

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
BEFORE HON'BLE KUL BHARAT, JUDICIAL MEMBER
AND HON'BLE MANISH BORAD, ACCOUNTANT MEMBER

ITA No.254/Ind/2017

Assessment Year 2008-09

DCIT-3(1), Indore (Appellant)	Vs.	Kumari Sheetal Garg, 8/2, New Palasia, Indore (Respondent)
PAN No.AFHPG9179G		

Revenue by	Shri K.C. Selvamani, Sr.DR
Assessee by	Shri S.S. Solanki, CA
Date of Hearing	07.01.2019
Date of Pronouncement	10.01.2019

ORDER

PER MANISH BORAD, AM.

The above captioned appeal is filed at the instance of Revenue pertaining to Assessment Year 2008-09 and is directed against the orders of Ld. Commissioner of Income Tax (Appeals)-I (in short 'Ld.CIT(A)'), Indore dated 07.12.2016 which is arising out of the order u/s 147 r.w.s. 143(3) of the Income Tax Act 1961(In short the 'Act') dated 31.07.2015 framed by ACIT-3(1), Indore.

2. Revenue had raised following grounds of appeal;

"1. Whether on the facts and in the circumstances of the case Ld. CIT(A) has erred in deleting the addition of Rs. 2,50,74,858/- made by the AO on account of disallowance of deduction claimed u/s. 54F as claim of Long Term Capital Gain was treated as Short Term Capital Gain.

2. Whether on the facts and in the circumstances of the case Ld. CIT(A) has erred in holding that effective date of transfer from hands of assessee was date of registration i.e. 10.04.2007 while, the assessee relinquished here rights vide sale agreement dated 14.12.2006 in favour of Shri Vinay Chajlani and Smt. Sunita Chajlani and enjoying the said rights Shri Vinay Chajlani & Smt. Sun ita Chajlani sold the property to M/s. Honeywell Property P. Ltd. at higher price than that is mentioned in Agreement with the assessee.

3. Whether on the facts and in the circumstances of the case Ld. CIT(A) has erred in holding that reopening is not valid while the copy of agreement dated 14.12.2006 was not submitted by assessee during the course of assessment proceedings hence, the facts of the agreement was not verified by the AO during the original assessment proceedings.

4. The appellant reserves the right to add, amend or alter the ground of appeal on or before the date the appeal is finally heard for disposal."

3. Briefly stated the facts as culled out from the records are that the assessee filed her return of income on 31.3.09 declaring total income of Rs.34,51,540/-. In the said return the assessee had claimed exemption u/s 54F of the Rs. 2,50,74,857/- in respect of Investment made in the fixed deposit of Rs. 2,51,00,000/- under the capital gain deposit scheme. As the correct exemption allowable u/s 54F was Rs. 2,18,13,595/-the return was revised. The

assessment of the assessee was completed u/s 143(3) of the Income Tax Act on 30.12.2010 wherein the total income was finally assessed at Rs. 67,12,802/- i.e. as per the revised return filed by her on 12.07.2010. An audit objection was raised alleging that as the assessee has entered into agreement to sale on 14.12.2016, the effective date of sale shall be 14.12.2006 and not 10.4.2007(the date of registered sale deed). On the basis of audit objection, the case was reopened and claim u/s 54F was denied alleging the gain to be short term capital gain.

4. Aggrieved assessee preferred an appeal before the Ld.CIT(A) who allowed the appeal of the appellant.

5. Aggrieved by the above deletion Revenue is in appeal before the Tribunal raising two Issues (i) As the date of agreement to sale was 14.12.2006, the capital gain is short term and exemption u/s 54F is not allowable & (ii) The reopening was valid.

