

आयकर अपीलिय अधिकरण "ई" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

श्री राजेन्द्र, लेखा सदस्य एवं श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष।
BEFORE SHRI RAJENDRA, AM AND SHRI SANDEEP GOSAIN, AM

आयकर अपील सं./ITA No. 1152/Mum/2013
(निर्धारण वर्ष/Assessment Year: 2007-08)

Dy. Commissioner of Income Tax- 12(2)
Room No. 134, First Floor
Aayakar Bhavan, M.K. Road
Mumbai 400020

अपीलार्थी/Appellant

बनाम/ Vs.

M/s. Simplex Concrete Works & Con. Co.
99, La-citadelle, M.K. Road
(Quens Road), Mumbai 400020

प्रत्यर्थी/Respondent

स्थायी लेखा सं./PAN - ABIFS5720J

अपीलार्थी की ओर से / Appellant by: Shri Pramod Nikalje
प्रत्यर्थी की ओर से/ Respondent by: Shri R.R. Lingsur

सुनवाई की तारीख /Date of Hearing : 24.11.2015
घोषणा की तारीख/Date of Pronouncement : 30.12.2015

आदेश / O R D E R

PER SANDEEP GOSAIN, J.M

This appeal is preferred by Revenue against the order dated 01.11.2012 passed by CIT(A)-23, Mumbai and it pertains to A.Y. 2007-08 on the grounds mentioned below: -

- "1. On the facts of the circumstances of the case and in law, the Ld.CIT(A) has erred in ho/ding that the Deed of Surrender and Declaration cum Undertaking cum Indemnity by Mr. Kerman Misty proves that Mr. Kerman Mistry was occupant of the property.
2. On the facts and the circumstances of the case and in law, the Ld.CIT(A) while ho/ding the above view failed to

appreciate the fact that the assessee inspite of being specifically asked for, could not produce any third party evidence in support of its contention that Mr. Kerman Mistry was occupant of the said property.

3. *On the facts and the circumstances of the case and in law, the Ld.CIT(A) while holding the above view also failed to appreciate Assessing Officers observation that the assessee had not taken any legal action against Mr. Kerman Mistry for vacating the property.*
4. *On the facts and the circumstances of the case and in law, the 'Ld. CIT(A) has erred in holding that the payment to Mr. Kerman Mistry is covered as either cost of acquisition or cost of improvement and thereby eligible for deduction u/s. 48 of the Act."*

2. The brief facts of the case are that assessee filed return of income for the A.Y. 2007-08 on 30.07.2007 declaring total income at ₹24,14,482/- and the case was processed u/s.143(1). During the course of assessment proceedings in the assessee's case for A.Y.2008-09 it was noticed from the AIR details that assessee had invested ₹50,00,000/- in REC Bonds during A.Y. 2007-08 and availed exemption under section 54EC. Assessee has declared purchase and sale of capital asset and computed the long term capital gain accordingly. Assessee, vide letter dated 26.10.2010 submitted statement of long term capital gain on sale of Bombay Municipal Corporation leased property situated at Cama Industrial Estate, Goregaon (E). From this statement of long term capital gain it has come to the notice of the AO that assessee had claimed deduction towards payment of ₹50,00,000/- made to Shri Kerman Mistry as per deed of surrender and declaration of occupant/tenant. On collecting further information, it was found that there was no evidence that Shri Kerman Mistry was a tenant/ occupant as assessee itself was tenant/occupant of premises which was allotted on lease by the Municipal Corporation of Greater Mumbai. It was therefore found that

a wrong claim had been made by the assessee resulting in escapement of income of ₹50.00.000/- for the A.Y. 2007-08. After elaborately recording the reasons for reopening assessment, a notice under section 148 dated 24.12.2010 was issued for reopening the assessment for A Y. 2007-08 under section 147. In response to the above said notice, assessee filed a letter dated 25.01.2011 requesting to treat the return filed by the assessee on 30.07.2007 for A.Y. 2007-08 as the return filed in response to notice under section 148 of the Act. Vide letter dated 27.01.2011 assessee requested for a copy of the reasons recorded for reopening the assessment under section 147 which was acceded to. Thereafter, notices under section 142(1)/143(2) dated 15.06.2011 were issued to assessee requesting copy of the return filed for the year along with the computation of total income, Profit and Loss Account and Balance Sheet. Ultimately the order of assessment was passed by AO vide order dated 29.12.2011 computing the total income at ₹74,14,480/- by adding ₹50,00,000/-, amount paid to Mr. Kerman Mistry as per deed of surrender and declaration of occupant/tenant. AO also initiated penalty proceedings under section 271(1)(c) of the Act.

3. Aggrieved by the order of AO assessee preferred appeal before the CIT(A). The CIT(A), after considering the facts and circumstances of the case, allowed the appeal of assessee vide order dated 01.11.2012.

4. Aggrieved by the order of CIT(A) Revenue is in appeal before us on the grounds mentioned above. At the very outset the learned D.R. submitted that assessee was not in a position to sub lease the premises which was leased to the assessee. The unexpired lease of the premises was transferred by assessee in favour of M/s. Kamal Corporation (Developer). The developer has paid a sum of

₹60,00,000/- to assessee for the purchase of the premises after entering into an assignment agreement between the assessee and the said developer, M/s. Kamal Corporation. While registering the aforesaid assignment agreement, the registering Authority valued the property at ₹2,00,38,000/-. Assessee declared capital gains for the year by adopting the value of consideration received as per the market value for stamp duty purpose for computing long term capital gains under section 50C at ₹2,00,38,000/-. After claiming expenses for brokerage/Valuation Report charges, assessee claimed further deduction of ₹50,00,000/- in respect of payment made to Shri Kerman Mistry purported to be a tenant. After indexation of cost, long term capital gain of ₹74,33,176/- was arrived at, out of which deduction under section 54EC of ₹50,00,000/- was claimed. Thus, taxable long term capital gain was declared at ₹24,33,176/-.

5. The learned D.R. relied upon the order passed by AO and submitted that the leased property belonged to Municipal Corporation of Greater Mumbai and therefore no one can legally occupy the property belonging to a Government Body that was validly leased to assessee to run a business. Since there was no sublease of the property to Mr. Kerman Mistry for which prior permission of BMC would be required. Since there was no documentary evidence in support of the claim that Mr. Kerman Mistry occupied the lease premises has been filed. Therefore the AO has rightly held that there was no valid ground or justification for claim of deduction of ₹50,00,000/- in respect of payment made to Mr. Kerman Mistry. Under the circumstances the AO has rightly disallowed and added to the total income of the assessee.

6. On the other hand, the learned A.R. for the assessee relied upon the operational portion of the order of the CIT(A) which reads as under: -

"3.3.6 I have considered the facts carefully. The payment to Mr. Kerman Mistry is not in doubt. In support of payments appellant had submitted copies of ledger account as well as Union Bank of India bank statement wherein name of Mr. Kerman Mistry is appearing clearly. AO's main contention was that no evidence was produced in support of the fact that Mr. Kerman Mistry occupied the said premises. In fact, in the statement recording reasons for reopening AO has noted as under: -

(d) This office letter dated 10.12.2010 was issued to Shri Kerman Mistry calling for information u/s 133(6) as under:-

"Please furnish copy of your return of Income for A Y 2006-2007, 2007-2008, & 2008-2009 with the computation of Total Income, Capital A/C, & Balance Sheet."

Vide letter dated 20. 12.2010 Mr. Kerman Mistry has replied as under:-

"I hereby agree and confirm that I have received Rs.50,00,000/- from M/s Kamal Corporation for surrendering and relinquishing all my rights and interests in the said property as an occupant. The deed of surrender is here with attached that evidences the above facts.

Thus, there was admission of the occupation of the property by Mr. Kerman himself.

In this connection, recital of Deed of Surrender and Declaration cum Undertaking cum Indemnity, are important to decide the issue before me.

Under clause (A) it is expressly accepted by Mr. Kerman Mistry that M/s Simplex Concrete Works and Construction Co. are the sole and absolute owner of the property.

Under clause (B) it is stated that he is an occupant of the said property.

Under clause (D), it is stated that vide MOU dated 16th September 2005 executed between Simplex and M/s Kamal Corporation, Simplex authorised M/s Kamal to deal and negotiate with the occupant of the said property and also to accept surrendering of occupancy in favour of Kamal.

Under clause (E) it is stated that M/s Kamal has negotiated with the occupant and in pursuance of the said negotiation, Mr. Kerman Mistry surrendered and relinquish his occupancy rights in favour of M/s Kamal Corporation.

Under Clause (2) of the Declaration cum Undertaking cum

Indemnity, it was stated that Mr. Kerman Mistry was aware that Simplex Concrete Works and Construction Co. being the owners of the said property are in the process of transferring and assigning the said property to M/s Kamal Corporation.

Under clause (5) it is stated that by Mr. Kerman Mistry that he confirms, agrees and declares that he has already received consideration of Rs.50,00,000/- for surrendering and relinquishing all my right and interest in the said property.

Under clause (8) it is stated that Mr. Kerman Mistry has handed over quiet, vacant and peaceful possession of the said property to M/s Kamal Corporation.

3.3.7 Thus, from these two documents it is further proved that Mr. Kerman Mistry was occupant of the property and has received consideration for vacating the possession of the said property.

3.3.8 Having understood these facts, question before me is to be decided is whether payment made by M/s Kama[Corporation to Mr. Kerman Mistry is allowable as deduction in computing long term capital gains? The AO was of the view that there was no justification for such payment and hence he did not allow the impugned deduction.

3.3.9 The appellant had entered into assignment agreement dated 15th February 2007. In accordance with the said assignment agreement and MOU dated 16th September 2005 following were the obligations of the appellant towards M/s Kamal Corporation: -

3.3.10 Under clause 1.5 of the MOU dated 16th September 2005, it shall be the responsibility of the assignor to make out a clear and marketable title in respect of the said plot more particularly described in the Schedule hereunder written and clear all the defects in title, if any, at its own costs and expenses with stipulated time, failing which the Assignee shall do so.

3.3.11 Under clause 2.1(b) of the said MOU the assignor shall hand over quiet, vacant and peaceful possession of the said plot to the assignee / nominee and shall also hand over the original documents of title to the aid plot.

3.3.12 Perusal of express covenants contained in MOU and assignment agreement establish the fact that appellant was under obligation to give vacant and peaceful possession to M/s Kamal Corporation. For giving such vacant and peaceful

possession, removal of Mr. Kerman Mistry was necessity. The amount paid by the appellant was essential as without such payment, the assignment of leasehold right in the property could not have taken place, as handing over vacant and peaceful possession was important term of the MOU and assignment agreement.

3.13 It can be seen from above that payment made by the appellant to the occupant of the property is in the nature of compensation for vacating the said property. The payment in question could be said to have been incurred with a view to remove the obstruction and obtain a clear title to the property before sale and in that view of the matter such payment would form part of cost of acquisition of the capital asset or the cost of improvement thereto as contemplated under section 48 of the Act. If the impugned payment would not have been made, perhaps the transaction in question would not have taken place at all giving rise to taxable capital gains. Therefore, I hold that there was proper justification for payment of compensation to the occupant of the property and is allowable as deduction while computing the capital gains. Appellant, therefore, is entitled to get deduction of Rs.50,00,000/- being compensation for vacating the property before the sale as contemplated in the MOU.

3.3.14 The AO's contention that there is no tripartite agreement between appellant, developer and Mr. Kerman Mistry also does not justify his action of disallowance in as much as the interest of occupant was taken care of well before entering into assignment deed as accepted by the occupant himself and reflected in the bank statements of the M/s Kamal Corporation.

33.15 Merely because appellant did not take any legal action against occupant for vacating the property is also of no help to the AO because in the business and commercial sense, efforts are always put in to resolve the disputes by way of negotiation and reconciliation and not by resorting to legal action.

Thus, this ground of appeal is allowed."

7. We have considered the detailed order passed by CIT(A) and we are of the view that CIT(A) has fully dealt with all the objections raised by Department. The AO has not dealt with the submissions of assessee while passing the assessment order which is evident from para 2.7 of the order, which is as under: -

"2.7 The leased premises belong to Bombay Municipal Corporation and therefore no one can illegally occupy a property belonging to a Government body that was validly leased to a tenant (assessee) to run a business. There was no sublease of the property to Mr. Kerman Mistry for which prior permission of B.M.C. would be required. No information is given by the assessee regarding the activity carried out at the leased premises for any of the prior years either by itself or by Shri Kerman Mistry though specifically asked for. Therefore, the averment that Mr. Kerman Mistry was conducting business on behalf of the assessee is without any basis. Since there is no evidence filed of any business activity being carried out at the premises, the indulgence of Mr. Kerman Mistry in carrying on business on behalf of the assessee or himself, is also found to be not true. No documentary evidence in support of the claim that Mr. Kerman Mistry occupied the lease premises has been filed. The assessee has only filed copy of deed of surrender entered into between Mr. Kerman Mistry and M/s Kamal Corporation and a declaration-cum- undertaking-cum- indemnity executed by Mr. Kerman Mistry and other related documents. These documents cannot be accepted as third party evidences as M/s. Kamal Corporation is an interested party. It is also not known whether Mr. Kerman Mistry has declared the aforesaid receipt as income during the year as such evidences have not been filed before the Assessing Officer while verifying the transaction during the scrutiny proceedings for A Y. 2008-09. Moreover, no case has been made out by the assessee to show that it had taken legal steps or any other steps whatsoever to get Mr. Kerman Mistry vacated from the premises if it was in his occupation. This, despite the fact that Mr. Kerman Mistry was claimed to be in occupation for many years. The assignment agreement was only signed between the assessee and M/s. Kamal Corporation to transfer and assign all their right, title and interest in the said property for the residue unexpired term of the lease on an as is where is basis. Therefore, there is no question of any compensation being paid by the assessee to Mr. Kerman Mistry. There was no tripartite agreement between the assessee, the developer and the purported occupier, Mr. Kerman Mistry."

8. After considering the submissions made by assessee as well as the Department, we are of the considered view that the only ground taken by AO while dismissing the deduction was that no permission of the Municipal Corporation was obtained before subleasing the property to Mr. Kerman Mistry and no documentary evidence in

support of the claim that Mr. Kerman Mistry occupied the leased property was filed by assessee except filing copy of the deed of surrender entered into between Mr. Kerman Mistry and M/s. Kamal Corporation. And a declaration-cum-undertaking executed by Mr. Kerman Mistry and other related documents. AO had further held that no legal steps, whatsoever, have been taken to get Mr. Kerman Mistry vacated from the premises. All these facts were fully dealt with by CIT(A) in para 3.3.5 to 3.3.15 of his order. More particularly it has been held by CIT(A) that the payment in question could be said to have been incurred with a view to remove the obstruction and obtain a clear title to the property before sale and in that view of the matter such payment would form part of cost of acquisition of the capital asset or the cost of improvement thereto as contemplated under section 48 of the Act. It was further observed that assessee did not take any legal action against occupant for vacating the property is also of no help to the AO because in the business and commercial sense, efforts are always put in to resolve the disputes by way of negotiation and reconciliation and not by resorting to legal action. Therefore we are fully convinced and satisfied that the order passed by CIT(A) need no interference. We uphold the same.

9. In the result, appeal filed by Revenue is dismissed.

परिणामतः राजस्व की अपील खारिज की जाती है।

Order pronounced in the open court on 30th December, 2015.

आदेश की घोषणा खुले न्यायालय में दिनांक: 30.12.2015 को की गई।

Sd/-
(RAJENDRA)
न्यायिक सदस्य/ ACCOUNTANT MEMBER

Sd/-
(SANDEEP GOSAIN)
लेखा सदस्य/ JUDICIAL MEMBER

मुंबई Mumbai, दिनांक Dated 30th December, 2015

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A) - 23, Mumbai
4. आयकर आयुक्त / The CIT - 12, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, "E" Bench ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ By Order

सत्यापित प्रति //True Copy//

सहायक पंजीकार /Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई/ITAT, Mumbai

n.p.