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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : F : NEW DELHI

BEFORE SHRI G.E. VEERABHADRAPPA, HON'BLE VICE PRESIDENT
AND
SHRI I.P. BANSAL, JUDICIAL MEMBER

ITA No.2558/Del/2010
Assessment Year : 2007-08

Mr. Praveen Gupta,
DD-21, Kalkaji,
New Delhi - 110 019.

Vs. ACIT,
Range-16,
New Delhi.

PAN : AADGP3474F

(Appellant)

(Respondent)

Assessee by : Shri Ved Jain, CA, Mrs. Rano Jain, CA &
Shri Venkatesh Chourasia, CA
Revenue by : Smt. Banita Devi Naorem, Sr. DR

ORDER

PER I.P. BANSAL, JUDICIAL MEMBER

This is an appeal filed by the assessee. It is directed against the order of the CIT (A) dated 31st March, 2010 for assessment year 2007-08. Grounds of appeal read as under:-

1. That, having regard to the facts and the circumstances of the case and the relevant provisions of the law, the CIT (A)-XIX, New Delhi erred in confirming an addition of Rs.28,59,595/- towards long term capital gain arising on the sale of the residential flat no.F-011, Richmond Park, DLF City Phase IV, Gurgaon.

i) by allowing the cost of acquisition of the said flat amounting to Rs.45,51,720/- to be indexed from the financial year 2001-02 in which the conveyance deed thereof was registered, instead of allowing the same from

a) the financial year 1995-96 in which the said flat was allotted by the DLF Universal Ltd. to the appellant vide



sale agreement dated 27.09.1995, and

b) the financial years 1995-96, 1996-97, 1997-98, 1999-2000 & 2001-02 in which the payments of instalments of the cost of the flat along with interest and other payments were made to Builder DLF Universal Ltd. by the appellant and the total payment of the flat was Rs.55,81,062/-;

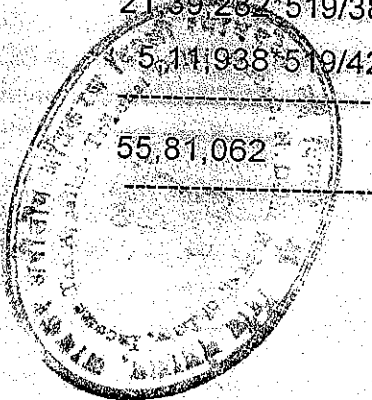
ii) by considering only the sum of Rs.45,51,720/- as cost of acquisition of the said flat and in not considering the following amounts for the purpose:-

a) interest of Rs.8,67,048/- paid to DLF Universal Ltd. by the appellant on loan taken by him for acquiring the said flat, and

b) fire fighting charges (Rs.34,916/-), generator charges (Rs.46,941/-) and processing fee & miscellaneous charges (Rs.80,437/-) paid to DLF Universal Ltd. in connection with acquisition of the said flat.

2. The assessee sold a flat No.F-011, Richmond Park, DLF City Phase IV, Gurgaon vide sale deed dated 30th November,2006 for a sum of Rs.90 lac. After claiming brokerage paid thereon of Rs.45,000/-, the sale price arrived at by the assessee was Rs.89,55,000/-. Out of the said sale consideration, the assessee claimed that it had incurred cost of acquisition in various financial years amounting to Rs.55,81,062/-. The cost as per indexation was worked out at Rs.84,54,439/-. The details of indexation as described in computation of capital gain by the assessee is as under:-

1995-96	$13,35,850 \times 519/281$	24,67,282
1996-97	$74,042 \times 519/305$	1,25,993
1997-98	$15,20,000 \times 519/331$	23,83,323
1999-00	$21,39,282 \times 519/389$	28,54,142
2001-02	$5,11,938 \times 519/426$	6,23,699
	55,81,062	84,54,439

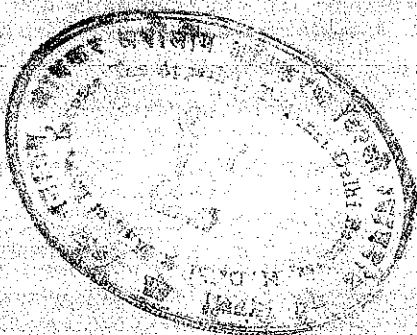


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3. After reducing the indexation cost of Rs.84,54,439/- from the net sale consideration of Rs.89,55,000/-, long-term capital gain was computed by the assessee at Rs.5,00,561/-. After claiming the exemption u/s 54 EC by making investment in REC bonds of Rs.5,50,000/-, the taxable long-term capital gain was computed at 'nil'.

