आयकर अपीलीय अधिकरण, **'ए'** न्यायपीठ**,** चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI

श्री वी. दुर्गा राव**, माननीय न्यायिक सदस्य** एवं
श्री **जी. मंजूनाथा, माननीय** लेखा सदस्य **के समक्ष**
BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.2529/Chny/2017**
निर्धारण वर्ष **/Assessment Year: 2012-13**

Dr.E.S.Krishnamoorthy, No.3, South Mada Street, Srinagar Colony, Saidapet, Chennai-600 015. [**PAN:** ALWPK 0134 A]	**v.**	The Income Tax Officer, Non-Corporate Ward-I(4), Chennai.
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Mr.S.Sridhar, Adv.
प्रत्यर्थी की ओर से /Respondent by	:	Mr.AR.V.Sreenivasan, Addl.CIT
सुनवाई की तारीख/Date of Hearing	:	29.12.2021
घोषणा की तारीख /Date of Pronouncement	:	23.02.2022

आदेश **/ O R D E R**

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-2, Chennai, dated 31.07.2017 and pertains to Assessment Year 2012-13.

2. The assessee has raised the following grounds of appeal:

Grounds w.r.t. adding back of book depreciation twice

i. Book depreciation has been incorrectly added back twice, solely on the ground that the inasmuch as the original return dt. 30-Mar-13 was belated, the correction made in the revised return dt. 29-May-13 could not be considered.

ii. The appellant cannot be precluded from correcting/rectifying an error apparent on the record.

iii. Even if the appellant had not rectified the same through his return dt.29-May-13, the department, on its own was bound to process the return by adjusting the apparent error in the return.

iv. The CIT(A) has nowhere stated that the claim in incorrect and hence not allowable. Where on merits the assessee is entitled to the claim, the same cannot be defeated on hyper-technical grounds.

v. In any case, in as much as the assessment had been taken up for scrutiny, all issues are opened up.

Grounds w.r.t. computation of capital gains

vi. The CIT(A) failed to understand the nature of the transaction involving transfer of UDS and purchase of constructed flats in return.

vii. The CIT(A) erred in holding that the sum of Rs.2.25 crores formed the sale consideration in the hands of the "owners" i.e. the appellant, appellant's father and the appellant's wife, when the said sum was solely to the account of, and payable by the developer only to the appellant's father.

viii. The said Rs.2.25 crores was rightly offered to tax by the appellant's father and same as also accepted by the department; taxing the same in the hand's of the appellant would be double taxation.

ix. The CIT(A) erred in giving a lesser deduction u/s.54, when the appellant was entitled to the full value of one flat received by him as deduction.

3. The brief facts of the case are that the assessee is a Medical Practitioner filed his return of income for the AY 2012-13 on 30.03.2013 declaring total income of Rs.14,43,930/- and said return has been subsequently, revised on 29.05.2013 declaring total income of Rs.13,00,840/-. The case was taken up for scrutiny and during the course of assessment proceedings, the AO noticed that the assessee is a joint owner (along with his wife and father) of the property being a residential house bearing Old No.3, New Dr.No.22, South Mada Street, Srinagar Colony, Saidapet, Chennai. The property was originally belonged to the assessee's grandfather who purchased the said property in the year 1962. The grandfather of the assessee executed a Will and bequeathed the life interest in the property to his wife (Grandmother of the assessee) and vested remainder to his son Dr.Krishnamoorthy Srinivas (Father of the

assessee). The assessee's father Dr.Krishnamoorthy Srinivas, got the Will probated subsequent to the death of his father. Later, Dr.Krishnamoorthy Srinivas executed a Settlement Deed on 03.03.2008 in respect of the property to the assessee. Therefore, the assessee become the absolute and sole owner of the property by virtue of Settlement Deed dated 03.03.2008. The assessee has been subsequently executed a Settlement Deed on 05.09.2011, and out of natural love and affection to his wife and father, settled a portion of the property in their favour. Thus, post the execution of the Settlement Deed, the ownership of the property pertaining to the house stood as follows:

