusing the facts and circumstances involved in this case find that the first objection by the A.O. while treating the sale of four floors as income from short term capital gains is based on the observation that the rights of the assessee-company in the land and building forming part of the said property situated at B-148, Barakhamba Road, New Delhi were extinguished, as soon as the same were handed over to the developer for development through construction of new multistoried building. Though the A.O. has held that the assessee-company was no longer the owner of the land and building and in fact it only got 43.2% shares by way of its entitlement in lieu of old land and building, however, in our considered opinion, such action of tax authorities does not hold any merit in view of the relevant clauses of terms of agreement between the assessee and the developer M/s. Ansal Properties & Industries Pvt. Ltd. A perusal of Development agreement dated 24.02.1988 executed in between the assessee-company and M/s. Ansal Properties & Industries Pvt. Ltd. shows that the assessee has never transferred 100% of the right in land to M/s. Ansal Properties and in fact only 56.8% shares in the said leasehold land was to be transferred to the builder that is only after completion of the development of the land. The above fact is clearly mentioned in Clause (4) and Clause (21) of the agreement, which is available at pages No.78, 79 and 89 of the paper book and is being reproduced for the facility of reference hereunder: 4. The "Transfer" as defined by Chapter XX-C of the Income Tax Act, 1961 contemplated by this Agreement comprised the following: (a) The right .of the Developers to build upon the land aforesaid in accordance with the terms of this Agreement and to own as property to belong to

the Developers, or to dispose of the Developers' Allocation (referred to hereafter and described in the Second Schedule hereunder written) at the will of and as may be decided by the Developers, from time to time, (but subject to the obligation of the Developers to construct for the owners and as property belonging to the Owners, the Owners' allocation referred to hereafter and more particularly described in the third Schedule hereunder written) in the proposed building to be built by the Developers.

(b) When the development of the said land as contemplated by this Agreement is completed, the right of the Developers to obtain from the Owners an assignment of the undivided 56.80% share in the said leasehold land described in the First Schedule hereunder written in favour of the Developers and/or in favour of such person or persons as may be selected by the Developers, i.e. the person to whom the developers may sell, on what is known as Ownership basis, the different units in the developers' allocation.

21. It is hereby expressly clarified, declared and confirmed that allowing the Developers to enter upon the said land contemplated by Clause 19 and/or 20 above is not intended to be and shall not be construed to be nor claimed by the Developers to imply that the Owners have allowed the Developers to enter into possession or given to the Developers possession of the said land or allowed the Developers to retain possession of the said land or of any part thereof in part performance of the contract referred to in 53A of the Transfer of Property Act, 1882 nor is it intended to be nor will it be construed to be "Transfer" as defined by Chapter XX-C or Section 2(47) of the Income Tax Act, 1961.

32. From the above clauses of terms and agreement, the fact that emerges is that the assessee at no point of time has relinquished or transferred the right of ownership on such land to the extent of 43.2% land and the assessee always held the ownership of 43.2% of the land as evident from the plain reading of terms and agreement between the assessee-company and the developer. Therefore, the first objection by the revenue while denying the computation of capital gain by the assessee does not hold any merit.

33. The second objection by the Revenue in this case is basically disputing apportionment of sales consideration by the assessee-company between the value of land and super structures. However, such objection raised by the Revenue is without any concrete and sound reasoning, whereas we find force in the argument of Id. counsel for the assessee that the undivided proportionate portion of land attributable to the structure has to be necessarily transferred and it is common knowledge that the market value of ownership apartment varies according to the situation of land over which the same is constructed. The above argument of the Id. counsel for the assessee gets support from the various case laws relied by him, as in the case of CIT v. Vimal Chand Golcha (201 ITR 442) (supra), the Hon'ble Rajasthan High Court held as under: If the price of two capital assets has been charged at one consolidated price, then the assessee is entitled to bifurcate the same. A situation may arise where a gain from one of the capital assets is a short term capital gain while from the other is a long term capital gain and, in such a situation the benefit to the assessee cannot be denied in respect of a gain arising from the sale of an asset which could be considered as a long term capital gain.

In another case in CIT v. Dr. D.L. Ramachandra Rao (236 ITR 51 (Supra), the Hon'ble Madras High Court while dealing with a similar issue had held that- the definition of capital asset includes property of any kind and land held by the assessee is also a capital asset and it is possible to bifurcate the capital gain arising with reference to the sale of land and building even if they are sold as unit, if the lands are held by the assessee for a period more than that prescribed under Section 2(42A) of the Income Tax Act, 1961, namely 36 months. It is not possible to say that by construction of the building, the land which was a long term capital asset, has ceased to be a long term capital asset. The land is an independent and an identifiable capital asset even after the construction of the building:.

Similar principle had also been reiterated by the Hon'ble Karnataka High Court in the case of CIT v. C.R. Subramanian reported in 242 ITR 342 and also by the jurisdictional Tribunal in the case of ITC Ltd. v.DCIT reported in 86 ITD 131 (Third Member- Kol.).

Since in the present case also, the assessee is the owner of 43.2% of the building and the land on which such building had been constructed, the assessee has rightly apportioned the sales consideration in its books of accounts on the disposal of 4th to 7th floor as per the principle laid down by the various High Courts. We also find that for the purpose of apportionment, the assessee has rightly taken the market value of land as on 1.4.1981, since the land was acquired before 1981 and the gain arising on disposal of the land was long term capital gain and the gain on disposal of the above four floors of the building has rightly been treated as short term capital gain. We also find that the fact in the present case clearly reveals that the assessee has also transferred proportionate undivided individual shares in the land to the purchasers of such floors as evident from the agreement for sale between the assessee and M/s. Pritty Portfolio Pvt. Ltd., a copy of which has been placed in the paper book at pages No. 147 to 167, and at page No. 149 it has been clearly mentioned that the assessee is transferring undivided individual shares in the land underneath to the purchasers. The relevant portion of such agreement is being re-produced hereunder for the facility of reference: AND WHEREAS the vendor is desirous of transferring and the vendee is desirous of purchasing 4617.76 sq.ft. FAR (capital area) being the entire allocation of the vendor in the 4th floor in "statesman House" at B-148, Barakhamba Road, New Delhi as detailed in Schedule "B" written hereunder along with proportionate undivided indivisible share in the land underneath with proportionate share in all common areas and facilities as detailed in Schedule "C" and equipment, plant and machinery as detailed in Schedule "D" written hereunder and hereinafter referred to as the said Apartment".

34. A plain reading of the above clause of agreement and from the ratio of decision of different Courts, it is clear that the assessee has rightly apportioned the sales consideration between the land and building. Even otherwise we find that when there is some difficulty in bifurcation/ apportionment, the same cannot be a ground for rejecting the claim of the assessee as held by the Hon'ble Supreme Court in the case of CIT v. Best & Co. (supra). Apart from the above orders, the decision of the Hon'ble jurisdictional High Court in the case of CIT v. Estate of Omprakash Jhunjhunwala reported in 254 ITR 153 (supra) is also squarely applicable to the fact of the present case, wherein the Hon'ble High Court held as

under: That since the house was a capital asset, the gain on sale of the house property was assessable as capital gains. The leasehold interest had to be treated as a separate asset and the building raised subsequently constituted a different asset. The gains attributable to the interest in land were assessable as long term capital gains. The gains attributable to the building were assessable as short term capital gains. The burden was on the assessee to show how much of the sale proceeds should be apportioned for land and how much pertained to the structure.

We find that the facts of the present case are almost similar to the fact of the case disposed by the Hon'ble jurisdictional High Court, in above case as in the present case also, the assessee has rightly divided the sales consideration between the value of land and the value of building and the assessee has also discharged its liability by apportioning the value between land and building as per valuation determined by the Government Approved Valuer, which was placed before the Revenue even immediately preceding previous year and was not contradicted rebutted by the Revenue at any stage of time.

35. Apart from the above decision of the Hon'ble jurisdictional High Court, identical issue came before this Tribunal in the case of ITC Limited v. DCIT (supra), wherein it was held by Third Member as under: In India, separate ownership of land and building is recognized in law. A person can hold the land and another person can be owner of the building or superstructure constructed thereon. This is fully recognized under the Act. Section 132 provides for depreciation on buildings, etc. From its very nature, land neither requires insurance against destruction nor any repair nor does it depreciate in value by use. [Para 18] The only problem in the instant case was the question of bifurcating the cost of the land and the flat from the sale consideration thereof which was not done by the assessee. If the cost of the land and the sale consideration of the same was impossible to work out and in fact if the seller and purchaser included the entire cost as a composite one, then the view taken by the Accountant Member was the appropriate view and justified in law. However, if it was possible to work out the cost of the land and the sale consideration of the same on the basis of material on record, it would not be justified to deny the claim of long term capital gains on the undivided share in the land sold along with the floors. [Para 20] The nature of treatment of the sale

If purchase consideration could be verified from the books of the seller and the purchasers. If, however, the sale /purchase consideration was treated as composite and depreciation was also claimed and allowed and it was impossible to bifurcate the cost/ sale consideration of the land from the total sale consideration, then only it had to be held as a composite sale.

Therefore, the view taken by the Judicial Member on this point was justified [Para 21].

36. We, therefore, from the facts and circumstances involved in this case and after perusing the relevant terms and conditions between the assessee and the developer and the assessee and the purchasers of 4th to 7th floor, are of the opinion that the assessee has rightly computed the capital gain by apportioning the sale proceeds between the land and building as per valuation report submitted by the Government Approved Valuer and the above computation of capital gain by the assessee is supported by various decisions of Hon'ble High Courts including the decision of Hon'ble jurisdictional High Court in the case of Omprakash Jhunjhunwala (supra) and the decision of Third Member of this Tribunal in the case of ITC Ltd. (supra) and, therefore, in our considered opinion, the above second objection by the Revenue is devoid of any merit.

37. The 3rd limb of objection by the Revenue while discarding the computation of capital gain by the assessee is based on the observation that the assessee-company had duly claimed depreciation thereon as part of building. However, the above observation of Revenue is also without any merit as the assessee never claimed depreciation on such land and building comprising in Wing 'A' as evident from the details of depreciation available at page 137 of the paper book, wherein the assessee has only claimed depreciation in respect of old office building excluding depreciation on such newly constructed capital asset and, therefore, the above objection raised by the Revenue is also devoid of any merit.

38. The authorities below has also disputed the benefit of indexation by the assessee but such action of revenue is also not tenable in view of the fact that the assessee has made necessary entries in the books of accounts on the basis of valuation report by the Government Registered Valuer and the revenue has not

doubted / contradicted such valuation report at any point of time. Virtually the assessee has submitted such computation of capital gain by taking into indexation of land from 1.4.1981 while filing return for the assessment year 2002-03, which is available at pages No. 126 & 127 of the paper book and the A.O. accepted such claim of the assessee while processing the same under Section 143(1) and the Department has not initiated any other proceeding on such return by the assessee till date. Apart from the above fact, we have already held hereinabove that the assessee never relinquished the right of 43.2% of land to any person and, therefore, the objection of tax authorities in denying the claim of indexation was not found correct.

39. The other objection raised by the Revenue regarding disputing the ratio of decision by the Hon'ble Third Member in the case of ITC Ltd. (supra) and treating the valuation by the Government Approved Valuer as hypothetical, is also found without having any merit keeping in view the fact that such observation of authorities below is without any concrete and sound reasoning, whereas the assessee has duly explained the reason for computing the capital gain while proportionating sales consideration between the land and building with the help of relevant documentary evidence and explanation on record. We, therefore, do not find any merit in other objections raised by the Revenue while discarding the claim of the assessee.

40. We, therefore, after considering the facts and circumstances involved in this case, the ratio of decisions laid down by the various High Courts including the Hon'ble jurisdictional High Courts, decision of the Hon'ble Third Member in the case of this Tribunal and in the light of above discussion are of the considered opinion that the action of A.O. and CIT(A) in denying the bifurcation of aggregate of sale consideration received by the assessee between the land and building was not correct and in our considered opinion, the action of assessee company in computing the capital gain by apportioning the sales consideration between land and building was correct in view of the ratios laid down by various High Courts as discussed herein above and as per terms and conditions of various agreements entered by the assessee with the developer and the purchasers. We, therefore, set aside the order of authorities below and accept the first five grounds raised by

the assessee.

41. Ground No. 6 is consequential and, therefore, the same has to be computed accordingly.

42. Ground No. 7 is general in nature and, therefore, does not need any adjudication.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com