4. The Assessing Officer did not accept the said computation of long-term capital gain submitted by the assessee and computed the capital gain at Rs.76,45,977/-. The Assessing Officer first took the value of sale consideration at Rs.1,26,43,800/- by applying Section 50C as the stamp duty value was Rs.5,05,752/-. Thereafter, the Assessing Officer took the purchase consideration at Rs.40,45,968/- (by deducting the cost incurred in financial year 2001-02) and worked out the indexation cost in the ratio of 497/406 by arriving at indexed cost value at Rs.49,52,823/- and reducing therefrom the brokerage of Rs.45,000/-, the long-term capital gain was computed at Rs.76,45,977/- wherefrom the exemption u/s 54EC of Rs.5,50,000/- was granted and net taxable long-term capital gain was computed at Rs.69,72,555/-.

5. Aggrieved, the assessee filed an appeal before the CIT (A) in which firstly it was submitted that the Assessing Officer has erred in taking the cost from financial year 2001-02 for the purpose of indexation by ignoring the explanation of the assessee that cost indexation benefit should have been given from financial year 1995-96 in which the assessee had acquired the absolute right not only to possess the said property, but also to dispose it of by entering into the residential apartment buyer's agreement with the developer in that year. Secondly, the calculation of the Assessing Officer was objected to for the reason that only a sum of Rs.40,45,968/- was considered to be the cost of acquisition of the property and the amount incurred on the stamp duty of Rs.5,05,752/- was not considered as cost which sum was stated in the purchase deed itself. Thirdly, the assessee objected to the index factor applied by the Assessing Officer at 497 which, according to the assessee, should have been 519 being financial year



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1996-97 in which the property was sold. Fourthly, the assessee objected to the computation of Assessing Officer for application of Section 50C.

6. Additional grounds were also raised before the CIT (A) in which the assessee claimed that interest paid by the assessee amounting to Rs.8,67,048/- on the purchase price of flat which was paid in instalments over the period of about 5 years should also be considered to be cost. Second additional ground was in respect of claim of other charges as cost being (i) fire fighting charges – Rs.34,916/-, (ii) generator charges Rs.46,941/-, and (iii) processing fee and miscellaneous charges – Rs.80,437/-. The cost was described in the table filed before the CIT (A) which is as under:-

S.No. Particulars	F.Y. 95-96	F.Y.96-97	F.Y. 97-98	F.Y.99-00	F.Y.01-02	Total
1. Purchase price as per conveyance deed	1,272,702.00	74,042.00	643,865.00	2,055,359.00	-	4,045,968.00
2. Stamp duty	-	-	-	-	505,752.00	505,752.00
3. Other Expenses						
(i) Interest	-	-	860,061.00	2,016.00	4,971.00	867,048.00
(ii) Fire fighting Charges	-	-	-	34,916.00	-	34,916.00
(iii) Generator charges	-	-	-	46,941.00	-	46,941.00
(iv) Processing Fee & Other Misc. charges	63,148.00		16,074.00	-	1,215.00	80,437.00
Total	1,335,850.00	74,042.00	1,520,000.00	2,139,232.00	511,938.00	5,581,062.00

7. Considering the submissions made by the assessee before the CIT (A), Ld. CIT (A) has framed the following issues:-

- (i) Whether sale price of Rs.90,00,000/- realized by the assessee is to be adopted or Rs.1,26,43,800/- as adopted by the A.O.
- (ii) Whether cost of acquisition is Rs.55,81,062/- as claimed by the assessee or Rs.40,45,968/- as adopted by the A.O.
- (iii) Whether the year of allotment of flat is to be taken the year in which the asset is said to have been acquired.