Name	***Relationship***	***% of the property***
Dr.E.S.Krishnamoorthy	*Self*	*42.50%*
Dr.Krishnamoorthy Srinivas	*Father*	*15.00%*
Mrs. Gayathri Krishnamoorthy	*Spouse*	*42.50%*

4. The assessee and other joint owners had executed a Joint Development Agreement (in short "JDA") on 08.09.2011 for development of the property with M/s.Coromandel Engg. Co. Ltd. As per the said JDA, the developer agreed to construct 4 flats with total saleable area of 16,368 sq.ft. Further, the owners shall receive a consideration of Rs.2.25 Crs. as non-refundable deposit and 50% of the constructed area being the 1st & 4th Floor Flats along with car parks. The developer has discharged his obligation by paying the entire non-refundable deposit of Rs.2.25 Crs. to Dr.Krishnamoorthy Srinivas (assessee's father) and one flat at 1st Floor allotted and registered in favour of Dr.E.S.Krishnamoorthy (assessee) and another Flat at 4th Floor to Mrs. Gayathri Krishnamoorthy (assessee's wife).

All three joint owners of the property individually filed their return of income by offering their respective share of capital gains in their hands.

5. During the course of assessment proceedings, the AO on the basis of information furnished by the assessee and also information received from the developer M/s.Coromandel Engg. Co. Ltd., u/s.133(6) of the Act, noticed that the land owners have received a sum of Rs.2.25 Crs. non-refundable deposit from the developer besides two flats each measuring 4092 sq.ft in lieu of 50% undivided share of the land sold to the developer. Therefore, he opined that cost of two flats received by the assessee in lieu of transfer of 50% of UDS in favour of developer and non-refundable deposit of Rs.2.25 Crs. should be considered as full value of consideration received as a result of transfer of property. Therefore, re-computed long term capital gains derived from transfer of property by the assessee by taking into account total cost of construction incurred by the developer for two flats and determined long term capital gains of Rs.93,20,300/- in the hands of the assessee. Similarly, the AO had also made additions towards credit card payment of Rs.7,15,893/- when the assessee has not offered any explanation as unexplained expenditure. The AO had also made additions towards disallowance of depreciation on car on the ground that the possibility of usage of car for personal purpose, cannot be ruled out. The relevant findings of the AO are as under:

In order to arrive at the capital gain in the case of the assessee, information was called for u/s.133(6) of the I.T.Act, 1961 from the Developer, M/s. Coromandei Engineering Co. Ltd, and it is stated by them vide letter dated Feb.5, 2015 filed in this office on 09.2.2015 that as per their books, the cost of the construction of four flats is Rs.9,31,42,101/- includes Non-Refundable One-time payment made to Shri Krishnamoorthy, amounting to Rs.2,25,00,000/-, the details are as under:

Date	***Cheque No.***	***Amount (Rs.)***
08.09.2011	*549324*	*1,50,00,000*
18.10.2011	*004155*	*50,00,000*
03.11.2011	*550009*	*25,00,000*

The assessee has received Rs.2,25, 00,000/- from the Developer M/s.Coromandel Engineers besides which he was also in receipt of 2 flats each measuring at 4092 sq. fts. in lieu of the 50% UDS sold to the Developer. As such the cost of these two flats should be considered as sale consideration as well as for the reinvestment into the residential house(s). The deduction claimed u/s.54 for the assessee's part of 42.5% has to be allowed after deducting the Indexed cost of acquisition for the assessee's share in the old property transferred. The long term capital gain is reworked as under:

The cost of the built up area alone as reported by the developer is calculated as under:

Total cost of consideration for the four flats	*Rs.*	*9,31,42,101*
***Less:** Non-refundable one-time payment made*	*Rs.*	*2,25,00,000*
Cost of 4 flats excluding payment received	***Rs.***	***7,06,42,100***
Cost of 2 flats	*Rs.*	*3,53,21,050*
Amount of Consideration received	*Rs.*	*2,25,00,000*
***Add:** Cost of 2 new flats as calculated above*	*Rs.*	***3,53.21,050***
Full value of consideration in respect of the transfer	*Rs.*	*5,78,21,050*
Full value of consideration in respect of the transfer	*Rs.*	*5,78,21,050*
Assessee's share of 42.5% of FVC	***Rs.***	***2,45,73,946***
Less: <u>Indexed cost of acquisition</u> *42.5% of the Fair Market Value property of Rs.4,00,000/- as on 01.04.1981 as claimed by you = 1,70,000/-* *= 1,70,000 x 785/551 (u/s.48(iii))*	*Rs.*	***2,42,200***
	Rs.	***2,43,31,746***
Less: <u>Deduction u/s.54</u> *Cost of two flats as worked out = 3,53,21,050* *Reinvestment worked out at 42.5%*	***Rs.***	***1,50,11,446***
Taxable capital gain	***Rs.***	***93,20,300***

The assessee was issued with a show cause notice dated 10.03.2015, why the above LTCG should not be taxed in his hands. It was duly served on the assessee. The assessee was requested to file explanations, objections, if any, to the proposed assessment of LTCG on or before 16.03.2015. The assessee, till date, has not filed any objections hence it is observed

that he has no objections to the proposed assessment. As such the Long Term Capital Gain is assessed at Rs.93,20,300/- in his case.

(Addition: LTCG Rs.93,20,300/-)

CREDIT CARD PAYMENTS

The credit card statement of accounts in respect of credit card payments made through RBS and Standard Chartered Bank, for an amount of Rs.7,15,893/-during the financial year relevant to Assessment year may be furnished to ascertain the allowability or otherwise.

The show cause notice dt. 10.03.2015 covered the above point also. The assessee, till date, has not filed any objections/ offered any explanations, hence it is observed that he has no objections to the proposed assessment. As such the credit card payments are assessed as unexplained at Rs.7,15,893/- in his case.

(Addition: Credit Card payments Rs.7,15,893/-)

DEPRECIATION ON MOTOR CAR

The assessee has claimed an amount of Rs.1,12,955/- as Depreciation on Car. To cover the personal usage, 20% of the above i.e. Rs.22,590/-is disaliowed and added to the income.

(Addition: Rs.22,590/-)

6. Being aggrieved the Assessment Order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee argued that long term capital gains computed by the AO by taking into account cost of two flats and non-refundable deposit in the hands of three co-owners is incorrect. The Ld.CIT(A) for the reasons stated in his appellate order confirmed the re-computation of the capital gains made by the AO and partially upheld the credit expenses disallowed by the AO. The Ld.CIT(A) had also dismissed the ground of the assessee pertains to disallowance of depreciation on car. Aggrieved by the Ld.CIT(A)'s order, the assessee is in appeal before us.

7. The first issue that came up for our consideration from Ground Nos.1-5 of assessee's appeal is disallowance of 20% of depreciation on car on the ground that the possibility of usage of car for personal purpose, cannot be ruled out. The Ld.AR for the assessee submitted that the Ld.CIT(A) has

erred in not considering the ground raised by the assessee challenging the action of the AO in not considering the revised return filed by the assessee correcting the mistake in depreciation without appreciating the fact that even if the assessee makes a wrong claim, the AO is bound to compute correct income after allowing necessary deductions/allowances in accordance with law. The Ld.DR, on the other hand, supported the order of the Ld.CIT(A).

8. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. Admittedly, original return filed on 30.03.2013 was belated and as per Sec.139(5) of the Act, if any person having furnished a return under Sub-Sec. (1) or Sub-Sec.(4) discovers any omission or any wrong statement therein, he may furnish revised return at any time before the end of the relevant AY or before completion of the assessment, whichever is earlier. In this case, the original return was not filed under Sub-Sec.(1) or Sub-Sec.(4) and thus, the belated return filed by the assessee is an invalid return. Therefore, the AO is not bound to consider invalid return. Hence, we are of the considered view that there is no error in the reasons given by the AO in not considering the revised return filed by the assessee for rectifying the mistake in claim of depreciation. Accordingly, we reject the ground taken by the assessee.

9. The next issue that came up for our consideration from Ground Nos.6-9 of assessee's appeal is computation of long term capital gains derived from transfer of property in pursuant to JDA. The fact with regard

to impugned dispute are that the JDA between the assessee and his wife & his father with M/s.Coromandel Engg. Co. Ltd., is not in dispute. As per the JDA between the parties, the developer has agreed to construct 4 flats and also agreed to share 50% of the constructed area along with payment of Rs.2.25 Crs., non-refundable deposit to the land owners. In terms of JDA between the parties, the developer has paid a sum of Rs.2.25 Crs. non-refundable deposit to the land owners and the same has been paid into the account of Dr.Krishnamoorthy Srinivas (father of the assessee) and who is also holding 15% of share in the property. The developer had also allotted two flats in favour of the land owners and accordingly, registered 1st Floor Flat in the name of Dr.E.S.Krishnamoorthy (assessee) and the another Flat at 4th Floor to Mrs. Gayathri Krishnamoorthy (assessee's wife). The assessee had considered only a flat allotted in his favour for computation of long term capital gains pursuant to JDA. However, not considered non-refundable deposit paid by the developer by claiming that non-refundable deposit had been offered to tax by his father (Dr.Krishnamoorthy Srinivas). The AO has re-computed long term capital gains derived from transfer of property in pursuant to JDA and has considered full value of consideration by taking into account cost of construction of two flats ***plus*** non-refundable deposit of Rs.2.25 Crs. paid by the developer. Accordingly, the AO has re-computed long term capital gains by taking into account a sum of Rs.5,78,21,050/- as full value of consideration and out of which, considered 42.50% of share in the hands of the assessee at Rs.2,45,73,946/-. From

the above, the AO had allowed deduction for indexed cost of acquisition and had also allowed deduction u/s.54 of the Act at Rs.1,50,11,446/- towards 42.5% of cost of two flats at Rs.3,53,21,050/-.

10. The Ld.AR for the assessee submitted that the Ld.CIT(A) erred in sustaining the re-computation of long term capital gains by substituting sale consideration by taking into non-refundable deposit of Rs.2.25 Crs. ***plus*** estimated cost of construction of two flats at Rs.2,45,73,946/- based on the construction cost details received from the developer u/s.133(6) of the Act. The Ld.AR further submitted that the power of substitution of sale consideration in computation of long term capital gains u/s.48 of the Act is restricted and narrow and further, which can be substituted within the scope of Sec.50C of the Act. The Ld.AR further submitted that the lower authorities completely ignored the legal position and proceeded to estimate the sale consideration for surrender of 50% of UDS in land on the basis of information received from the developer without sharing the said information to the assessee. Therefore, he argued that the lower authorities exceeded their jurisdiction within the scope of Sec.48 of the Act in re-computation of the long term capital gains. The Ld.AR further submitted that the AO in computation of long term capital gains, has arrived at the full value of consideration at Rs.5,78,21,050/- which included non-refundable security deposit received by the assessee's father directly from the developer, even though, the assessee's father had offered cash component to tax in his return filed for the relevant assessment year. In

this regard, he has filed revised computation of long term capital gains in Page No.9 of the Paper Book and requested that the same may be considered in the interest of justice.

