

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad**

**Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri S.Rifaur Rahman, Accountant Member**

ITA No.1755/Hyd/2017
(Assessment Year: 2014-15)

Udai Hospitals Private Ltd Hyderabad PAN: AABCU1975A (Appellant)	Vs	Income Tax Officer Ward 17 (3) Hyderabad (Respondent)
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For Assessee :	Shri Ajay Gandhi
For Revenue :	Smt. N. Swapna, DR

Date of Hearing:	05.07.2018
Date of Pronouncement:	28.09.2018

ORDER

Per Smt. P. Madhavi Devi, J.M.

This is assessee's appeal for the A.Y 2014-15 against the order of the CIT (A)-5, Hyderabad, dated 31.08.2017. The assessee has raised the following grounds of appeal:

"1. The CIT (A) has erred in upholding the rejection of the market value rate adopted by the Sub-Registrar relatable to the superstructure as consideration for calculating Long term capital gains.

2. The CIT (A) has erred in upholding the cost of construction incurred by the developer as consideration ignoring the fact that the assessing officer has overlooked the request made during the assessment proceedings to provide evidences of cost of construction incurred by Incor Infrastructure for offering detailed objections for considering the cost of construction as consideration received under development agreement.

3. The CIT (A) has erred in upholding the cost of construction incurred by the developer as consideration ignoring the fact that the assessing officer has overlooked the objection of inclusion of probable costs that may be

incurred in construction area to be developed by Incor Infrastructure in the cost of construction.

4. The CIT (A) has erred in upholding the adoption of cost of construction incurred by the developer as consideration for calculating Long term capital gains.

5. The CIT (A) has erred in upholding the amount not paid by the developer to M/s Kohli Constuctions of Rs. 1,16,00,000 (Rs. 1,76,00,00 - 60,00,000) as part of cost of construction.

6. The CIT (A) has erred in upholding the adoption of Rs.21,38,39,466 as consideration received under development agreement for calculating capital gains.

7. The CIT (A) has erred in upholding the amount not paid by the developer to M/s Kohli constructions as part of cost of construction ignoring the fact that the amount payable to M/s Kohli Construction was offered to capital gains tax in Udai Health Care Private Limited as their share of consideration received under development agreement.

8. The CIT (A) has erred in upholding the amount of development rights of Rs. 4,24,08,889 as part of cost of construction ignoring the fact that the development rights was offered to capital gains tax in Udai Health Care Private Limited as their share of consideration received under development agreement.

9. Any other ground that may be urged at the time of hearing”.

2. Brief facts of the case are that the assessee had purchased a piece of land on 19.08.2008 for a consideration of Rs.1,60,05,000 plus registration charges. Its sister concern M/s. Udai Healthcare Private Limited was also the owner of the adjoining property. Both the parties had initially entered into a development agreement with a builder M/s. Kohli Constructions. But, the same was not carried through and thereafter, they entered into another development agreement with M/s. Incor Infrastructure Pvt. Ltd for construction of a hospital building consisting of 63237 sq.ft covering the cellar and ground plus five

floors. Under the said agreement, the assessee company handed over 1000 sq. yards of land to the Developer, while its sister concern has handed over 1600 sq. yards and both the land owners and the developers agreed to share the constructed area and the undivided land of the scheduled property in the ratio of 50:50. Since the assessee had transferred the land during the financial year 2013-14, by entering into the development agreement cum GPA, the assessee offered the capital gains by adopting fair market value of the share of constructed area to be received by the assessee as sale consideration, which, as per the SRO was Rs.700 per sq. ft. Therefore, the assessee reported a long term capital loss of Rs.78,22,123 to be carried forward.

3. In order to verify the cost of construction of the building, the AO issued a letter to the Builder M/s. Inco Infrastructure Pvt. Ltd u/s 131 requiring it to furnish the relevant information. The said builder furnished the information, according to which, the total cost of construction of the building was Rs.20,16,39,466. The AO, therefore, worked out the cost of construction per sq. feet at Rs.3199/- sq.ft. Since the assessee had adopted the value at Rs.700/- per sq.ft, a show cause notice was issued to the assessee as to why the cost of construction should not be adopted at Rs.3199/- per sft. The assessee filed its reply dated 7.12.2016 submitting that as on the date of the filing of the return of income on 29.09.2014, the cost of construction was not available and therefore, the SRO value as on the date of the transfer was adopted as the cost of construction for computing the long term capital gains.

4. The AO was however, not convinced with the submission of the assessee and held that the cost of construction to the builder alone is to be adopted as the consideration received by the assessee. Further, he also observed that the assessee had entered into an agreement with M/s. Kohli Constructions prior to the agreement dated 5.10.2013, and that M/s. Incor Infrastructure Pvt. Ltd had agreed to pay Rs.1,76,00,000 to the builder Kohli Constructions, but, in effect only Rs.60.00 lakhs was paid. The AO, therefore, took the entire amount agreed to be paid as part of cost of construction and arrived at a sum of Rs.21,38,39,466 as the total cost of construction for 63235 sq.ft and worked out the per sq.ft cost at Rs.3,381.65. Taking the same into consideration, the AO worked out the long term capital gain falling to the share of the assessee at Rs.2,47,88,420 and since the assessee has reported long term capital loss of Rs.(-) 78,22,123/-, the AO brought the difference of Rs.3,26,10,543 to tax. Aggrieved, the assessee preferred an appeal before the CIT (A), who confirmed the order of the AO, and the assessee is in second appeal before us.

5. The learned Counsel for the assessee, Shri Ajay Gandhi, while reiterating the submissions made by the assessee before the authorities below submitted that the development agreement is not an agreement of sale, but is a transaction of exchange. He submitted that the assessee is exchanging its land with the built-up area and therefore, there is no sale and there cannot be any capital gains arising out of such transaction. In support of this contention, he placed reliance upon the judgment of the Hon'ble Andhra Pradesh High Court in the case of Motor & General Stores vs. CIT reported in (1967) 66 ITR 0701 which has

been approved by the Hon'ble Supreme Court as reported in (1967) 66 ITR 692 (S.C). He also placed reliance upon the decision of the Hon'ble Kerala High Court in the case of P.S. Rajan vs. Asstt. CIT reported in (2003) 263 ITR 279 (Ker.) wherein by applying the ratio laid down by the Hon'ble Supreme Court in the case of Motors & general Stores (Supra), the Hon'ble Kerala High Court held that where there is a transaction of exchange, it cannot be considered as a sale since there is no exchange of money in such a transaction.

6. He also submitted that the assessee is receiving built up area in future as the consideration for exchange of its land and the future cost of construction cannot be taken as a consideration for the assessee since varied factors such as the period of construction, fluctuation in the prices of building material etc., could affect the cost of construction and therefore, the actual cost of construction cannot be estimated at the stage of filing of ROI or till the construction is completed. He therefore, prayed that the SRO value should be considered as the consideration receivable by the assessee since the capital gains is being computed on the execution of JDS and handing over of possession. He also referred to the sub-section 5A of section 45 of the Income Tax Act for the proposition that for purpose of computation of capital gains, it is the stamp duty value, which is to be adopted. He also referred to the language used in section 50C where there is a reference to the SRO value as fair market value. He referred to clause (viiia) and (viiib) of section 56 of the I.T. Act, where it is provided that where an immovable property is transferred without consideration, the stamp duty value of which exceeds Rs.50,000, the stamp duty value of such property shall be considered as the value of the

property received. Therefore, according to him, the assessee had rightly adopted the SRO value and that should be accepted by the authorities below.

7. Without prejudice to the above arguments and in the alternative, the learned Counsel for the assessee submitted that if the cost of construction has to be taken into consideration, the matter should be remanded to the file of the AO for taking only the relevant factors constituting the cost of construction, such as the payment made to Kohli Construction, (the actual payment and not the agreed amount) and by reducing the finance and other costs incurred by the Developer. He submitted that as far as the assessee is concerned, the value of the property received by the assessee alone should be considered and that should be the actual cost of construction excluding any other expenditure which may be business expenditure for the builder but does not constitute the cost of construction. He referred to the SRO value which is placed at page 52 of the Paper Book filed by the assessee.

8. The learned DR, on the other hand, supported the orders of the authorities below and submitted that the SRO certificate submitted by the assessee does not mention the purpose for which it has been obtained. He also brought out the distinction between the nature of the building i.e. building of the assessee and the building mentioned in SRO certificate. He pointed out that the building of the assessee consisted of cellar and 5 floors above, whereas the building in the SRO certificate mentioned only two floors. He submitted that the SRO certificate does not consider the differences in the quality of the buildings

and is uniform for all the buildings in the vicinity whereas, the assessee had made specific request to the builder to construct the building in a particular way and therefore, those factors have to be taken into consideration while computing the construction cost of the built up area. He submitted that the AO has clearly considered all the objections of the assessee on the cost of construction as given by the builder and thereafter, has rightly rejected the same. Therefore, according to him, the cost of construction incurred by the builder should be adopted as against the SRO value adopted by the assessee.

9. Having regard to the rival contentions and the material on record, we find that the argument of the assessee that the JDA is a transaction of exchange and not sale, is to be adjudicated at the outset. By virtue of JDA, the assessee is parting with a portion of its land and in consideration thereof, is receiving built-up area on the land retained by it. Whether it can be termed as a transaction of exchange?. Whether the judgment of the Hon'ble Supreme Court in the case of Motors & General Stores (cited Supra), would apply to the facts of the case before us. In the said case, the Hon'ble Court was dealing with a case of exchange of property for a percentage of shares and pertained to the A.Y 1955-56. Therefore, this decision is clearly distinguishable on facts and thus not applicable to the case on hand. Further, the Hon'ble Kerala High Court in the case of P.S. Rajan (cited Supra) has followed this decision to hold as under:

“6. There is no dispute that the appellant had transferred his shares in SISCO to Essar on the basis of the offer made by Essar. In the absence of any suggestion of bad faith or fraud, the true principle is that the taxing statute has to be applied in accordance with the legal rights of the parties to the transaction. When the transaction is

embodied in a document, the liability to tax depends upon the meaning and context of the language used in accordance with the ordinary rules of construction [CIT v. Motors & General Stores (P) Ltd. (1967)] 66 ITR 692 (S.C). In the case of a sale for a price there is no question of any market value unlike in the case of an exchange. The consideration for transfer of the shares in the instant case is not only cash, but also shares. In a case where the value of a share is not specified in terms of cash, necessarily the same has to be fixed in terms of the market value [Motors & General Stores (P) Ltd. v. CIT (1967)] 66 ITR 701 (A.P)..

7. We find that Essar in the offer has clearly stated that as on 28th Feb., 1991, the closing market price of Essar equity shares was Rs. 38.50 at Madras Stock Exchange and Rs. 37.50 at Bombay Stock Exchange and Essar has clearly stated that.

"Based on these prices, the offer price is more than the highest market price of the equity shares of SISCO during the six months immediately preceding to this date."

10. Thus, it can be seen that there is no finding by any of the Courts that vide JDA, there is no transfer of property u/s 2(47)(v) of the Act. In fact, in lieu of parting of a portion of its land, the assessee is receiving the consideration in kind (i.e. by way of superstructure on the land retained by it) in future and is therefore, a transfer within the meaning of section 2(47)(v) of the Act.

11. As regards the quantification of the consideration received by the assessee, we find that the capital gains has arisen to the assessee on account of the execution of the joint development agreement. The assessee is entitled to receive the built up area or superstructure to its share. At the time of JDA, the assessee is transferring part of its land to the Developer in consideration of receiving the built-up area in future. Therefore, as rightly pointed out by the learned Counsel for the assessee, it is not possible, at this stage of time, to accurately estimate the exact cost of construction for the building as many factors would affect such cost of construction. It appears that the assessee had

earlier given the plot of land for development to another builder, and subsequent builder has agreed to compensate the earlier builder. Though there was agreement to pay more than Rs.1,76,00,000/-, in effect only of Rs.60.00 lakhs was paid. Therefore, the cost of construction should include only the amount of Rs.60.00 lakhs which was actually paid and not the entire amount which was agreed to be paid. Further, cost of construction also varies due to duration of construction and also other circumstances. Therefore, at the time of filing of the ROI it is difficult to estimate and consider the cost of construction to the builder as the consideration for the land. When the assessee is offering the capital gains, it can only do so, on the basis of material available before it at that point of time and cannot presume about the events in future. Therefore, the assessee had adopted the SRO value, but as rightly pointed out by the AO and the CIT (A), the same cannot be relied upon in the case as the description of the nature of the building in the SRO certificate did not match with the description of assessee's building. The quality of construction would also differ between building-to-building. The SRO value can at best be a guiding factor but cannot be a substitute. Therefore, we reject the assessee's contention that the SRO value should be accepted as the value of the property receivable by the assessee. In such circumstances, we are of the opinion that the cost of construction of the building alone is the right choice, as at the time of assessment proceedings, the cost of construction was available. However, the AO has taken into consideration certain expenditure incurred by the builder which is not part of the cost of construction of the building. Further, the assessee's contention that certain part of consideration has already been offered to tax in the hands of its sister concern also

has not been verified by the AO/CIT (A). Therefore, we deem it fit and proper to remand the issue to the file of the AO with a direction to re-compute the capital gain again by considering only elements which are necessary for the construction of the building as the cost of construction, and not the entire expenditure of the builder, including the compensation agreed to be paid to Kohli Constructions and also the finance charges etc., which are not relevant for computing the cost of the construction. The objections of the assessee to the cost of construction reported by the builder shall be considered and disposed of by a speaking order. Needless to mention that the assessee shall be given a fair opportunity of hearing.

12. In the result, assessee's appeal is partly allowed for statistical purposes.

Order pronounced in the Open Court on 28th September, 2018.

Sd/-
(S.Rifaur Rahman)
Accountant Member

Sd/-
(P. Madhavi Devi)
Judicial Member

Hyderabad, dated 28th September, 2018.

Vinodan/sps

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- 3 CIT (A)-5 Hyderabad
- 4 Pr. CIT – 5, Hyderabad
- 5 The DR, ITAT Hyderabad
- 6 Guard File

By Order