6. Ld. Departmental Representative vehemently supported the order of Ld.A.O.

7. Per contra Ld. Counsel for the assessee supported the findings of Ld. CIT(A) and submitted that as per Section 2 (47)(v) of the IT Act "Any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882." As per this clause three conditions are mandatory for transfer, (i) Part Performance, (ii) Possession & (iii)

Contract of nature referred to in Section 53A of the Transfer of Property Tax. That the appellant received only Rs. 2,50,000/- each vide agreement to sale dated 14.12.2006 from the buyers whereas the sale value was Rs. 2,64,30,573/- and Rs. 3,24,63,573/-. That the appellant has received less than 10% of the amount as token amount vide agreement to sale. That is para 5 of Agreement to sale it was clearly mentioned that possession will be handed over to the buyers at the time of registration of Sale Deed. In para 15 of Agreement to sale it was mentioned that if the balance amount is not paid within stipulated time, Rs. 2,50,000/- will be forfeited and this sale agreement will automatically stand cancelled. That neither possession is transferred nor part performance is done, only a token amount is given. Further the same is not registered as required u/s 53A of the Transfer of Property Act, 1882. Hon'ble Supreme Court in the case of CIT v. Balbir Singh Maini reported in 389 ITR 0531 held as under :-

"The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of section 53A. In short, there is no agreement in the eyes of law which can be enforced under Section 53A of the Transfer of Property Act. This being the case, we are of the view that the High Court was right in stating that in order to qualify as a "transfer" of a capital asset under Section 2(47) (v) of the Act, there must be a "contract" which can be enforced in law under

Section 53A of the Transfer of Property Act.

8. The Ld. Counsel for the assessee further submitted that as per above decision transfer under section 2(47)(v) will take place from the date of registration of document and not otherwise.

9. As regards reopening of assessment, the AO, after carefully considering the facts and submissions of the case allowed the claim of assessee. When the claim of assessee was allowed by the AO after taking care of all the facts of the case more particularly of the issue involved, the case cannot be reopened. It will tantamount to change of opinion. That the ground has been raised by the AO that the copy of the agreement dated 14.12.2006 was not submitted by the assessee during the course of assessment proceedings. The copy of the sale agreement was part of assessment record as is clearly evident from the reason to believe supplied by the AO. Further in both Sale Deeds in point no.2 this fact was clearly mentioned that an agreement to sale dated 14.12.2006 has been entered into between the parties. In this case Notice u/s 148 has been issued on 12/03/2015 i.e after 4 years from the end of Asst year which is 2008-09 in the present case. As per proviso to Section 147 where an assessment u/s 143(3) or under this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of 4 years from the end of relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of assessee to disclose fully and truly all material facts

necessary for his assessment for that assessment year. In the present case there was no failure on the part of assessee. The assessee has also placed reliance on the following judgments;

(A) In order to qualify as "transfer" of Capital Asset u/s 2(47)(v) of the Act, there must be "contract" which can be enforced in law under Section 53A of the Transfer of Property Act:-

i) CIT V. Balbir Singh Maini 389 ITR 531 (SC)

(B) When possession is transferred and part performance (Substantial payment) is made, then only transfer is considered as per Section 2(47)(v):-

(i) Chaturbhuj Dwarkadas Kapadia V. CIT 260 ITR 9

(ii) CIT V. Cochin Stock Exchange Ltd 363 ITR

(iii) CIT V Ved Prakash Rakhra 370 ITR 762 (Karnataka)

(iv) Shri Mahesh Nemichandra Ganeshwade V ITO
ITANo.594/PN/10 ITAT (Pune)

(C) Assessment u/s 147 cannot be reopened on change of opinion:-

(i) CIT V. Kelvinator of India Ltd 320 ITR -

(ii) Assistant Commissioner of Income Tax, Mumbai & Others v/s
ICICI Securities Primary Dealership Ltd 348 ITR 0299 (SC)

(iii) Commissioner of Income Tax vs. Fujistu Opel Ltd 359 ITR 0067(MP)

(iv) Principal Commissioner of Income Tax vs. CHL Limited 110 CCH 0113 (Delhi)

(v) Karti P. Chidambaram vs. Assistant Commissioner of Income Tax 300 CTR 0233 (Madras)

(vi) Commissioner of Income Tax vs. P.G. Foils Ltd 356 ITR 0594 (Guj.)