11. The Ld.AR further submitted that the AO had also erred in adopting indexed cost of acquisition of the UDS of land at 42.5% without appreciating the fact that the assessee is having only 17.5% of UDS in land, because the remaining 50% of UDS in land has been transferred to developer. The Ld.AR further submitted that the AO also erred in determining the amount of investment in new asset to claim the benefit of exemption u/s.54 of the Act by taking into account 42.5% of cost of construction and further, restricted to Rs.1,50,11,446/-. The Ld.AR for the assessee further submitted that the AO ought to have considered total construction cost incurred by the developer for 4 flats and as per which, one flat cost would be around Rs.2,32,85,525/-. Since, one flat is allotted to the assessee, the cost of same should be considered for the purpose of provisions of Sec.54 of the Act. The Ld.AR further submitted that the AO and the Ld.CIT(A) erred in applying the cost of indexation from the AY 2007-08 being the year of settlement in favour of the assessee by the father of the assessee, whereas as per provisions of Sec.49(1) read with explanation (iii) below Sec.48 of the Act, the AO should have considered the indexation from the year 1981-82 as base year, because the assessee's grandfather held the property from the year 1962. In this regard, he relied upon the decision of

the Hon'ble Bombay High Court in the case of CIT v. Manjula J. Shah reported in [2013] 355 ITR 474 (Bombay).

12. The Ld.DR, on the other hand, supporting order of the Ld.CIT(A), submitted that the AO has rightly computed capital gains from transfer of property pursuant to JDA, because as per the Settlement Deed between the parties, the assessee owned 42.5% share in the property, his wife owned 42.5% and his father owned 15% and thus, full value of consideration received as a result of transfer should be shared proportionate to their right in the property. The AO after considering the relevant facts has rightly computed long term capital gains and also exemption claimed u/s.54 of the Act and thus, there is no error in the reasons given by the Ld.CIT(A) to sustain additions made towards re-computation of capital gains from transfer of property.

13. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The facts with regard to ownership of property by three co-owners and their respective share in right and interest in the property is not in dispute. As admitted by the assessee himself, he owned 42.5% share in the property. The land owners have received two flats measuring 4092 sq.ft. each ***plus*** Rs.2.25 Crs. non-refundable deposit from the developer in lieu of 50% UDS sold to the developer. From the above, what is clear is that three co-owners have specified share in the property and as a natural corollary, full value of consideration received as a result of transfer of property in pursuant to JDA

should be considered in the hands of three co-owners according to their share in the property. Since, the assessee has 42.5% share in the property, the AO is right in considering 42.5% of consideration in the hands of the assessee for the purpose of computation of long term capital gains as a result of transfer of property in pursuant to JDA. The arguments of the assessee that, he had received consideration separately, as specified in the JDA, we find that receipt of entire non-refundable deposit by the assessee's father and one flat each by the assessee and his wife is an internal arrangement and which is nothing to do with computation of capital gains by adopting respective share of full value of consideration. As per law, when a property transferred, consideration received or accrued as a result of transfer should be taken into account according to their share in the property, but not as per the internal arrangement between the parties. Hence, the arguments of the assessee is rejected.

14. Having held so, let us come to computation of long term capital gains. The assessee has computed long term capital gains by taking into account cost of one flat received from the builder as full value of consideration. However, did not consider his share of non-refundable security deposit paid by the builder and received by his father for computing full value of consideration. The AO, on the other hand, considered cost incurred by the builder for construction of two flats and non-refundable deposit of Rs.2.25 Crs. received by the land owners as full value of consideration agreed as a result of transfer pursuant to JDA. Thus, the AO has taken 42.5% of full

value of consideration of Rs.5,78,21,050/- and determined assessee's share of full value of consideration of Rs.2,45,73,946/-. From the above, he had allowed deduction towards indexed cost of acquisition and determined long term capital gains at Rs.2,43,31,746/-. We find that full value of consideration determined by the AO by considering cost of two flats ***plus*** non-refundable security deposit received from the builder is in accordance with law, because when the assessee is having a specified share in the property, which had been given for JDA, then, consideration received from the builder also needs to be taken in proportionate to their share in the property. To that extent, full value of consideration adopted by the AO is in accordance with law and hence, the arguments of the assessee are rejected. In so far as indexed cost of acquisition and the benefit of indexation, the AO has considered Fair Market Value (in short "FMV") of the property at Rs.4 lakhs as on 01.04.1981 and further, allowed benefit of indexation from the AY 2007-08, when the assessee became the owner of the property by way of Settlement Deed executed by his father. There is no dispute with regard to the FMV of the property as on 01.04.1981, because both the parties have not disputed in FMV considered by the AO. The only dispute is with regard to method of computation followed by the AO and the benefit of indexation. In this case, the AO has taken 42.5% of FMV of property as on 01.04.1981 which works out to Rs.1,70,000/- on which allowed the benefit of indexation from the AY 2007-08. We find that the FMV of the property considered by the AO @ 42.5% in the hands of the

assessee is incorrect. Admittedly, the assessee has transferred 50% of UDS in the property in favour of the developer and the remaining 50% of the UDS is with the land owners. Therefore, when 50% UDS only has been transferred in favour of the developer, then the cost of acquisition in respect of 50% UDS should be considered for the purpose of determining the cost of acquisition in the hands of the assessee. Therefore, 50% of the FMV of the property comes to Rs.2 lakhs. Out of which, the assessee's share at 42.5%, works out to Rs.85,000/-. Therefore, the AO should adopt Rs.85,000/- cost of acquisition in the hands of the assessee and further, should allow the benefit of indexation from the year 01.04.1981, because as per the provisions of Sec.49(1) read with Explanation (iii) below sec.48 of the Act, when a property is owned by the assessee by anyone of the modes specified therein, then the benefit of indexation should be allowed from the date when the previous owner held the asset. In this case, the assessee has inherited property from his grandfather by one of the mode specified u/s.49(1) of the Act and thus, he is entitled benefit of indexation from the date his grandfather held the property i.e. from the year 1962. Since, base year is 1981-82 for computing the benefit of cost of acquisition, the AO is directed to adopt the cost of acquisition as arrived at herein above and allow the benefit of indexation from the year 1981-82.

15. Coming back to exemption claimed u/s.54 of the Act. The assessee has claimed the benefit of exemption to the extent of cost of one flat at Rs.1,76,60,525/-, because as per the terms of the agreement between the

parties, the assessee had received one flat from the builder. The AO has allowed the benefit of deduction u/s.54 of the Act to the extent of 42.5% of cost of two flats which works out to Rs.1,50,11,446/-. We have gone through the reasons given by the AO and we ourselves do not subscribe to the reasons given by the AO to allow exemption u/s.54 of the Act to the extent of 42.5% of cost of construction of two flats, because what was invested by the assessee in new asset is cost of one flat, which is at Rs.1,76,60,525/-. Although, the AO is correct in principle to allow the benefit of exemption u/s.54 of the Act to the extent of 42.5% share of the assessee, because one flat is registered in the name of the assessee, the benefit of exemption should be allowed to the extent of cost of one flat which is at Rs.1,76,60,525/-. Therefore, we direct the AO to allow deduction u/s.54 of the Act to the extent of cost of one flat which is at Rs.1,76,60,525/-. To sum up, the AO is directed to re-compute the long term capital gains derived from transfer of property in pursuant to JDA in terms of our observation given herein above.

16. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced on the 23rd day of February, 2022, in Chennai.

Sd/-	***Sd/-***
(वी. दुर्गा राव)	**(जी. मंजूनाथा)**
(V. DURGA RAO)	**(G. MANJUNATHA)**
न्यायिक सदस्य/**JUDICIAL MEMBER**	लेखा सदस्य/**ACCOUNTANT MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 23rd February, 2022.
TLN, Sr.PS

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF