

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH: KOLKATA
[Before Shri M. Balaganesh, AM & Shri S. S. Viswanethra Ravi, JM]

I.T.A No. 970/Kol/2016
Assessment Year: 2005-06

Shri Bablu Sur, PAN:ALIPS9730N Vs. Income-tax Officer, Ward-44(1), Kolkata.
(Appellant) (Respondent)

Date of hearing: 29.11.2016

Date of pronouncement: 09.12.2016

For the Appellant: Shri S. M. Surana, Advocate

For the Respondent: Shri Amitabha Bhattacharya, JCIT

ORDER

Per Shri M. Balaganesh, AM:

This appeal by assessee is arising out of order of CIT(A)-13, Kolkata vide appeal No. 92/CIT(A)-13/W-44(1)/Kol/2014-15 dated 01.02.2016. Assessment was framed by ITO, Ward-41(1), Kolkata u/s. 143(3) of the Income tax Act, 1961 (hereinafter referred to as the “Act”) for AY 2005-06 vide his order dated 31.12.2007

2. The first issue to be decided in this appeal is as to whether the assessee is entitled for claiming deduction towards cost of improvement while computing capital gains in the facts and circumstances of the case. The other interconnected issue thereon is as to whether the assessee is entitled for deduction u/s 54F of the Act in the facts and circumstances of the case.

2.1. The brief facts of this issue is that the assessee is a small retailer engaged in the business of supply of building materials under the proprietorship concern styled as Bholanath Builders. The assessee had declared sales of Rs. 36,14,713/- and net profit of Rs. 1,97,626/-. The assessee filed his business as well as personal balance sheet before the Id AO. The assessee purchased a three storied building at 7B, Paul Street / Jatindarnath Basu Sarani, Kolkata – 04 with consideration of Rs. 3 lakhs on 19.6.2000 from Shri Nemai Ch. Saha. The said building which was purchased was in dilapidated condition and the assessee undertook lot of renovation work thereon and also did some reconstruction in the said building out of his funds which were drawn from the business. The Id AO observed

that in the personal balance sheet, investment in building account as on 31.3.2004 was Rs. 14,22,035/- and as on 31.3.2005 it was Rs. 15,40,076/-. The assessee also filed revised return of income within the prescribed time along with the personal balance sheet wherein the investment in building was reflected as on 31.3.2005 at Rs. 12,67,985/- . The entire building comprised of Ground Floor, First Floor and Second Floor. The assessee stated before the Id AO that he had gifted the Ground Floor to his sister Smt Mamata Saha Sur vide Gift Deed dated 10.9.2000 and First Floor to his younger brother Shri Bapi Sur vide Gift Deed dated 9.6.2001. It was also submitted that the assessee's sister and brother had executed power of attorney in favour of the assessee. The Id AO observed that the assessee furnished the Gift Deed and Power of Attorney in case of his brother Shri Bapi Sur but could not furnish any such evidence in respect of his sister. The assessee stated that based on the Power of Attorney, the assessee sold the flat of Ground Floor to Shri Sanjay Kumar Mishra, Son of Bidhubhushan Mishra for consideration of Rs. 7 lakhs by Registered Sale Deed dated 30.4.2004. The Id AO also examined the balance sheet for the Financial Year 2000-01 and observed that the assessee had shown in the balance sheet as advance for building in the sum of Rs. 3,32,961/-. The Id AO show caused the assessee as to why the capital gains derived from sale of Ground Floor should not be taxed in his hands. The assessee replied that he had taken interest free loans from his sister.

2.2. The Id AO did not proceed to accept the contention of the assessee for the following reasons :-

- (a) The assessee made gift of ground floor to his sister on 10.9.2000 but in the balance sheet of the assessee for the FY 2000-01 , he has shown the whole amount of building as his asset. No gift of property was reflected in the balance sheet and this status remained unchanged upto FY 2003-04. In the balance sheet for the year 2003-04, the building account was transferred to his personal balance sheet where assessee has shown business advance from Sanjay Kumar Mishra of Rs. 5,50,000/-. It appears that Mamata Saha (Sur) was not assessed to tax and did not file any return of income for Asst Years 2004-05 and 2005-06.
- (b) Besides the assessee enjoyed the whole sale consideration personally. He has deposited the money received from Sanjay Kr Mishra in his personal bank account.

