

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

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

ITA No. 2003/Del/2022  
Asstt. Year: 2018-19

Bushra Javed, D-112, Lower Ground Floor, Panchsheel Enclave, New Delhi-110 017 PAN AFGPJ3907C (Appellant)	Vs.	ACIT, Circle Int. Taxation 2 (1)(1) New Delhi. (Respondent)
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Assessee by:	Shri Manish, CA
Department by:	Shri Vizay Vasanta, CIT- DR
Date of Hearing:	24.04.2023
Date of pronouncement:	18.07.2023

**ORDER**

**PER ASTHA CHANDRA, JM**

The appeal filed by the assessee is directed against the order dated 26.06.2022 of the Ld. Assistance Commissioner of Income Tax, Circle International Taxation-2(1)(2) (**"AO"**) passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (**the "Act"**) pertaining to Assessment Year (**"AY"**) 2018-19.

2. The only grievance of the assessee is addition of Rs. 19,42,581/- on account of cost of acquisition with indexation and cost of improvement with indexation.

3. Briefly stated, the facts are that the assessee is a non-resident individual. She resides in London with her husband Mr. Khalid Hussain Kureshi. The assessee filed her revised return of income for AY 2018-19 on

21.08.2018 declaring income of Rs. 45,290/-. Her case was selected under complete scrutiny. In his draft assessment order dated 25.09.2021 under section 144C of the Act. The Ld. AO computed the long term capital gain of Rs. 19,47,875/- as against Rs. 5,294/- declared by the assessee resulting in addition of Rs. 19,42,581/- to the income of the assessee.

3.1 The assessee raised objections with the Ld. Dispute Resolution Panel (**“DRP”**) to the draft assessment order. After hearing the assessee, the Ld. DRP issued directions vide order under section 144C of the Act on 09.05.2022. In para 4.1 of its directions, the Ld. DRP observed that all the grounds are related to issue of allowability of indexation from date of payment which is post absolute transfer of asset during F.Y. 2003-04 and proportionate cost of improvement Rs. 6,44,280/- as supporting document filed by the assessee. In para 4.2.2 the Ld. DRP referred to the statements of facts filed by the assessee according to which in F.Y. 2003-04 the assessee and her husband together entered into triparty agreement with Cosmos Builders and Developers Limited for purchase of residential property. The residential property is jointly owned since the date of triparty agreement and not from the date of registration on 08.12.2010. In para 4.3 of its directions the Ld. DRP observed that the Ld. AO has not mentioned about the tripartite agreement and simply mentioned that deed reflecting the name of the assessee is dated 08.12.2010 i.e. in the year 2010-11 and the assessee became half owner in the property, hence indexation under section 48 should be done accordingly. In para 4.4 of its directions, the Ld. DRP observed that it appears that the Ld. AO has not passed a speaking and reasoned order considering all the facts including the documentary evidence and also the factual matrix made by the assessee. The Ld. DRP also observed that the Ld. AO has allowed the index cost of improvement of Rs. 601770/- without recording any reasons as to how this figure has been arrived at. Finally, the Ld. DRP directed the Ld. AO to consider the assessee's factual submission, make necessary verification and pass a speaking order.

3.2 However, the Ld. AO in his order dated 26.06.2022 passed under section 143(3) r.w.s. 144C(13) maintained the impugned addition of Rs. 19,42,581/- by observing, inter alia, in para 7 thereof that the agreement to sale may not culminate into a final sale. Such contractual right can be surrendered or neutralized by the parties through subsequent contract or conduct leading to no transfer of the property to the proposed vendee. By mere execution of an agreement to sell, right of the vendor/transferor in respect of the property cannot be extinguished.

4. Dissatisfied, the assessee is in appeal before the Tribunal.

5. The Ld. AR submitted that the Ld. AO erred on facts in considering that name of the assessee first appeared on the registered deed dated 08.12.2010 as alleged by him in para 3 of the assessment order which formed the solitary basis for disallowance of indexation as claimed by the assessee. According to him the Agreement to sale dated 3<sup>rd</sup> February, 2004 is a tripartite agreement along with her husband and the builder. The same forms part of the record and establishes the fact of joint ownership of the property since the date of original purchase deed dated 3<sup>rd</sup> February, 2004. Demolishing the contention of the Ld. AO that the agreement to sale may not culminate into a final sale etc., the Ld. AR submitted that the agreement is not between two partners which can be altered subsequently. It is a triparty agreement between the builder, the assessee and her husband which has no possibility of unilateral revision. Evidence in the form of copy of cheque issued by the assessee at the time of booking of property and communications from the lender bank indicating that the assessee is joint borrower for the property were brought on record. The Ld. AR relied on the decision of the Hon'ble Supreme Court in CIT vs. Podar Cement Pvt. Ltd. 226 ITR 625 (SC) and Mysore Minerals Ltd. vs. CIT 239 ITR 775 (SC); decision of Hon'ble P&H High Court in CIT vs. Ved Prakash & Sons (HUF) 207 ITR 148 and the decision of Hon'ble Delhi High Court in CIT vs. Frick India Ltd. 369 ITR 328.

6. The Ld. CIT-DR supported the order of the Ld. AO and submitted that the agreement to sale is not in the name of the assessee. It was in the year 2010 that first time the assessee's name appeared as co-owner in the sale deed. The Ld. AR refuted this allegation and pointed out that perusal of the agreement to sale will reveal that it bears the signature of the assessee as also of her husband at each and every page thereof as purchaser.

7. We have considered the rival submissions of the parties and perused the records. It is observed from the assessment order that the Ld. AO negated the assessee's claim of indexation of cost of acquisition taking the Cost Inflation Index (CII) of 2003-04 for the reason that the property was registered in the name of her husband only and that the assessee became half owner in the property by virtue of deed dated 08.12.2010 in which her name is reflected. The assessee raised objection before the Ld. DRP and asserted that during the previous year relevant to AY 2004-05 the assessee and her husband together entered into triparty agreement with the builder for purchase of the property and paid the total cost of acquisition in FY 2004-05. Therefore, the Ld. AO ought to have allowed indexation for cost of acquisition from FY 2004-05 and not from the date of registration of sale deed on 08.12.2010. We find that the Ld. DRP noticed that the Ld. AO has not mentioned about the tripartite agreement. As pointed out by the Ld. AR agreement to sale on which the Ld. AO placed reliance bears the signature of both the assessee and her husband as purchasers. In our considered view the Ld. AO arrived at an erroneous conclusion that the agreement to sale is not in the name of the assessee.

7.1 Referring to the clause 7 of the tripartite agreement and the sale deed, the Ld. AR argued that the ownership of the property got transferred from the builder to joint owners in the F.Y. 2003-04 itself. The total cost of acquisition was also paid in F.Y. 2004-05 which has not been disputed by the Ld. AO. If that be so, the Ld. AO is not justified in disallowing indexation of the cost of acquisition from F.Y. 2004-05. The judicial consensus is that indexation benefit against cost of acquisition shall be

available to the assessee on the basis of index of the year in which the payments were actually made.

8. We, therefore, direct the Ld. AO to compute the long term capital gain keeping in view the facts of the assessee's case, our observations above and in the light of the definition of "indexed cost of acquisition" and "indexed cost of any improvement" contained in Explanation (iii) and (iv) to section 48 of the Act. The Ld. AO shall allow reasonable opportunity of hearing to the assessee. We order accordingly.

9. In the result, appeal of the assessee is allowed for statistical purposes.

**Order pronounced in the open court on 18<sup>th</sup> July, 2023.**

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

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

Dated: 18/07/2023

**Veena**

Copy forwarded to -

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

ASSISTANT REGISTRAR  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
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