

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE**

RESERVED ON: 14.12.2021
DELIVERED ON: 18.01.2022

CORAM:

**THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

ITAT/164/2017
IA NO: GA/1/2017[OLD NO: GA/1423/2017]
PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-1, KOLKATA
VERSUS
M/S. BLUE HEAVEN GRIHA NIRMAN PVT. LTD.

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ITAT/239/2017
IA NO: GA/1/2017[OLD NO: GA/2101/2017]
PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-1, KOLKATA
VERSUS
M/S. WELLGROWTH GRIHANIRMAN PVT. LTD.

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ITAT/250/2017
PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-1, KOLKATA
VERSUS
M/S. ORCHID GRIHA NIRMAN PVT. LTD.

Appearance:-

Mr. Debasish Chowdhury, Adv. in ITAT/164/2017
... For Appellant

Ms. Sucharita Biswas, Adv. in ITAT/239/2017
... For Appellant

Mr. P. K. Bhowmik, Mr. Asok Bhowmik, Adv.

in ITAT/250/2017
... For Appellant

Mr. J.P. Khaitan
Ms. Swapna Das
Mr. Siddhartha Das

.....For the respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. These three appeals filed by the revenue under section 260 A of the Income Tax Act, 1961 (Act of brevity) are directed against three separate orders the details of which are as follows:-

(i) ITAT 164 of 2017 has been filed challenging the order dated 16.11.2016 passed by the Income Tax Appellate Tribunal “B” Bench Calcutta, (tribunal) in ITA No. 2270/Kol/2013 for the Assessment Year 2008-09.

(ii) ITAT No. 239 of 2017 has been filed challenging the order dated 15.03.2017 passed by the Income Tax Appellate Tribunal “C” Bench Calcutta, (tribunal) in ITA No. 2260/Kol/2013 for the Assessment Year 2008-09.

(iii) ITAT No. 250 of 2017 has been filed challenging the order dated 19.10.2016 passed by the Income Tax Appellate Tribunal “A” Bench Calcutta, (tribunal) in ITA No. 2269/Kol/2013 for the Assessment Year 2008-09.

2. All the three appeals were heard together as the issues arising in all the three appeals were identical though the assessee were different companies. Furthermore, the tribunal followed the decision in ITA No. 2269/Kol/2013,

(impugned in ITAT No. 250 of 2017), in the other two appeals and therefore, the appeals were taken up together.

3. The revenue has raised the following substantial questions of law for consideration:-

(a) Whether on the facts and in the circumstances of the case the Learned Tribunal, erred in law in upholding the order of the CIT (Appeals) in deleting the Short Term Capital Gain of Rs. 96,37,85,635/- in contravention to the provision of Section 45(3) of Income Tax Act, 1961 without considering the fact that in this case the capital gain arose from transfer of land to the partnership firm by way of capital contribution as the assets was converted to Fixed Capital Asset by the partnership firm on March 31, 2008?

(b) Whether on the facts and in the circumstances of the case the Learned Tribunal, erred in law in ignoring the sham arrangement between the ground concerned wherein the nomenclature of the impugned asset was intentionally shown as stock-in-trade and undervalued to escape the provision of Section 45(3) of Income Tax Act, 1961 whereas it is evident from the audited accounts of the year that the asset taken over by the firm was nothing but a capital asset?

(c) Whether on the facts and in the circumstances of the case the Learned Tribunal, erred in law in deleting the revaluation profit of Rs. 37,03,36,187/- although no tax was paid either by assessee or the partnership firm on the said profit.?

(d) Whether on the facts and in the circumstances of the case conclusion arrived at by the Learned Tribunal in dismissing the Appeal of the revenue, is perverse?

4. The substantial question of law raised by the revenue in ITAT No. 164 of 2017 is as follows:-

(a) Whether on the facts and in the circumstances of the case the Learned Tribunal was justified in law to uphold the order of the CIT(A) by quashing the notice issued under Section 148 of the said Act;

(b) Whether on the facts and in the circumstances of the case the Learned Tribunal was justified in law to delete the additions made by the Assessing Officer on account of revaluation profit of Rs. 37,03,36,187/- despite the fact that no tax was paid either by the assessee or the partnership firm on the said profit;

(c) Whether on the facts and in the circumstances of the case the Learned Tribunal was justified in law to delete short term capital gain to the tune of Rs. 96,85,635/- in contravention to the provisions of Section 45(3) of the said Act despite the fact that

the capital gain arose from the transfer of land to the partnership firm by way of capital contribution as the asset was converted to fixed capital assets of the partnership from 31.03.2008.

5. In ITAT No. 239 of 2017 the following substantial questions of law have been raised for consideration:-

(a) Whether on the facts and in the circumstances of the case the Learned Tribunal was justified in law to quash the notice issued under Section 148 of the said Act holding, inter-alia, that the Assessing Officer has acted without jurisdiction in issuing the notice under Section 148 and made re-assessment under Section 147 of the said Act:

(b) Whether on the facts and in the circumstances of the case the Learned Tribunal was justified in law to delete the addition of the re-valuation profit of Rs. 259,23,53,313/- despite the fact that no tax was paid either by the assessee or by the partnership firm on the said profit.

(c) Whether on the facts and in the circumstances of the case the Learned Tribunal was justified in law in ignoring the sham arrangement between the group concerns wherein the nomenclature of impugned assets was initially shown as stock-in-trade and undervalued to escape the provision of Section 45(3)

which was evident from audited accounts of the year but the assessee was taken over by the firm was merely a capital asset:

6. In ITAT No. 250 of 2017 the following substantial questions of law have been raised for consideration:-

(a) Whether on the facts and in the circumstances of the case the Learned Tribunal, erred in law in upholding the order of the CIT (Appeals) in deleting the Short Term Capital Gain of Rs. 96,37,85,635/- in contravention to the provision of Section 45(3) of Income Tax Act, 1961 without considering the fact that in this case the capital gain arose from transfer of land to the partnership firm by way of capital contribution as the assets was converted to Fixed Capital Asset by the partnership firm on March 31, 2008?

(b) Whether on facts and in the circumstances of the case the Learned Tribunal, erred in law in ignoring the sham arrangement between the ground concerned wherein the nomenclature of the impugned asset was intentionally shown as stock-in-trade and undervalued to escape the provision of Section 45(3) of Income Tax Act, 1961 whereas it is evident from the audited accounts of the year that the asset taken over by the firm was nothing but a capital asset?

(c) Whether on the facts and in the circumstances of the case the Learned Tribunal, erred in law in deleting the revaluation profit of Rs. 37,03,36,187/- although no tax was paid either by the assessee or the partnership firm on the said profit.?

7. Since the tribunal had followed the decision which is impugned in ITAT No. 250 of 2017 in the other two appeals the said appeal was taken up as the lead case.

8. We have heard Mr. P.K. Bhowmick, Mr. Ashok Bhowmick, Mr. Debasish Chowdhury and Ms Sucharita Biswas, Learned Standing Counsels appearing for the appellant/revenue and Mr. J.P. Khaitan, Learned Senior Advocate assisted by Ms Swapna Das, and Mr. Siddhartha Das, Learned Counsels for the respondents/assessee.

9. For the purpose of deciding whether the substantial questions of law as suggested arise for consideration, it would suffice to refer to the case of the assessee who is the respondent in ITAT No. 250 of 2017, the lead case. The assessee filed their return of income for the relevant assessment year (A.Y- 2008-09) declaring loss of Rs. 58,885/-. The assessee along with three other companies was a partner in a partnership firm under the name M/S. Salapuria Soft Zone. As amongst the three partners, two are assesses in ITAT No. 164 of 2017 and ITAT No. 239 of 2017 respectively. The income declared by the assessee was on account of the share of exempt profit from

the partnership firm M/S. Salapuria Soft Zone. The return was processed under section 143 (1) of the Act.

10. Subsequently, proceedings under section 147 of the Act were initiated and notice dated 03.11.2011 was issued under section 148 of the Act. The reasons for reopening was that the partnership firm M/S. Salapuria Soft Zone had revalued its assets and transferred the revalued reserve to its partners' account and the assessee being a partner had received certain sum of money on account of such revaluation reserve. Therefore, the Assessing Officer opined that he had reasons to believed on examination of record that the above has escaped assessment within the meaning of Section 147 of the Act. The assets which were the subject matter was a large tract of land measuring about 3,19,086 sq. ft. owned by one M/s. I Gate Global Solutions Ltd. The said land was advertised for sale. The assessee company along with the two other companies namely M/s Command Construction Private Limited and Blue Haven Griha Nirman Private Limited, the assessee in (ITAT No. 164 of 2017) offered to purchase for a sum of Rs. 16,94,34,666/-. Subsequently the price was increased to Rs. 22,36,79,266/- on the basis that the said land measured 3,19,08 sq. ft. in contrast with the original measurement of 3,12,092 sq. ft. An agreement was entered into on 14.06.2004 and it appears that the re -measurement of the area was done and it was found that correct extent was only 3,12,092 sq. ft., therefore, the final price stood fixed at Rs. 21,87,76,492/- and supplementary agreement dated 28.12.2004 was entered into. The three companies paid the agreed

sale consideration and possession was handed over. The Deed of Sale was executed and registered in their favour on 30.03.2005. The guideline value for the purpose of stamp duty as fixed by the Government at the relevant time was Rs. 260/- per sq. ft. and the purchase price paid by the three companies was Rs. 701/- per sq. ft. The total cost of the land paid by the three companies, inclusive of stamp duty and registration charges was Rs. 24,54,54,125/-. The land was purchased with a proposal to develop an industrial park and the three companies accounted for the said land so purchased as “work in progress” and reflected it under “Current Assets” in their balance sheet.

11. On 09.01.2006, these three companies and another company M/s. Wellgrowth Griha Nirman Private Limited. (the assessee in ITAT No. 239 of 2017) formed the partnership firm namely M/S. Salapuria Soft Zone and the three companies transferred the said land to the partnership firm. The fourth company (the assessee in ITAT No. 239 of 2017) was to arrange the finance required for development of the land. Each of the said three companies had 10% share in the profit/loss and the fourth company's share was 70%. The partnership business was deemed to have commenced from 01.04.2005. By supplementary deed of partnership dated 13.03.2006 between the four partners (companies) provided that the partnership firm M/S. Salapuria Soft Zone was entitled to avail a loan/credit facilities from commercial banks/financial institutions by mortgaging the movable and immovable properties. The firm, M/S. Salapuria Soft Zone, obtained the

loan/credit facilities to the tune of Rs. 250 crores. The transfer effected by the three companies in favour of the firm was at cost and such cost was the amount recorded in the books of account of the firm for the year ended 31.03.2006, as the value of the said land with corresponding credit to the capital accounts of each of the said three companies. Accordingly, the capital account of the assessee (respondent in ITAT No. 250 of 2017) was credited Rs. 8,15,00,000/-. The firm M/S. Salapuria Soft Zone accounted for the said land as work in progress and reflected it under "Current Assests" in its balance sheet. The completed industrial park was leased out during March 2008. On 30.03.2008 the firm converted the land, building and its amenities which were shown as inventory in its account into fixed assets. On 31.03.2008 the land and building were revalued in order to reflect the market value of the land and building in the books of account with a view to justify the bank loan of Rs. 250 crores. The amount of revaluation was credited to the "Current Account" of the four partners (three assesseees before us and M/s. Command Constructions Private Limited) in their profit sharing ratio. Thus the current account of each of the said three companies as well as the fourth company was credited. The amount which was credited in the accounts is not of much relevance for us. The above factual position is not in dispute.

12. The Assessing Officer while examining the return in the assessment which was reopened was of the view that the credit to the "Current Asset" of the assessee in the partnership firm M/S. Salapuria Soft Zone gives rise to

income chargeable to tax. The Assessing Officer in the reassessment proceedings held that bringing of land into the firm by way of inventory without crediting partners' capital account and without bringing it as fixed asset cannot be considered as capital contribution by the partners during the financial year ended March 31, 2006. The land was contributed by the three companies during the previous year ended March 31, 2008 relevant to the assessment year 2008-09 by way of capital contribution when it was converted into fixed assets from inventory by the firm. The Assessing Officer held that Section 45(3) was applicable in respect of such transfer made during the previous year relevant to the assessment year 2008-09. It was further held that the revaluation figure recorded in the books of accounts in the firm M/S. Salapuria Soft Zone as on March 31, 2008 was to be deemed as full value of consideration received or accruing as a result of transfer of the capital asset by way of capital contribution. Further the revaluation amount was the profit which accrued to the three companies (assesseees before us) and each of them was liable to be taxed on one-third of such profit as short term capital gains. Further, the Assessing Officer pointed out that the land was grossly undervalued till it was part of inventory in the books of accounts of the firm to avoid the market value of the land being taken into consideration and consequently to avoid higher taxes on capital gains in the hands of the assessee company.

13. Thus, the Assessing Officer concluded that the revaluation amount was real profit and not notional and the firm was taxable in respect of its

profits but the revaluation profit was not disclosed by it as its income for the assessment year 2008-09 and no tax was paid thereon. Thus, the three assesses were made liable for tax on its share of revaluation profit. With the above reasoning the assessment was completed. The assessee carried the matter on appeal to the Commissioner of Income Tax Appeal [CIT(A)] firstly questioning the validity of the re-assessment proceedings apart from the merits of the matter. The CIT(A) held that even if the case made out in the reasons recorded by the Assessing Officer is accepted, no belief could have been entertained by the Assessing Officer that any income in respect of which the partner was chargeable to tax had escaped assessment, and therefore held that the Assessing Officer acted without jurisdiction by issuing notice under section 148 of the Act. With regard to the merits of the matter, the assessee contended before the CIT(A) that the transfer of the land by the three companies to the partnership was by way of capital contribution during the financial year ended March 31, 2006 relevant to the assessment year 2006-07. The other transfer was given effect in the accounts of the partners for the year ended March 31, 2006. The assessee's balance sheet and profit and loss account for the financial year showed that the land is "work in progress" under "Current Asset" which was transferred to the firm M/S. Salapuria Soft Zone as capital contribution. It was contended that the finding of the Assessing Officer that the partners' capital account were not credited during the financial year ended March 31, 2006 for their capital contribution by way of bringing in the said land is contrary to facts. The said

land was brought in by the partners as inventory/current assets and it does not in any way alter the fact that the partners had in fact brought in the land into partnership business as their capital contribution. Further, by relying on the books of account of the firm M/S. Salapuria Soft Zone for the previous year ended March 31, 2006, it was demonstrated that the receipt of the said land by the firm was by way of capital contribution from the three assesseees as also the value thereof with corresponding credit to the partners' capital account. Further it was contended that the firm upon receipt of the said land during the financial year ended March 31, 2006 also accounted for it as "Current Asset". The partners transferred the said land at cost and there was no profit in the hands of the partners upon transfer of the said land to the firm. Therefore, it was contended that Section 45(3) of the Act was inapplicable. It was further contended that after the firm received the land as the capital contribution, it was developed by infusing substantial funds during the financial year 2005-06 and thereafter. It was only on March 30, 2008 the firm converted the developed land including construction thereon as inventory into "fixed assets" and thereafter on March 31, 2008 revalued it with consequent credit to the partners' "Current Account". Further it was contended that Section 45(3) of the Act did not come into operation for the assessment year 2008-09 and by reason of conversion of the developed land and building into fixed asset by the firm or due to revaluation by the firm of the asset so converted during the previous year ended March 31, 2008. Further it was pointed out that the Section 45(3) of

the Act is applicable in the year of transfer by the partner of his capital asset to the partnership firm by way of capital contribution and in the case at hand the year of transfer was financial year ended March 31, 2006 and the Assessing Officer was not justified in invoking section 45(3) which had no application in the assessment year 2008-09 or for the assessment year 2006-07. The assessee also placed reliance on the circular issued by the CBDT subsequent to the insertion of sub-section 3 in Section 45 of the Act bearing Circular No. 495 dated 22.09.1987. Thus, it was contended that there was no transfer of any capital asset by the assessee to the said firm during the previous year, relevant to the assessment year 2008-09 for Section 45(3) to apply and therefore, the question of resorting to a device to avoid tax under section 45(3) does not arise. The assessee further contended that the finding of the Assessing Officer that the land was grossly undervalued till it was part of the inventory in the books of the firm M/S. Salapuria Soft Zone is wholly without any basis. There was no under valuation of the land when it was held by the said firm as inventory. By relying to the decision of the Hon'ble Supreme Court in *Chainrup Sampataram, (1953) 24 ITR 481 (SC)*, it was contended that for accounting purposes, the stock is valued at cost or market price whichever is lower and the market value is taken only when it falls below cost. Further it was submitted that the three companies paid Rs. 21,87,76,492/- for purchasing the said land which was more than two and half times the guideline value fixed by the Government for stamp duty purposes at the relevant time.

Further it was contended that the entire area underwent major development and became a premium destination for IT and ITES and several IT parks and SEZ zones and also high end residential projects were developed in the year. The area which was revalued was in a Gram Panchayat, was brought under the limits of the Municipal Corporation of Bangalore and it carried out various developmental activities by constructing flyovers under passes etc. water supply and sewerage facilities were provided and the FAR ratio of construction of buildings was also increased on account of the road width of 150 feet.

14. Subsequently the land price in the area continued to rapidly rise and the state government kept on revising the guideline value for stamp duty purpose thrice. The assessee contended notwithstanding such price rise, in accordance with the accounting principles, the land held as inventory could only be shown at its costs. The revaluation of the asset by the firm was justified by contending that it was to bring it in line with the current market value of the land and building and for justifying the bank finance obtained by the firm to the tune of Rs. 250 crores. Thus, it was submitted that the revaluation was not the colourable device. Other factual details with regard to the loan availed by the firm were also placed for consideration.

15. The CIT(A) accepted the contention raised by the assessee. After examining the factual issues it specifically held that revaluation of an asset is not a business transaction resulting in any pecuniary gain which can form

subject matter of taxation. Ultimately by a well reasoned order, the CIT(A) allowed the appeal filed by the assessee. Aggrieved by the same, the revenue preferred the appeal before the tribunal. The tribunal firstly considered the validity of the reopening of the assessment under section 147 of the Act. After elaborately considering the facts the tribunal held that, if at all any income accrues or arises owing to such revaluation, it is an issue which had to be dealt with in the assessment of the firm M/S. Salapuria Soft Zone which is the separate taxable entity. After noting the facts the tribunal held that in terms of the Section 10 (2A) of the Act partners' share in the total income of the firm is not to be included in the total income of the partner. Therefore, it was held that there was no reason for initiating proceedings under section 147 of the Act. With regard to the applicability of Section 45(3) of the Act, the tribunal after considering the books of accounts of the firm recorded the following factual findings:-

The books of account of the said firm for the financial year ended March 31, 2006 clearly reflected the receipt of the said land by it by way of capital contribution from three of its partners as also the value thereof with corresponding credit to the partners' capital accounts. The land upon purchase was shown by the said three companies as part of their current assets. The said firm upon receipt of the said land during the financial year ended March 31, 2006 also accounted for it as a current asset. The partners transferred the said land at cost. As such, there was no profit in

the hands of the partners upon transfer of the said land to the said firm. Section 45(3) of the Act is applicable only in respect of a capital asset. The said provision has no application in the instant case since what was transferred by the partners was a current asset and not a capital asset. Section 45(3) of the Act did not come into operation for the assessment year 2008-09 by reason of conversion of the developed land and building into fixed assets by the said firm or due to revaluation by the said firm of the asset so converted during the previous year ended March 31, 2008. Section 45(3) of the Act is applicable in the year of transfer by the partner of his capital asset to the partnership firm by way of capital contribution. In the instant case, the year of transfer was the financial year ended March 31, 2006. The ITO was wholly unjustified in invoking Section 45(3) which had no application in the assessment year 2008-09 or for that matter in the assessment year 2006-07. Even otherwise, Section 45(3) seeks to determine the capital gains with reference to the value of the asset recorded in the books of account of the firm. The value so recorded is statutorily deemed to be the full value of consideration received or accruing to the partner as a result of the transfer of the capital asset to the firm. Thus, Section 45(3) does not seek to substitute by any other figure the value agreed between the partners at which the asset is transferred by a partner to the firm.

16. With regard to the revaluation, tribunal re-appreciated the facts which were considered by the CITA. With regard to the development of the area in question, as to how there was steep rise in the value of the properties and the state government revised the guideline value for the purpose of stamp duty several times between 2004-07 and after noting the price rise the tribunal held notwithstanding the said fact in accordance with the accounting principles the land held as inventory was shown at its cost and therefore it cannot be said that under valuation was done by the assessee as alleged by the Assessing Officer.

17. Further more on facts the tribunal agreed with CIT(A) that after conversion of inventory into fixed asset the firm revalued the developed land including construction thereon in order to bring it in line with the current market value to justify the business assistance secured by the firm from the banks to extent of nearly Rs. 250 crores. Therefore, on facts the tribunal concluded that the revaluation was not a colourable device.

18. Further more on facts it was held that there was no withdrawal by the partners from capital accounts and therefore there cannot be any income liable to tax in their hands.

19. After having given our anxious consideration to the entire matter we find that a thorough examination of the factual position has been done by the CIT(A) and the tribunal as well. We find no questions of law, much less

substantial questions of law arises for consideration in this appeal. In the result, the appeals are dismissed. No costs.

(T.S. SIVAGNANAM, J)

I agree.

(HIRANMAY BHATTACHARYYA, J)

(P.A- SACHIN)

OD-1,2,4

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)

ORIGINAL SIDE

ITAT/164/2017
IA NO: GA/1/2017[OLD NO:GA/1423/2017]
PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-1, KOLKATA
VERSUS
M/S. BLUE HEAVEN GRIHA NIRMAN PVT. LTD.

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ITAT/239/2017
IA NO: GA/1/2017[OLD NO:GA/2101/2017]
PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-1, KOLKATA
VERSUS
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ITAT/250/2017
PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-1, KOLKATA
VERSUS
M/S. ORCHID GRIHA NIRMAN PVT. LTD.

.....

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM

And

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : 21st January, 2022.

[VIA VIDEO CONFERENCE]

Appearance:-

Mr. Debasish Chowdhury, Adv. in ITAT/164/2017
... For Appellant

Ms. Sucharita Biswas, Adv. in ITAT/239/2017
... For Appellant

Mr. P. K. Bhowmik, Mr. Asok Bhowmik, Advs.

in ITAT/250/2017
... For Appellant

Mr. J. P. Khaitan, Sr. Adv.,

Ms. Swapna Das, Adv.,

Mr. Siddhartha Das, Adv.

... For Respondents

The Court : These appeals are listed under the caption 'To Be Mentioned'.

We have heard learned standing counsel appearing for the appellant/revenue and the learned senior counsel for the respondent.

It is pointed out that though common judgment was delivered in all the appeals on 18.1.2022 in the first page of the order two of the appeals number namely, ITAT/164/2017 and ITAT/239/2017 have been omitted to be mentioned. This being an inadvertent error. The same stands rectified and all the three appeals number be shown in the first page of the order along with the cause title. All connected applications are also dismissed.

This order shall form part of the judgment dated 18.1.2022.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

pkd/S.Pal

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