2.3. The Id AO recorded statement from Smt Mamata Saha (sister of the assessee) on 27.12.2007 wherein she stated that she had no idea of the gift or sale. All she had done was only signing papers on demand of his elder brother. The Id AO also recorded statement from the brother of the assessee (Sri Bapi Sur) on 27.12.2007 wherein it was found that the brother had no known source of income. He gave a statement that he would simply oblige the request of his brother as he is dependent upon him. Finally the assessee came up with submission dated 28.12.2007 that gift made to brother and sister were revoked due to financial urgency. All the sale proceeds of the property have been enjoyed by the assessee herein and the assessee agreed to pay the tax on the capital gains arising out of the sale of the subject mentioned property. Accordingly the Id AO concluded that the sister and brother of the assessee were only name lenders and disbelieve the aspect of gift of ground floor and first floor to them respectively. The Id AO observed that though the consideration reflected in the sale deed was Rs. 7 lakhs, the value determined u/s 50C of the Act was Rs. 8,26,767/-. The Id AO concluded that the assessee made no renovation or repairing works from his funds. The Id AO also believed on the statement of the sister of the assessee who stated that she had made no investment in the subject mentioned property. Accordingly the Id AO concluded that the purchase price of the building was Rs. 3,32,961/- and 1/3rd of which is Rs. 1,10,987/- and gave the benefit of indexation on the said cost and computed the capital gains at Rs. 6,95,551/- in the assessment without giving any deduction towards cost of improvement.

2.4. Before the Id CITA, the assessee made claim of deduction u/s 54F of the Act for the renovation and reconstruction of the subject mentioned property as substantial sums were indeed spent by him out of loans borrowed for this purpose which were duly reflected in his personal balance sheet which is already forming part of the records. The claim of deduction u/s 54F of the Act was denied by the Id CIT(A) on the ground that the said deduction is available only when the amount is invested in new house by creating more infrastructure going by the spirit of section 54F of the Act. The Id CIT(A) also did not give the deduction towards the cost of improvement of the building (1/3rd portion for the subject mentioned property) in the computation of capital gains and upheld the action of the Id AO. Aggrieved, the assessee is in appeal before us on the following grounds:-

“2. For that the Ld. CIT(A) erred confirming the action of the AO in taking the cost of acquisition/property at Rs.1,10,987/- ignoring the cost of improvement duly evidenced.

3. For that the Ld. CIT(A) erred in confirming the action of the AO denying the deduction claimed u/s. 54F when the building was reconstructed evidence whereof was filed and there was no basis to reject the said deduction claimed by the assessee and determining the Long Term Capital Gain at Rs.695551/-.”

2.5. The Id AR made a request for admission of additional evidence vide his petition dated 15.7.2016 in the form of copy of the plan approved by the municipal corporation evidencing the reconstruction of the property by the assessee to make the property habitable. Apart from this, he also filed the copies of the Balance Sheet (both personal and business) as on 31.3.2004 and 31.3.2005 wherein both the housing loan as well as improvements made to the subject mentioned properties were duly reflected. Based on these evidences, he prayed for granting deduction of cost of improvement at 1/3rd of the total cost while computing the capital gains. In respect of claim of deduction u/s 54F of the Act, he placed reliance on the decision of the co-ordinate bench of Bangalore Tribunal in the case of K. Rajendra vs ITO in ITA No. 790/Bang/2010 dated 31.8.2012 wherein the benefit of deduction u/s 54F of the Act was granted on the renovation and reconstruction made on the existing building which was in dilapidated condition in order to make the same habitable. In response to this, the Id DR made a simple argument that the claim of the Id AR for grant of deduction u/s 54F of the Act is totally baseless as the said section could be made applicable only when a capital asset other than the residential property was sold and the proceeds thereon were reinvested in residential property. In the instant case, there was no sale of any capital asset other than residential property by the assessee. The assessee had merely purchased a property in dilapidated condition and made some improvements thereon. Hence the claim of section 54F deduction should be rejected.

2.6. We have heard the rival submissions and perused the materials available on record. The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. We are in full agreement with the arguments of the Id DR that there was no sale of any capital asset other than residential property that had happened in the instant case by the assessee. The assessee in the instant case had merely purchased an old building in dilapidated condition and had made some improvements by reconstructing the entire building in order to make the same habitable. It is not in dispute that the reconstruction was

carried out by the assessee by using the housing loan and after obtaining the approved plan from the municipal corporation which were part of additional evidences filed before us by the Id AR , which are hereby admitted for better appreciation of the facts. The provisions of section 54F of the Act are very clear in this regard as rightly pointed out by the Id DR. Hence the claim of deduction u/s 54F of the Act is dismissed. However, we find from the personal balance sheet of the assessee, that lot of amounts have been spent on the subject mentioned property out of housing loan and interest on housing loan was also claimed by the assessee and allowed by the Id AO. In these circumstances, it would be just and fair to allow the benefit of cost of improvement as a deduction at 1/3rd of the total cost incurred thereon while computing capital gains in accordance with the provisions of the Act. Hence the Id AO is hereby directed to grant the deduction of cost of improvement (1/3rd portion only) and rework the capital gains on sale of the subject mentioned property. Accordingly, the Ground No. 2 raised by the assessee is allowed and Ground No. 3 raised by the assessee is dismissed.

3. The next issue to be decided in this appeal is as to whether the Id CITA is justified in upholding the addition made by the Id AO towards unverified sundry creditors in the sum of Rs. 1,36,795/- ; and grant of depreciation of computer of Rs. 36,670/- in the facts and circumstances of the case.

3.1. The brief facts of this issue is that the Id AO observed that the assessee had reflected a sum of Rs. 1,36,795/- as sundry creditors in his business balance sheet as on 31.3.2005. According to Id AO, the assessee could not furnish any details for sundry creditors but merely stated that as a retail trader, he had some creditors from whom he used to purchase building materials. The Id AO directed the assessee to produce books of accounts. The assessee vide letter dated 20.12.2007 submitted that he was a retail trader and his turnover was below Rs. 40 lakhs and profit was shown at above 5% of turnover and hence he need not maintain any books of accounts. The Id AO concluded that the assessee did not maintain any books of accounts and he could not furnish name and address of the creditors and accordingly he concluded that the existence of the creditors are doubtful and also concluded that the assessee had created these bogus creditors by way of inflated purchase to reduce his profit. No bills from these creditors were also produced before the Id AO.

Accordingly the entire sundry creditors of Rs. 1,36,795/- was added to the total income as bogus liability .

3.2. The assessee claimed depreciation of Rs. 97,299/- in the return. During this year, he purchased a new computer for Rs. 61,117/- for which the purchase bill together with the date of put to use of the said asset was not produced before the Id AO by the assessee. Hence depreciation on computer amounting to Rs. 36,670/- was disallowed by the Id AO.

3.3. The Id AO finally completed the assessment by starting from the net profit as per profit and loss account of the assessee and made additions towards bogus sundry creditors of Rs 1,36,795/- ; disallowance of depreciation of Rs. 36,670/- and further additions on account of other items.

3.4. The Id CITA upheld the disallowances made by the Id AO as no better explanations or evidences were filed by the assessee before him. Aggrieved, the assessee is in appeal before us on the following ground :-

4. For that the Ld. CIT(A) erred in confirming the action of the AO in disallowing Rs. 36,670/- , Rs. 1,36,795/- being sundry creditors, which was not disallowable and / or the addition was not called for.

3.5. The Id AR argued that admittedly the assessee had not maintained any books of accounts. As per the provisions of the Act also, he was not required to maintain any books of accounts as he was a retail trader having turnover of less than Rs 40 lakhs and had reported net profit of more than 5 % of turnover. The Id AO having accepted the fact that the assessee had not maintained any books of accounts ought not to have made any separate addition towards disallowance of depreciation and by treating the sundry creditors as bogus liability by getting into the balance sheet and profit and loss account of the assessee. He placed reliance on the co-ordinate bench decision of this tribunal in the case of Raman Kumar Malhotra vs ITO in ITA No. 1609/Kol/2014 dated 21.10.2016 in support of his proposition. In response to this, the Id DR vehemently argued that the decision relied upon by the Id AR is not applicable to the facts of the instant case, as in the case before us, the Id AO had not rejected the books of accounts and had not made any estimate of net profits for arriving at the income from business. The Id AO instead proceeded to compute the business

profits based on the net profit as per profit and loss account declared by the assessee and made certain additions as is being done in the regular assessment. In the case law relied upon by the Id AR, the books were rejected and estimate of profits were made and accordingly this tribunal held that there cannot be any separate addition towards sundry creditors by looking into the same books of accounts. He further argued that in the instant case, the assessee though he was a retail trader having turnover of less than Rs 40 lakhs and having profit of more than 5% , did not opt for presumptive scheme of taxation provided u/s 44AF of the Act. If the income is so determined, then the Id AR's argument would be right and the decision of this tribunal would come to his rescue. He argued that the assessee had not taken any effort to prove the genuinity of these sundry creditors either before the lower authorities or before this tribunal and accordingly prayed for non interference in the order of the Id CITA in this regard.

3.6. We have heard the rival submissions. We find that the Id AO had stated that the books of accounts were not maintained by the assessee. But the assessee had produced the balance sheet and income and expenditure account before the Id AO for both personal as well as his business account. The subject mentioned sundry creditors of Rs. 1,36,795/- is part of the business balance sheet submitted by the assessee. We are in agreement with the argument of the Id DR that the Id AO had proceeded with the net profit declared by the assessee and made certain additions thereon as is being done in every normal case. We find that the Id AO had not rejected the books of accounts . He has only stated that the assessee had not maintained any books of accounts. We also find that the Id AO had not resorted to any estimation of net profits from business. Hence the case law relied upon by the Id AR as rightly pointed out by the Id DR is not applicable to the facts of the instant case. We find that in the absence of the books of accounts of the assessee, the Id AO treated the balance sheet of the assessee to be right and proceeded to frame the assessment accordingly by just making certain additions wherever the assessee was not able to adduce any evidences thereon. It is a fact that the assessee had not proved the existence and genuinity of these sundry creditors in the sums of Rs. 1,36,795/- . It is a fact that even the name and address of these creditors were not proved. In these circumstances, we do not deem it fit to interfere with the findings of the lower authorities in this regard. Hence the Ground No. 4 raised in this regard is dismissed.

With regard to the disallowance of depreciation on computer, the assessee was not able to produce any evidence of the said asset being put to use for business purposes before us. Hence we do not deem it fit to interfere with the findings of the lower authorities in this regard. Hence the Ground No. 4 raised in this regard is dismissed.

4. During the course of hearing, the Id AR stated that the Ground No. 4 raised by the assessee in respect of disallowance made in the sums of Rs. 30,769/- and Rs. 16,056/- are not pressed and the same is taken as the statement from the Bar. Accordingly the Ground No. 4 in respect of these two sums are dismissed as not pressed.

5. The Ground Nos.1 , 5, 6 & 7 are general in nature and does not require any adjudication.

6. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 09.12.2016

Sd/-

Sd/-

(S. S. Viswanethra Ravi)
Judicial Member

(M. Balaganesh)
Accountant Member

Dated :9th December, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – Shri Bablu Sur, 1, Nanda Kishore Street, Kolkata-700004..
- 2 Respondent –ITO, Ward-44(1), Kolkata.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.