(D) As per proviso to Section 147, where an assessment u/s 143(3) has been made, no action can be taken after the expiry of 4 years if there being no failure on the part of assessee to disclose fully and truly all material facts:-

(i) Commissioner of Income Tax & ANR. Vs. Foramer France 264 ITR 0566 (SC)

(ii) Commissioner of Income Tax vs. Steel Tubes of India Ltd 326 ITR 0046 (MP)

(iii) Sabh Infrastructure Ltd vs. Assistant Commissioner of Income tax 398 ITR 0198 (Delhi)

(iv) Bhor Industries Ltd vs. Assistant Commissioner of Income Tax & Ors. 267 ITR 0161 (Bombay)

(v) Parikh Petrol Chemical Agencies (P) Ltd Vs. Assistant

Commissioner of Income Tax 266 ITR 0196 (Bombay)

(vi) Nikhil K. Kotak vs. Mahesh Kumar, Assessing Officer 319 ITR 0445 (Guj.)

(vii) Lambda Therapeutic Research Limited vs. Assistant Commissioner of Income Tax 101 CCHP 0030 (Guj)

(viii) Simplex Concrete Piles (India) Ltd vs. Deputy Commissioner of Income Tax & ORS. 262 ITR 0605 (Calcutta)

(ix) Coperion Ideal Private Limited vs. Commissioner of Income Tax 378 ITR 0525 (Delhi)

(E) Reopening the assessment u/s 147 merely on the basis of audit objection is illegal and wrong:-

(i) Commissioner of Income Tax (L TU) vs. Reliance Industries Ltd 382 ITR 0574 (Bombay)

(ii) Reckitt Benckiser Healthcare India private Ltd vs. Deputy Commissioner of Income Tax 96 CCH 0159 (Guj.)

(iii) Raajratna Metal Industries Ltd vs. Assistant Commissioner of Income tax 371 ITR 0222 (Guj.) ,

(iv) Avtec Limited .vs. Deputy Commissioner of Income ITR 0611 (Delhi)

(v) Commissioner of Income Tax vs. DRM Enterprises 91 CCH 0070 (Bombay)

(vi) Shree Ram Builders vs. Assistant Commissioner of Income tax 377 ITR 0631(Guj.)

(vii) National Construction Co. Vs Joint Commissioner of Income Tax 93 CCH 0309 (Guj.)

(viii) P.C. Patel And Company vs. Deputy Commissioner of Income Tax 379 ITR 0151

(ix) District Cooperative Bank Ltd vs. Deputy Commissioner of Income Tax 94 CCH 0019 (Allahabad)

(F) AO has to dispose of objections, if filed by passing speaking order, before proceedings with assessment:-

(i) GKN Drive Shafts (India) Ltd V. ITO 70 CCH 1264 (SC)

10. We have heard rival contentions and perused the records placed before us and carefully gone through the submissions of Ld. Counsel for the assessee. We will first take up Ground No.3 raised by the revenue challenging the findings of Ld. CIT(A) holding that the reopening of the assessment u/s 147 r.w.s. 143(3) of the Act was not valid.

11. It is an admitted fact that the assessee's case is pertaining to Assessment Year 2008-09, and the assessment proceedings u/s 143(3) completed on 30.12.2010 and the transactions giving rise to capital gain were thoroughly examined by the Ld.A.O while allowed the deduction u/s 54F of the Act during the course of assessment proceedings. It was on 12.03.15 that the Ld.A.O issued a notice u/s 148 of the Act which is beyond the period of four years from the end of the assessment year 2008-09. The power to reopen the assessment beyond four years can be used by the AO only if any income chargeable to tax has escaped the assessment for such assessment year by reason of the failure on the part of the assessee to make the return u/s 139 or failure to response to notice u/s 142(1) or Section 148 of the Act or a failure to disclose fully and truly the material facts necessary for assessment for that assessment year i.e. 2008-09. Perusal of the records reveals that during the course of assessment proceedings u/s 143(3) of the Act when the transaction giving rise to capital gain was examined, the copy of sale agreement was very much part of the assessment record and the details of copy of agreement dated 14.02.2006 and other conditions were duly mentioned therein. It cannot be

presumed that the Ld.A.O did not examined the sale deed while completing the assessment. In our view there was no failure on the part of the assessee to disclose fully or truly all material facts necessary for assessment and in these given facts and circumstances of the case reopening of the completed assessment u/s 143(3) beyond four years was not valid as it was merely for change of opinion and therefore in the light of the settled legal position as held by Hon'ble Apex Court in the case of CIT V/s Kelvinator of India Ltd 320 ITR 561 (SC) which in our view squarely applies on the facts of the assessee, the reassessment proceedings carried out u/s 147 r.w.s. 143(3) of the Act in the case of the assessee are bad in law and cannot be held to be valid. We therefore find no reason to interfere in the finding of Ld. CIT(A) holding the reassessment proceedings as invalid and uphold the same and dismiss revenue's Ground No.3.

12. As regards Ground No.1 & 2 which relates to the merits of the case, revenue is aggrieved that the Ld. CIT(A) erred in deleting the addition of Rs.2,50,74,858/- made by Ld.A.O on account of disallowance of deduction u/s 54F of the Act. Though we have

already held that the reassessment proceedings are invalid but just for academic purpose we will adjudicate Ground No.1 & 2 relating to the merits of the case. We find that the Ld.CIT(A) deleted the addition of Rs.2,50,74,858/- observing as follows;

“5. Ground Nos. 2 & 3:- The above grounds are directed against the rejection of claim of exemption u/s 54F of The Act and the treatment of LTCG on sale of plot as STCG. The detailed facts of the case as per the assessment order are reproduced at Para No.2 above and the detailed submission of the appellant are reproduced at Para No.3 above.

5.1 On perusal of the material on record, it is seen that the only dispute is regarding the date of transfer of the plot in question. The appellant has contended that the date is 10/04/2007 on which date the registry was made while the AO has taken the view that the date is 14/12/2006 which is the date of agreement. The AO has relied on the definition of transfer as per section 2(47)(ii) of The Act contending that transfer includes extinguishment of any rights in the capital asset and vide Para No. 11 of the agreement dated 14/12/2006 the appellant had given up her right in the capital asset of transferring it to any other person. The AO further observed that as per the sale agreement dated 14/12/2006 the consideration was agreed to be paid on or before 10/04/2007 and as the consideration was paid on 07/04/2007 the transfer will relate back to the date of agreement which is 14/12/2006 irrespective of the fact that registry was made only on 10/04/2007.

5.2 The above argument of the AO is however without taking into consideration the following material facts:-

1. As per, the sale agreement dated 14/12/2006 Para No.2 out of the

total sale consideration of Rs. 26430573/- only Rs.250000/_ was paid by the purchaser to the appellant;

2. As per the Para No.2 it was also agreed that the balance consideration will be paid before 10/04/2007 and if, the balance amount is not paid within the agreed time and deed is not registered the agreement will stand cancelled.;

3. Except for Rs.250000/ - no amount was received by the appellant in pursuance of the agreement dated 14/12/2006 from the purchaser;

4. It is also an admitted fact that possession was not handed over to the purchaser by the appellant;

5. The plot was ultimately "not sold to the purchaser, but was sold to another party namely Honey Well Properties Pvt. Ltd. and the consideration was received from Honey Well Properties Pvt. Ltd. and not the original purchaser with whom the appellant had entered into the agreement dated 14/12/2006;

6. As registered deed was with a party which was different from the party with whom the appellant entered into an agreement the general legal principle that the transfer as per the registered deed will relate back to date of agreement does not apply;

5.3 The Supreme Court in the case of Alapati Venkataramiah Vs CIT (1965) 57 ITR 185 had held that capital Gain arose in the year in which the deed was registered. It is however to be noted that the decision was with reference to the chargeability under section 45 with reference to transfer as defined e amendment under the Taxation Laws Amendment Act 1984 with effect from 1.4.1985 and the Finance Bill 1987 with effect from 1988.

In the decision reported in Zuari Estate Development and Investment Co. P. Ltd. Vs. J.R. Kanekar, Deputy CIT (Assessment) [2004J 271 ITR 269 (8 the Bombay High Court considered the effect of section 2(47) which was amended from March 1, 1988. The Bombay High Court held that for the transaction to amount to "transfer" within the meaning of section 2(47), the minimum requirements are that there has to be an agreement between the parties signed by the parties; it should be in writing; it should pertain to transfer of property and the transferee should have taken possession of the property. In the decision of the Punjab and Haryana High Court reported in CIT Vs. Ved Parkash and Sons (HUF) [1994J 207 ITR 148, the decisions of the Rajasthan High Court reported in CIT Vs. Vishnu Trading and Investment Co. [2003] 259 ITR 724 and CIT Vs. Rajasthan Mirror Manufacturing CO. [2003J 260 ITR 503 as well as the decision of the Andhra Pradesh High Court reported in M. Syamala Rao Vs. CIT [1998] 234 ITR 140, it is held that the capital gain arising on the transfer of capital assets has to be worked out from the date of the agreement under which the assessee was put in possession of the property.

5.4 On analyzing the facts of the present case in the light of the above judicial pronouncements it cannot therefore be held that the transfer took place on 14.12.2006 which is the date of the agreement as the purchaser was not put in possession at all and the property was subsequently sold to another entity by the registered deed dated 10.4.2007. No doubt as pointed out by the AO some right in the property was relinquished by the appellant however the transfer of the said right was also only conditional and was executable on fulfilment of the conditions as specified in Para 2 of the agreement which conditions have admittedly not been fulfilled. Also the said right was transferred by the erstwhile purchaser to the new entity namely Honeywell Properties Pvt. Ltd. by becoming an assignor in the deed dated 10.4.2007 for a

consideration of Rs.1500000/- 'Thus as far as the appellant is concerned therefore the effective date of transfer was 10.4.2007 and hence the capital gains was rightly shown by the appellant as Long Term Capital Gains. There is no other dispute as to the claim of exemption u/s 54F of The Act and hence the appellant is also eligible for the claim of exemption u/ s 54F of The Act to the extent as allowed in the original assessment u/s 143(3) of The Act dated 30.12.2010. Both the above grounds of the appellant are therefore allowed”.

13. The above finding of Ld. CIT(A) has not been controverted by the Ld. Departmental Representative by placing any contrary material on record. The facts clearly shows that in the agreement of sale dated 14.12.2006 the possession of the property was not transferred to the purchaser and only a token amount of Rs.2,50,000/- (which is approximately 1% of sale consideration) was received by the assessee. Para 5 of the agreement of sale deed clearly mention that possession will be handed over to the buyer only at the time of registration of sale deed. We therefore find that the basic conditions required under the provisions of 2(47)(v) of the Act for treating it to be a valid transfer could not be fulfilled and therefore the date of agreement to sale i.e. 14.12.2006 cannot be taken as a effective date of sale. We therefore confirm the view taken by Ld.CIT(A) and hold that the date of transfer of property is

10.4.2007 and the gain from sale thereof is giving rise to Long Term Capital Gain and therefore no interference in the finding of Ld.CIT(A) is called for. In the result Ground No. 1& 2 of the revenue's appeal stands dismissed.

14. Ground No.4 of revenue is general in nature which needs no adjudication.

15. In the result appeal of the revenue is dismissed.

The order pronounced in the open Court on 10.01.2019.

Sd/-

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

**(MANISH BORAD)
ACCOUNTANT MEMBER**

दिनांक /Dated : 10 January, 2019

/Dev

Copy to: The Appellant/Respondent/CIT concerned/CIT(A) concerned/ DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore