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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No.5423/M/2016
Assessment Year: 2010-11

ITO, 17(3)(4), Aayakar Bhavan, Room No.123, 1st Floor, M.K. Road, Mumbai – 400 020	Vs.	Shri Sudhir Ravee Sood, 612, 6th Floor, Maker Chambers, Nariman Point, Churchgate, Mumbai – 400 021 **PAN: AAEPS 2032G**
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Anil Sathe, A.R.
Revenue by : Shri V. Vidhyadhar, D.R.

Date of Hearing : 10.04.2018
Date of Pronouncement : 15 05.2018

O R D E R

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the Revenue against the order dated 30.06.2016 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2010-11.

2. The Revenue has raised following grounds of appeal:

"On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in directing the Assessing Officer to Compute LTCG arising on sale of non-agricultural land at Marve at Rs.. 65,00,000/- holding that the payment of Rs.85,00,000/- to M/s. Kwality Frozen Foods Pvt. Ltd. and M/s. Magnum Holdings Pvt. Ltd., is covered u/s 48(i) of the Act., without appreciating the facts that-

(i) The Assessing Officer during the course of assessment proceedings and later appellate proceedings in the remand report

had brought it on record that the assessee by his suo motto submissions had conceded to the fact that he is the sole recipient of the entire sale consideration of Rs. 1,50,00,000/- and further that there was no sharing of the sale consideration with shri.Rradeep Ravi Sood..

(ii) The contention of the assessee that the payments were made to the entities M!s.Kwality Frozen Foods Pvt Ltd and M!s. Magnum Holdings Pvt Ltd., also cannot be accepted on face value since no relevant corroborative details were filed by them.

(iii) Shri. Vikram Seth, Director of the entity Kwality Frozen foods Pvt Ltd.(now known as Graviss Holding Pvt.Ltd.), in his statement recorded under oath u/s 131 of the Act stated that the details of acquisition of the property and the proof of payment made was not available with him. He further stated that the company had never take possession of the property and no taxes/ levies were paid to local authorities but the company.

(iv) No compliance by way of requsite submission was made by M/s. Magnum Holdings Pvt Ltd, Hon'ble

2) The appellant prays that the order of the A.O. should be restored and order of the CIT(A) should be set aside.

3) The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. The only issue raised by the Revenue is against the direction by Ld. CIT(A) to compute the long term capital gain by taking the sale consideration of non agricultural land at Rs.65 lakh by holding that payments to M/s. Kwality Frozen Foods Pvt. Ltd. and M/s. Magnum Holdings Pvt. Ltd. is covered under section 48(i) of the Income Tax Act.

4. The facts in brief are that the assessee was owner of the property comprised in plot No.1B measuring 2599.9 sq. yards, CTS No.1719/11, Village Erangal, Taluka Borivali which was purchased on 29.04.1972 by the assessee along with his brother Mr. Pradeep Ravee Sood and another person Mr Shyam Dugal for a consideration of Rs.35,300/- in co-ownership. The said property was sold by the assessee on

11.12.2009 for a consideration of Rs.1,50,00,000/- to Citizen Credit Co-operative Bank Ltd. and the entire consideration was received by the assessee and nothing was paid to Mr. Pradeep Ravee Sood. However, assessee paid Rs.35,00,000/- to M/s. Kwality Frozen Foods Pvt. Ltd. and Rs.50,00,000/- to M/s. Magnum Holdings Pvt. Ltd. on the ground that the said company has partial interest in the said land which was duly created by executing an agreement dated 14.05.1991 and without their consent the said property could not have been sold. Thus the capital gain was worked out by taking the sale consideration of Rs.65 lakhs and after reducing the index cots of Rs.74,361/-, a long term capital gain of Rs.64,25,639/- was calculated which was claimed as exempt under section 54F of the Act by making reinvestment in another property within one year from the date of transfer of the said property and thus the income from capital gain was shown at nil. It is pertinent to note that in 1988 the other co-owners Mr. Pradeep Ravee Sood and Mr. Shyam Dugal entered into an agreement with Ajay Verma representing M/s. Magnum Holdings Pvt. Ltd. and Mr. Mohan Thakkar for their respective 1/3 share in the said land . However, Mr. Mohan Thakkar could not pay the consideration and 1/3 share was sold in 1991 to new purchaser M/s. Kwality Frozen Foods Pvt. Ltd. Thus, the beneficial ownership was with the assessee, M/s. Magnum Holdings Pvt. Ltd. and M/s. Kwality Frozen Foods Pvt. Ltd. According to the AO all these transactions were not genuine as these were entered into to circumvent the tax on long term capital gain on the ground that agreement with said

parties was also not registered and ultimately he recomputed long term capital gain as under and added the same to the income of the assessee:-

"Sale consideration as per conveyance deed dated 11/12/2009		1,50,00,000
Fair Market value as on 1-4-1981	Rs.35,300	
With Indexation @ 632/100	Rs.2,23,096	2,23,096
		1,47,76,904
Less: Investment u/s. 54F on payment against new flat No.2902, 29th floor, Lodha Primero of Carpet Area of 1217 sq. ft. alongwith car parking space No.5052, 5053, 5053A:		
On 18-7-2009	22,15,556	
On 24-6-2009	14,77,037	
Registration charges	31,520	
Stamp Duty	14,60,120	51,84,639
Long Term Capital Gain		95,92,265
		========

5. In the appellate proceedings, the Ld. CIT(A) allowed the appeal after considering the various contentions of the assessee of the assessee by observing and holding as under:

"6.1 There is no denying the fact that the assessee was the sole recipient of the consideration of Rs.1.5 crore, however, he has paid Rs.50 lakhs and Rs.35 lakhs to the wo companies in lieu of right held by them on the land.

6.2 Without a compensation (in the nature of payment as made here) the 'assessee would not have been able to dispose off the property.

6.3 The Hon'ble Bombay High Court in the case of CIT vs. Shakuntala Kantilal 190 ITR 56 6 has held as under:

"It must be stated in fairness to Dr. Balasubramanian for the Revenue that he did not dispute the fact of payment or even the necessity of making such a payment. His contentions is that the language in which section 48 is couched does not contemplate deduction of such an amount. Reference in this regard was made to section 48 of the Act to show that the payment herein could neither be termed as expenditure incurred wholly and exclusively for the transfer or the cost of acquisition or of any improvement thereto. None had appeared on behalf of the respondent-assessee.

6. In order to appreciate Dr. Balasubramanian's submission, it is desirable to refer to the provisions of section 48 which read as under.

"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 capital asset and the cost of any improvement thereto."

7. The section broadly contemplates three amounts for the purpose of computing income chargeable under the head "Capital gains ". The first is the full value of the consideration for which the capital asset has been transferred. The second is the expenditure incurred wholly and exclusively in connection with such transfer and the third and the last is the cost of acquisition of the capital asset including the cost of any improvement thereto. We have already referred to the facts of the case in detail earlier. It cannot be disputed that, unless the assessee had settled the dispute with Radia and Sons (Pvt) Ltd., the sale transaction with Messr. Cosmos Co-operative Housing Society Ltd., under the agreement dated March 30, 1967, would not, rather would not, have materialised. If this transaction had not materialised, there would perhaps have been no question of capital gains. The sale would then have taken place at the rate of Rs. 29 per sq. yard as against Rs. 51 per sq. yard. One way of looking at the problem could be to say that the full value of the consideration in this case was not the apparent consideration, i.e., Rs 2,58,672, but Rs. 2,23,168 (i.e., 2,58,672 minus Rs. 35,504). The Legislature, while using the expression “full value of consideration" in our view, has contemplated both additions to as well as deductions from the apparent value. What it means is the real and effective consideration, that apart, so far as clause (i) of section 48 is concerned, we find that the expression “for the transfer". The expression used is "the expenditure incurred wholly and exclusively in connection with such t ansfer". The expression "in connection with such transfer" is, in our view, certainly wider than the expression “for the transfer". Here again. We are of the view that any amount the payment of which is absolutely necessary to effect the transfer will be an expenditure covered by this clause. In other words, if, without removing any encumbrance including the encumbrance of the type involved in this case, sale or transfer could not be effected, the amount paid AGEB for removing that encumbrance will fall under clause (i). Accordingly, we agree with the Tribunal that the sale consideration requires to be reduced by the amount of compensation. The first questions is, therefore, answered in the affirmative and in favour of the assessee."

Similarly, the Hon’ble Bombay High Court in the case of CIT vs. Abrar Alvi 247 ITR 312 has held as under:

"2. Before concluding one more point needs to be mentioned. The assessee has paid an amount of Rs. 8 lakhs to his son, Abrar Alvi. Much prior to the sale of the property in 1992, Abrar Alvi has instituted a suit in the city civil

court being Suit No. 4763 of 1986, seeking an injunction restraining the assessee from selling "Janki Kutir". Hence, the said amount of Rs. 8 lakhs was paid. On the facts, the Tribunal found that the amount was paid to remove the encumbrance. The Tribunal also applied the ratio of the judgment of this court in the case of CIT v. Shakuntala Kantilal [1991] 190 ITR 56, wherein it has been held that expenditure incurred in removing the encumbrances was deductible. The Tribunal found that there was an acrimonious dispute between the father and the son and the said amount was paid to effect the transfer. Hence, the Tribunal ordered Rs. 8 lakhs to be deductible. We see no reason to interfere with this finding of fact.

3. In this appeal no substantial question of law arises. Hence, the appeal is rejected."

6.4 The payment to the two companies would thus be covered u/s.48(i) In view of the fact that the other two parties had received money (compensation in lieu of their rights / interest on the land) and have offered it to tax also as capital gain, in effect, the assessee's effective sale consideration would only be Rs.65,00,000/- (on reducing Rs.50 lacs and Rs.35 lacs paid to othe two companies). The Assessing Officer is directed to compute the capital gain taking sale consideration and allowing the payments made as expendit re uls.48(i). Net sale consideration is directed to be reduced to Rs. Additional Ground of Appeal is allowed."

6. The Ld. D.R. vehemently submitted before us that the order of Ld. CIT(A) is not correct as it ignored and overlooked the several vital facts on record. The Ld. D.R. contended that the first appellate authority has grossly erred in accepting the contention of the assessee that M/s. Kwality Frozen Foods Pvt. Ltd. and M/s. Magnum Holdings Pvt. Ltd. were having partial interest in the said property and payments made to the tune of Rs.85 lakhs is covered under the provisions of section 48(i) of the Act. The Ld. D.R. heavily relied on the order of AO and submitted that all these co called beneficial interests were created by entering into an agreement which was not even registered and thus cannot be treated as genuine. Finally, the Ld. D.R. submitted that the order of Ld. CIT(A) be set aside and that of AO be restored.

7. The Ld. A.R. submitted before us that the said two entities were having beneficial interest in the property and without their prior consent/permission, the said property could not have been sold. The ld AR argued that the Ld. CIT(A) has correctly appreciated the facts of the case after having gone through the various documents and deeds as incorporated in para 5.1 and 5.2 of the order of the Ld. CIT(A). The Ld. A.R. also submitted that even in the remand proceedings the additional evidences which were remanded to the AO were confirmed by the AO that the said two companies were having beneficial interest in the said property and there was no cancellation of the agreement entered into between the said companies qua the interest in the property. Further, it was also stated by the AO in the remand report that both these companies have made payment for acquiring beneficial interest in the said property. The Ld. A.R. finally relying on the order of Ld. CIT(A) prayed before the Bench that since the order of Ld. CIT(A) has taken into account every aspect of the matter including all agreements and remand report of the AO and give a finding that the payments to the two companies namely M/s. Magnum Holdings Pvt. Ltd. and M/s. Kwality Frozen Foods Pvt. Ltd. were covered under the provision of section 48(i) of the Act and therefore deserved to be affirmed.

8. We have heard the rival submissions of both the parties and perused the material on record including the impugned order. Upon perusal of the record as placed before us, we find that the assessee has sold the property for a consideration of

Rs.1,50,00,000/- ,which was purchased along with two other co-owners, entered into an agreement under which the beneficial ownership of M/s. Kwality Frozen Foods Pvt. Ltd. and M/s. Magnum Holdings Pvt. Ltd. was created in 1991. The AO doubted the said agreements between the two co-owners and these companies. The AO treated entire property as belonging to the assessee and capital gain was calculated accordingly without allowing the deduction of Rs.85 lakhs which was paid to these two companies for the reason that without their consent the said property was not possible to be sold. In the appellate proceedings, the Ld CIT(A) upheld that both these parties were having beneficial interest in the property and allowed the deduction of Rs.85 lakhs paid to these companies under section 48(i) of the Act. We find from the order of Ld. CIT(A) especially para 51. & 5.2 which deal with the various documents placed by the assessee before the appellate authority and also the remand report which was called for to conf ont the AO with the new evidence placed before the Ld. CIT(A) and finally reached and recorded a conclusion that the findings of the AO was wrong. It was also observed by Ld. CIT(A) that these companies have paid consideration for acquiring beneficial interest in the said property which was also verified by the AO in the remand proceedings. In view of these facts, we find that the Ld. CIT(A) has taken a very balanced and correct view of the whole matter and thus allowed the payments made to the said two companies aggregating to Rs.85 lakhs under section 48(i) of the Act while computing the capital gain and there is no

reason to interfere in the said order as the same does not suffer from any illegality. Accordingly, we affirm the order of Ld. CIT(A) by dismissing the appeal of the Revenue.

Order pronounced in the open court on 15.05.2018.

Sd/-	**Sd/-**
(Saktijit Dey)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 15.05.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.