- (iv) Whether indexation is to be allowed from 1995-96 as adopted by the assessee.
- (v) Whether each payment made by the assessee towards cost of acquisition is to be allowed indexation.

8. So as it relates to the first issue relating to sale price, Ld. CIT (A) has found that stamp duty rate for financial year 2001-02 could not be applied to the transaction which occurred in financial year 1996-97. He found that the sale consideration received and shown in the sale deed was accepted by the stamp valuation authority at Rs.90 lac only. Thus, he found no force in the action of Assessing Officer for application of Section 50C on the basis of which the Assessing Officer computed the sale price at Rs.1,26,43,800/-.

9. On the issue of cost of acquisition, Ld. CIT (A) has found that stamp duty charges were part of the agreement and, therefore, the Assessing Officer was not right in treating the cost at Rs.40,45,968/-. He, therefore, directed the Assessing Officer to take the cost of acquisition at Rs.45,51,720/- which included a sum of Rs.5,05,752/- incurred on stamp duty.

10. As regards the third issue regarding indexed cost of acquisition, Ld. CIT (A) has referred to Explanation (iii) which defines "indexed cost of acquisition" and has observed that the flat came into existence only in financial year 2001-02, hence, the question of holding the same as an "asset" by the assessee from financial year 1995-96 does not arise. Distinguishing the cases relied upon by Ld. AR, it is observed by Ld. CIT (A) that the asset was in existence and possession had taken place at the time of agreement, thus, those cases were distinguishable. Thus, the reason assigned by the CIT (A) to give the cost indexation benefit from 2001-02 is based on the fact that the asset did not exist in financial year 1995-96 from where the assessee was claiming the cost indexation benefit.

11. So as it relates to additional grounds raised by the assessee, Ld. CIT (A), referring to the decision of Karnataka High Court in the case of CIT vs. Maithreyi



Pai 152 ITR 247 (Kar) has denied the claim of interest to the assessee from being considered as cost of acquisition. Similarly, the other charges, namely, fire fighting charges, generator charges and processing fee and miscellaneous charges were not held to be allowable as cost by the CIT (A) on the ground that those were not substantiated by any evidence of payment and they being part of the cost of acquisition and, in this manner, Ld. CIT (A) has rejected the additional grounds. So far as it relates to applicability of the cost indexation factor, Ld. CIT (A) has observed that as sale has taken place in financial year 2006-07, cost inflation factor should be taken at 519 and vide para 24.2 of the impugned order, the capital gain as worked out by Ld. CIT (A) is as under:-

"24.2 The capital gain is worked out as under:-

Sale consideration (as per paras 10 to 12 above)	Rs.90,00,000/-	
Brokerage paid	Rs.45,000/-	Rs.89,55,000/-
Less Purchase consideration (as per para 13 above)	$\frac{45,51,720 \times 519}{426}$	<u>55,45,405/-</u>
		34,09,595/-
Less : Investment in Bonds u/s 54EC as allowed		<u>5,50,000/-</u>
Taxable Capital Gain		28,59,595/-

12. In this manner, Ld. CIT (A) has sustained the addition of Rs.28,59,595/-. The computation made by the CIT (A) is objected to by the assessee and the above mentioned grounds of appeal have been raised.

13. Ld. AR has submitted before us a synopsis on the basis of which he argued the matter.

14. The first objection of Ld. AR would be that the CIT (A) has erred in not treating the cost which as per the assessee was Rs.55,81,062/-. The CIT (A) only included in the cost a further sum of Rs.5,05,752/- being the amount incurred by the assessee on stamp papers. He submitted that further sum of Rs.10,29,342/- was required to be considered as cost the details of which is as under:-

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Towards fire fighting	34,916
Towards generator	46,941
Processing fee	80,437

	1,62,294
Interest	8,65,032

Totalling error A.O.	10,27,326
	2,016

	10,29,342

15. Ld. AR argued that the payment made towards processing fee, fire fighting and generator to the builder is part of the cost of acquisition and cannot be ignored. Ld. AR further argued that the interest paid of Rs.8,65,032/- to the builder is also part of the cost of acquisition and he placed reliance on the following decisions:-

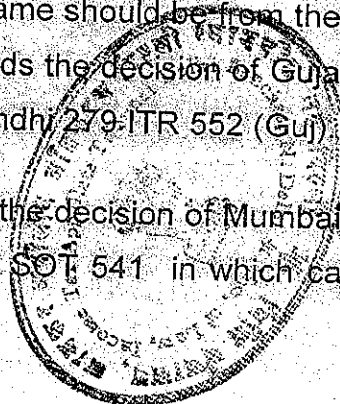
- i) CIT vs. Mithilesh Kumar 92 ITR 9 (Del)
- ii) CIT vs. K. Raja Gopala Rao 252 ITR 459 (Mad)
- iii) Addl. CIT vs. K.S. Gupta 119 ITR 372 (A)
- iv) SAS Hotels United vs. ITO 4 ITD 927 (Mad)
- v) CIT vs. Sri Hari Ram Hotels P. Ltd. 34 DTR 162

16. He submitted that reliance by the CIT (A) on the decision in the case of CIT vs. Maithreyi Pai (supra) is wrong as in the said case the assessee had claimed the expenditure against other income and, thus, it was held by the court that no double deduction was permissible and the matter was remanded for verification. He submitted that in the present case no such deduction was claimed and it is also not the case of the revenue that the assessee has claimed double deduction. He referred to the decision of Karnataka High Court in the case of CIT vs. Sri Hari Ram Hotels P. Ltd. (supra) to contend that such interest is an allowable deduction.

17. Coming to the second issue of date from which the indexation benefit is to be allowed, it was submitted by Ld. AR that the flat was allotted to the assessee vide allotment letter dated 2nd August, 1995 and agreement was executed on 27th September, 1995. He drew our attention towards copy of agreement which is placed at pages 45 to 59 of the paper book. He submitted that vide the said agreement all the necessary particulars regarding flat number, area, etc. were duly identified. He submitted that the terms and conditions of payments were also marked and those conditions have duly been complied with. The assessee started making payment from 2nd August, 1995 and was making payment till 28th September, 2001. He in this regard referred to the copy of the receipts submitted at pages 16 to 38 of the paper book. He also submitted that conveyance deed was executed on 27th December, 2001.

18. He submitted that the Assessing Officer is wrong in holding that the benefit of indexation will be available to the assessee from 27th December, 2001 i.e., from the date of execution of the conveyance deed and for that purpose the Assessing Officer has relied upon Section 48. He submitted that the CIT (A) is also incorrect to confirm the stand of Assessing Officer on the ground that there was no asset existed at the time of allotment and the same was not held by the assessee from financial year 1995-96. He submitted that according to the proviso to Section 48, the word used is 'held.' He submitted that exactly the same word is appearing in Section 2 (42A) which defined short-term capital gain asset and which definition also describing the word 'held.' He submitted that while interpreting analogous provisions i.e., provision of Section 2 (42A) it has been held by Hon'ble Gujarat High Court in the case of CIT vs. Aniraben Upendra Shah 262 ITR 657 (Guj) that for the purpose of computing the period for which the asset is held the same should be from the date of allotment. Similarly, he invited our attention towards the decision of Gujarat High Court in the case of CIT vs. Jindas Panchand Gandhi 279 ITR 552 (Guj).

19. He further relied upon the decision of Mumbai Tribunal in the case of Lata G Rohra vs. DCIT (2008) 21 SOT 541 in which case the CIT had invoked his

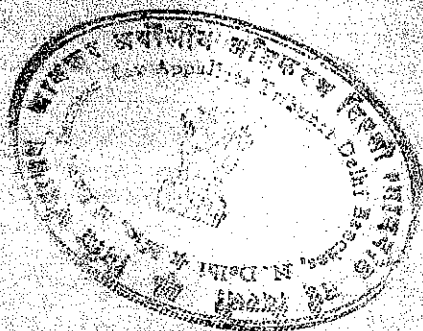


powers u/s 263 on the order of Assessing Officer where he allowed indexation benefit from the date of allotment despite the fact that the property came into existence after construction and it was held by the ITAT that the assessee was holding asset from 7th August, 1993 i.e., date of allotment letter and indexation benefit was required to be given from that date. He submitted that the said decision has been applied in another decision by the Tribunal in the case of ACIT vs. Credit Rating Information Services of India Ltd. (ITA No.9396/Mum/2004 , order dated 30th April, 2008). Thus, he submitted that the order of Assessing Officer and CIT (A) on this issue should be reversed and the Assessing Officer may be directed to give the indexation benefit from the date of allotment. Thus, it was submitted by the Ld. AR that the appeal of the assessee should be allowed.

20. On the other hand, it was submitted by Ld. DR that the other cost claimed by the assessee to the tune of Rs. 10,29,342/- has rightly been disallowed by the Assessing Officer and CIT (A). He submitted that these items cannot be considered to be cost as the same were not incurred on the construction, etc. Similarly, he argued that for interest also Ld. CIT (A) has rightly rejected the claim as it is not clear that whether the assessee has claimed the said deduction under any other Section and if it is so, the interest cannot be allowed to him again in these proceedings.

21. On the issue of indexation, relying upon the order of the Assessing Officer and CIT (A) he submitted that the asset came into existence only on the date of conveyance deed and, therefore, Ld. CIT (A) was right in holding that the indexation benefit should be allowed only from the date of conveyance deed. Thus, it was submitted by Ld. DR that order of the CIT (A) on both the issues should be confirmed.

22. In a rejoinder it was submitted by Ld. AR that he is making a statement at the bar that the said interest was not claimed by the assessee under any other Section.

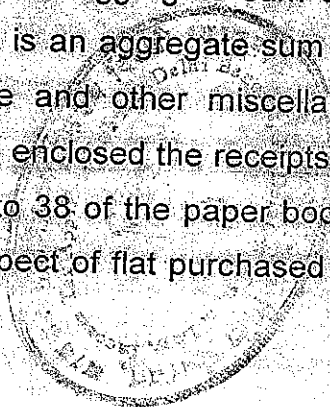


23. We have carefully considered the rival submissions in the light of the material placed before us. Section 48 prescribes the mode of computation of capital gain. The relevant portion whereof read as under:-

"48. The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :-

- (i) expenditure incurred wholly and exclusively in connection with such transfer,
- (ii) the cost of acquisition of the asset and the cost of any improvement thereto."

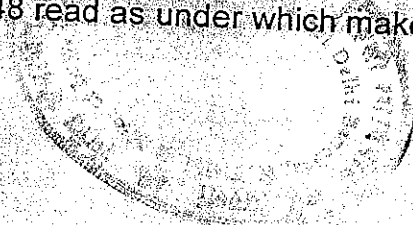
24. It can be seen from the above provision that the assessee is entitled to deduct the expenditure incurred by it wholly and exclusively in connection with such transfer and also the cost of acquisition of asset and cost of any improvement thereon. Therefore, the Section itself permit the assessee to deduct the cost of acquisition as well as cost of any improvement thereon. The assessee has given full details of payments made by him to the developer and these details are given at pages 15 to 17 of the paper book. The assessee has shown the total cost incurred by him for the relevant property at a sum of Rs 55,81,062/- which included the base price of the flat, stamp duty paid for having the conveyance deed in his name, interest paid thereon, fire fighting charges, generator charges and processing fee and other miscellaneous charges. The details are provided at pages 16, according to which the payment made as per conveyance deed is a total sum of Rs 40,45,968/-. The payment made on account of stamp duty is a sum of Rs 5,05,752/-. The payment made in respect of interest is a total sum of Rs 8,65,032/-. The payment made for fire fighting charges is an aggregate sum of Rs 34,960/-. The payment made for generator charges is an aggregate sum of Rs 46,941/- and aggregate sum paid for processing fee and other miscellaneous charges are Rs 80,437/-. The assessee has also enclosed the receipts issued by the builder in respect of each item at pages 18 to 38 of the paper book. Each of the payments made by the assessee is in respect of flat purchased by him and is issued by DLF Universal



Ltd. It is not the case of the revenue that the assessee did not make any extra payment apart from what was mentioned in the title deed as sale consideration. It is a known fact that the builder and developer of a property would charge from the assessee various charges which are as per the agreement entered into by the assessee for allotment of a particular property.

25. According to the scheme of capital gain, as per Section 48, while computing the capital gain, the assessee is entitled to get deduction from the sale value of the asset liable for capital gain, the amount of cost of acquisition of asset and the cost of any improvement thereon. Without making the payment of the amounts to the builder the assessee could not have obtained the conveyance deed. Therefore, we are of the opinion that the Assessing Officer is wrong in taking the cost of acquisition only as stated in the conveyance deed. As against that the assessee has filed evidence on record to contend that what is shown by him as cost of acquisition are the payments made to the builder for getting the right over the property which is sold by him. In our considered opinion such claim of the assessee could not be denied unless proved otherwise. There is no material on record to suggest that the payments which are stated to be made by the assessee were not incurred by him as the cost of the said flat which has been subject matter of sale during the year under consideration. It is so with respect to base price, processing fee, preference charges, external development charges, fire fighting charges, generator charges, etc. which all will form cost of acquisition incurred by the assessee for getting the ownership of the asset and, therefore, the assessee is entitled to get deduction thereof under the provisions of Section 48 (ii).

26. Now, coming to the second question, which relates to the date from which the indexed cost of acquisition is to be computed. Here, it has been the case of the assessee that on the date of allotment of flat, the property was identified. The assessee got the right over the said property and from that date the indexation benefit has to be given to the assessee. Explanation (iii) to Section 48 read as under which makes entitle the assessee to the indexation benefit:-



"(iii) "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later;

27. Ld. AR has pleaded that the language employed in Explanation 3 is in pari materia with the language employed in Section 2 (42A) where describing the definition of "short term capital asset" the word "held" is used.

28. Explanation 3 to Section 48 refer to the word 'the asset.' It means some capital asset which is subject matter of sale on which long-term capital gain is to be computed. The capital asset is defined in Section 2 (14) as under:-

"2 (14) "capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include -

- (i) any stock-in-trade, consumable stores or raw materials held for the purposes of his business or profession;
- (ii) personal effects, that is to say, movable property (including wearing apparel and furniture) held for personal use by the assessee or any member of his family dependent on him, but excludes -
 - (a) jewellery;
 - (b) archaeological collections;
 - (c) drawings;
 - (d) paintings;
 - (e) sculptures; or
 - (f) any work of art.

29. According to the aforementioned definition, capital asset means property of any kind held by an assessee whether or not connected with the business or profession and it excludes certain items which while considering the facts of the present case are not relevant. Therefore, it has to be seen that whether by entering into an agreement vide which the assessee was allotted a particular flat by allotment letter whether the assessee has held any asset or not? By entering into an agreement to allot a flat, the assessee has identified a particular property

which he is intended to buy from the builder and the builder is also bound to provide the applicant with that property by accepting certain advance amount and making agreement for balance payment as scheduled in the agreement. Thus, going into the provisions, it is not necessary that to constitute a capital asset the assessee must be the owner by way of a conveyance deed in respect of that asset for the purpose of computing capital gain. The assessee had acquired a right to get a particular flat from the builder and that right of the assessee itself is a capital asset. The word 'held' used in Section 2 (14) as well as Explanation to Section 48 clearly depicts that assessee must have some right in the capital asset which is subject to transfer. By making the payment to the builder and having received allotment letter in lieu thereof, the assessee will be holding capital asset and, therefore, the benefit of indexation has to be granted to the assessee on the basis of payments made by him for acquiring the said asset and the assessee has rightly claimed the indexation benefit from the dates when he has made the payments to the builder. Therefore, we see force in the claim of the assessee. The Assessing Officer is directed to provide the benefit of indexation to the assessee in the manner in which the assessee has claimed.

30. In the result, the appeal filed by the assessee is allowed.

The order pronounced in the open court on 13 08 2010.

[G.E. VEERABHADRAPPA]
VICE PRESIDENT

[I.P. BANSAL]
JUDICIAL MEMBER

Dated, / , 2010.

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Copy forwarded to: -

1. Appellant - By Hand
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

Deputy Registrar
आयकर महानगर अदालत
Deputy Registrar
ITAT, Delhi Benches
New Delhi