

आयकर अपीलीय अधिकरण "SMC" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH, MUMBAI

श्री शमीम याहया, लेखा सदस्य एवं श्री राम लाल नेगी, न्यायिक सदस्य के समक्ष।

BEFORE SRI SHAMIM YAHYA, AM AND SRI RAM LAL NEGI, JM

आयकर अपील सं./ ITA No. 3166/Mum/2019

(निर्धारण वर्ष / Assessment Year 2010-11)

Mrs. Rashmi Mahendra Dhanani C-10, 506, Pratyakshkar Bhavan, Bandra Kurla Compex, Bandra - East] Mumbai	बनाम/ Vs.	Income Tax Officer Ward-26(2)(5), Mumbai
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AADPD3333T		

अपीलार्थी की ओर से / Appellant by	:	Shri Satya Prakash Singh, AR
प्रत्यर्थी की ओर से / Respondent by	:	Shri Jeetendra Kumar, DR

सुनवाई की तारीख / Date of hearing:	19.10.2020
घोषणा की तारीख / Date of pronouncement:	26.11.2020

आदेश / ORDER

**शमीम याहया, लेखा सदस्य/
PER SHAMIM YAHYA, AM:**

This appeal by the assessee is directed against order of learned CIT(A)-38, Mumbai dated 20.03.2019 and pertains to Assessment Year 2010-11.

2. The grounds of appeal read as under: -

"1. The order dated 20/-3/2-10 bearing No.cita-38/ITO-26(2)(5)/IT-10182/2017-18 by the CIT(A)-38, Mumbai is arbitrary,

against natural justice, unlawful, against the provisions of Income Tax Act, 1961, invalid and therefore liable to be quashed.

2. The Learned Commissioner of Income Tax, Appeal was not justified in not considering the following payments amounting to ₹10,22,492/- made by the assessee for acquisition of the property before arriving Long Term Capital Gain.

<i>Particulars</i>	<i>Amount (₹)</i>
<i>Amenities</i>	<i>9,38,250</i>
<i>Furniture & Fixture</i>	<i>84,242</i>
<i>Total</i>	<i>10,22,492</i>

3. Brief facts of the case are as under that during the course of assessment proceeding under section 143(3) of the Act, 1961, the AO observed that the assessee had sold flat being Flat No.604/B, ETERNIA Hiranandani Gardens, Powai for sale consideration of Rs.46,60,000/- and claimed long term capital loss. From the working of long term capital loss furnished by the assessee during the course of assessment proceedings, it was noticed that the assessee had shown purchase price of the flat at ₹18,39,397/- in 1994 the year 2002-03 with transfer charges of ₹ 75,000/-. After indexing the purchase price from 1994-95 onwards, the assessee arrived at indexed purchase price of ₹44,88,413/- and after indexing garage cost from 2002-03 onwards, the indexed cost of acquisition of garage was shown at ₹2,26,219/- which also included transfer charges of ₹75,000/-. Thus, the total indexed cost of the property was taken by the assessee at ₹47,89,632/- as against which the

sale consideration of the property was shown at ₹46,00,000/-, thereby arriving at long term capital loss of ₹1,29,632/-. On further verification of the purchase deed, it was noticed that the assessee along with her husband purchased the property at ₹7,29,750/- and paid stamp duty of ₹26,300/- totaling to ₹7,56,050/- whereas the assessee had shown purchase cost of ₹18,39,397/- before indexation and deduction of ₹44,88,413/- was claimed after indexation. In view of the same, at the time of assessment, the assessee was asked to furnish the details of purchase cost of ₹18,39,397/-. In reply, assessee has submitted that the amount of ₹9,38,250/- was paid to the builder towards amenities charges on the flat and this amount was regularly shown in the balance sheet since the year 1995. Further, the assessee also contended that the amount of Rs.9,38,250/- should be considered as cost of acquisition/improvement to the said property. However, the explanation furnished by the assessee was not accepted by the Assessing Officer as it was observed that construction of fiat which in fact are fully covered by the purchase deed of the said flat. It was further observed that as per the amenities agreement the amount of ₹9,38,250/- was required to be paid on or before 30.04.1994, however, assessee did not disclose the details of payment, mode of payment with date and supporting evidences. It was stated by the Assessing Officer that as per the purchase deed the assessee has purchased a completely constructed flat for ₹7,29,750/ with all amenities which indicates that a completely constructed flat was purchased by the assessee hence, any further claim towards amenities was not acceptable. Accordingly, the AO reduced the indexed

purchase price of ₹18,44,879/- and garage cost of Rs. 226,219/- from the sale consideration of Rs. 46.60 lakhs and determined long term capital gain of ₹25,88,902/-, against this addition, assessee filed appeal before the Ld. CIT(A). The Ld. CIT(A) upheld the decision of the AO in disallowing assessee's claim of indexed cost of acquisition in respect of amenity charges. However, the learned CIT(A) directed the AO to consider assessee's claim in respect of Stamp duty paid towards cost of acquisition and also the transfer charges paid to the society while computing capital gain. On assessee's appeal against the learned CIT(A)'s order as aforesaid, the ITAT held as under:

"in our view, these works if actually had been undertaken by the builder as per amenities agreement, would certainly need to be included in the cost of acquisition. Only because the agreement is in plain paper or not registered would not deprive the assessee from getting the benefit of amount paid towards amenities in case the assessee has actually paid it. Moreover, if all other flat owners have entered into similar agreement for amenities and have made payment for such amenities, it will definitely prove that there was an arrangement between the builder to split the work into two different agreement, for which the purchasers of flat cannot be held responsible. Therefore, when such fact was brought to the notice of the Assessing Officer, it was incumbent on his part to make enquiry and find out whether similar agreement was entered into by other flat owners. In that

event, it would have been proved that the flat purchased by the assessee was in a semi-finished condition and was not complete in all respect as certain work was to be done as per the amenities agreement. Therefore, in our view, if it is found that all other flat owners have entered into similar amenities agreement with the builders/ developers, no adverse view can be taken in respect of the assessee and the amenities charges paid by the assessee has to be treated as part of the cost of acquisition for the purpose of indexation. Hence, for the limited purpose of ascertaining whether other flat owners have entered into similar amenities agreement, we restore the matter back to the file of the Assessing Officer for verifying this aspect and decide the issue afresh in terms of our observations herein above after due opportunity of being heard to the assessee.

The Assessing Officer issued notice under section 142(1) of the I.T. Act, 1961 dated 01.09.2017 to the assessee. In response to the same, the assessee vide letter dated 04.09.2017 reiterated the submission made by the assessee at the time of assessment proceedings.

(i) The assessee has already filed the copy of Purchase Agreement as well as Amenities Agreement at the time of assessment proceedings.

(ii) The assessee has also filed all her earlier year balance sheets up to Assessment Year 2010-11 showing the payments made by her for purchasing the property and the amenities

provided in the above float.

(iii) It was confirmed that while purchasing the above flat it was regular practice of the builder to divide purchase agreement into 2 parts i.e. purchase Agreement as well as Amenities Agreement.

(iv) The similar agreement in all other properties sold by the builder during the time of purchase of property.

In view of ITAT's direction to ascertain whether all other flat owners of Eternia CHS have entered into similar amenities agreement letters dated 15.11.2017 were issued to the Builder, M/s. Hiranandani Lake Gardens and to the Secretary, Eternia Co-operative Housing Society Ltd. calling for details of sale agreements entered by the builder with other flat owners in the society Eternia CHS Ltd., Hiranandani Gardens, Powai. However, only one copy of agreement entered into by the Builder with one buyer was provided. As regards details called from the society, there was no compliance from the society. Therefore, reminder letters dated 12.12.2017 were issued to the builder and the Secretary, Eternia CHS calling for further details of flat owners who have entered into Amenities agreement. A letter was also issued to M/s Lake View Developers, a group concern of Hiranandani Lake Gardens. In reply, the builder Hiranandani Lake Gardens and its group concern M/s. Lake View Developers, vide letter dated 19.12.2017 submitted as under: -

1. There are 128 flats in Eternia Co-operative Housing Society Ltd.

No compliance has been received from the society even after repeated reminders. On perusal of the submission received from the builder, Hiranandani Lake Gardens and the group concern M/s. Lake View Developer, AO observed that out of 128 flats in Eternia CHS amenities agreement have been made only in respect of 33 flats. This implies that there was no mandatory arrangement on the part of the builder to split the work into two different agreements, which is contrary to the facts submitted by the assessee vide letter dated 04.09.2017. It establishes the fact that the flat was handed over by the builder in complete constructed form and was fit for habitation in all respects as, apart from very few flat owners, majority of other flat owners in Etemia CHS have not entered into such amenities agreement with the builder. It is further observed from the amenities agreement that the amenities charges claimed includes special water proofing in toilets/kitchen, special wood for doors/windows etc. which are not in the nature of improvement cost. The amenities agreement-claimed by the assessee is also not with the builder but a group concern., M/s. Lake View Developer. The assessee has not been able to co-relate the two agreements entered with two different business entities one with M/s. Hiranandani Lake Garden and other with M/s. Lake view Developers. The assessee has also not been able to disclose the details of payment, mode of payment with date, supporting evidences in respect of such payments. In view of the above, long term capital gain determined as per order under section 250 of the I.T. Act of ₹25,13,902/- is charged to tax.

4. Upon assessee's appeal learned CIT(A) confirmed the

Assessing Officer's action by interalia observing as under: -

"7.3.1 Taking into consideration the information with a pinch of salt, that only 33 flat owners have entered into amenities agreement since copy of the said documents have not been made available either by the builder, society or the appellant, out of 128 flats in the said society building strongly indicates that there was no mandatory splitting of the purchase/ sale agreements into two parts as wrongly contended by the appellant vide letter dated 14.09.2017. This also proves the fact that the builder had handed over fully completed and constructed flat to the flat buyers because majority of other flat owners have not entered into any such amenities agreement with builder. I also find that the said amenities agreement is also not with the builder but the group concern, M/s. Lakeview Developers. Therefore, the appellant failed to establish correlation between the two agreements entered with two different entities."

Against the above order assessee is in appeal before us.

5. We have heard both the parties and perused the materials

available on record. We find that the issue in dispute is the amenities charges claimed by the assessee as part of cost of acquisition of the flat. This issue had already travelled to the ITAT before. The ITAT had principally agreed with the assessee's claim but had directed the authorities below to examine whether the similar agreement had been entered for amenities by other flat owners. The objection of the authorities below towards the veracity of agreement for the amenities had already been rejected by the ITAT.

6. We find that thereafter upon subsequent enquiry the Assessing Officer got information that 33 of the flat owners have also entered into such amenities agreements. Despite this information the authorities below disallowed the assessee's claim by holding that the veracity of the same was not established. We note that the veracity of the claim was already established by the agreement already submitted by the assessee earlier which the ITAT has accepted. The matter was only remanded to find out the position of other flat owners. From the enquiry of the authorities below it came to light that 33 other flatters had entered into similar amenity agreement. In such circumstances in our considered opinion the authorities below should have followed the ITAT order and allowed the assessee's claim of amenities charges as part of cost of the position. This position is further fortified that the amenity charges had already been paid and the same was appearing in the balance sheet of the assessee. Accordingly, in our considered opinion the denial of the assessee's claim towards amenities charges paid as part of cost of acquisition is not

sustainable. Accordingly set aside the orders of authorities below on this issue and decide the issue in favour of assessee.

7. In the result, appeal filed by the assessee stands allowed as above.

Order pronounced under Rule 34(4) of ITAT Rules on 26.11.2020.

Sd/-

(राम लाल नेगी / RAM LAL NEGI)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 26.11.2020

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

Sd/-

(शमीम याहया / SHAMIM YAHYA)

(लेखा सदस्य / ACCOUNTANT MEMBER)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार / BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai