

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'SMC-II' NEW DELHI**

BEFORE SMT DIVA SINGH, JUDICIAL MEMBER

**I.T.A .No.-4449/Del/2015
(ASSESSMENT YEAR-2007-08)**

Ajit Singh, Vill.Garhi, Alawalpur, Dharuhera, Distt.Rewari, Haridwar. PAN-CZSPS4445N (APPELLANT)	Vs	ITO, Ward-2, Narnaul. (RESPONDENT)
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Assessee by	None
Revenue by	Ms. Anima Baranwal, Sr. DR

Date of Hearing	01.08.2016
Date of Pronouncement	28.10.2016

ORDER

The present appeal has been filed by the assessee assailing the correctness of the order dated 28.04.2015 of CIT(A), Rohtak pertaining to 2007-08 assessment year. Though the grounds raised are repetitive and argumentative however the sum total of the grievance posed is that sale proceeds of sisters share of land has wrongly been sustained in the hands of the assessee.

2. No one was present on behalf of the assessee. However, on considering the material available on record and after hearing the Ld.Sr.DR, it was considered appropriate to proceed with the hearing ex-parte qua the assessee appellant on merits.

3. The relevant facts of the case are that the assessee sold agricultural land in Village Garhi Alawalpur allegedly belonging to him and his two sisters, Ms. Prem and Ms. Bati. The sisters are stated to have executed a Power of Attorney authorizing the assessee to sell their share of land also. The sale of property has allegedly been registered by Tehsildar for which full sale consideration admittedly was received by the assessee. As per assessee's

claim the sisters share of the sale proceeds was given to them in cash. Considering the facts the AO found no evidence of sisters having been paid their share and considering the remaining evidence also not supported the case rejected the claim of the assessee. The specific objection of the AO is extracted hereunder:-

a) *"The assessee has adopted the cost of acquisition of land alongwith cost index at Rs 2.59.500/- and no cost of acquisition of land as on 01.04.1981 has been given. Further no documentary evidence regarding adoption of cost of acquisition of land with cost index has been filed.*

b) *The assessee has taken the amount of his share only for calculation capital gain but from the sale deed of agril land sold on 05.06.2006 it has been noticed that the entire amount of Rs.39,50,000/- has been given to the assessee by the purchaser and not to his sisters.*

c) ***The perusal of bank statement has also revealed that no amount appear to have been given by the assessee to his sisters Smt. Prem and Smt. Bati and no such submissions/ documents have been furnished by the assessee that he has given the amount of their share to his sisters. Therefore the entire sale consideration of Rs. 39,56,250/- is taken in the hands of the assessee for the purpose of capital gain.***

d) *The assessee during the course of assessment proceedings has filed valuation report of the residential house in which value of the house has been shown at Rs. 19,00,000/-. Further on 04.03.2013 the assessee filed another valuation report according to which valuation has been shown at Rs 20,31,000/-. Thus the valuation reports are contradictory to each other. The Inspector of this office was asked to make spot inquiry regarding cost of construction of the building. He visited vill. Garhi Alwalpur and submitted his report, vide which value of the building has been estimated between 16 to 17 lakh therefore- keeping in the view of fact of the case the value of the building is taken at Rs. 16,50,000/-*

e) *The value of acquisition cost of land as on 01.04.1981 is taken at Rs. 300 per marla on the basis of sale of Agril. Land in village Garhi Alwalpur by Sh. Ajit Singh S/o Mohan vill- Garhi Alwalpur on 01.07.1981 vide which one canal land has been sold for Rs. 6.000/-. Copy of sale deed is placed on record."*

(emphasis provided)

3.1. As a result thereof, he made an addition of Rs.14,51,987/- to the income of the assessee as per the following computation of the capital gain in the hands of the assessee:-

<i>Cost of acquisition of land as on 1.4.1981. (105.5 marla x Rs.300 per marla)</i>	<i>Rs.31,650/-</i>
<i>Cost as on 05.06.2006</i>	
<i>By applying cost index (519/100)</i>	<i>Rs.1,64,263/-</i>
<i>Sale consideration of land</i>	<i>Rs.39,56,250/-</i>
<i>Capital gain</i>	<i>Rs.37,91,987/-</i>

Exemption u/s 54B(1)
Exemption u/s 54F
Net Taxable capital gain

Rs.6,90,000/-
Rs.16,50,000/-
Rs.14,51,987/-

3.2. Before the CIT(A) the assessee argued that the claim of sale of the specific piece of land sold for Rs.39,56,250/- was supported by a copy of Jamabandi. The said document was stated to have also been filed before the AO. As per the statement of facts filed before the CIT(A) the share of the assessee, it is seen was claimed to be 3K 4M (i.e.3 Kanal 4 Marla) out of the total land consisting of 5K 5.5M. The assessee qua its claim that the value for the purposes of calculating the capital gains the value of Rs.20,31,000/- be accepted was successful. However, qua the claim that the sisters share of the sale proceeds amounting to Rs.15,20,492/- the assessee failed in persuading the CIT(A) to grant any relief. Aggrieved the present appeal has been filed before the ITAT.

4. The Ld. Sr.DR relying upon the impugned order submitted that by convention the sisters of the assessee as daughters in an inherited property would not have been given any share in the sale proceeds of the ancestral agricultural lands as daughters are generally not given any rights. Thus, the occasion for the assessee to pay his sisters for their so-called share would not arise and the bank accounts of the assessee have already been examined which show no such out flow of money towards his sisters. Accordingly, it has been argued that the addition in the hands of the assessee is warranted on facts.

5. I have heard the submissions and perused the record. In the first instance, I find that on record there is no reference to copy of Sale Deed being filed. Only a copy of Jamabandi as evidence of sale has been placed on record to show the sale of a specific piece of land. Jamabandi only reflects the mutation entry in the land Revenue records and hence examination of the Registered Sale Deed as the primary document is required to be done. It is this document which would reflect the true narration of the respective share of

the parties and the power to sell-whether as owner or as a close relative and Registered Attorney holder of the co-owners. This document i.e. the Sale Deed will address the correct factual position and it is this document which needs to be considered. Further, it is also seen that there is no discussion whatsoever as to the nature of land sold by the assessee whether it is ancestral land inherited by the assessee alongwith his sisters or is it self-acquired property of assessee's parents inherited by way of a will wherein the shares of the son and the daughters have been defined. These aspects have not been addressed by the tax authorities on the basis of record. The assessee is found to have made a claim that only a specific portion belonging to his sisters has been sold on the basis of Power of Attorney permitting the assessee to sell the sisters share in the said property. The share proceeds belonging to the sisters are claimed to have been paid to them. The facts in support of the said claim need be addressed and demonstrated on record. The arguments of the Ld.Sr.DR that sisters are conventionally not given their share in their parental property need to be rejected as they run contrary to the laws of the land. There is no escaping the fact that by virtue of the Hindu Succession (Amendment) Act, 2005 No.39 of 2005 the Hindu Succession Act 1956 stands amended and in the Joint Hindu family governed by the Mitakshara law, the daughters alongwith the sons also have henceforth been given equal inheritance rights in the joint family property. As per assessee's own claim, the share of the sisters has been given to them. Thus, as far as the law is concerned, the daughters can not be denied their share in the ancestral property. However, if bowing to convention Ms. Bati & Ms. Prem have chosen not to accept the sale proceeds from their share in the lands either as co-purchasers with their brother or inherited alongwith their brother, then it is their prerogative/personal choice even if dictated by convention. This is

not a case of Relinquishment of Rights in ancestral or inherited property by the daughters as per law which necessarily has to be demonstrated by way of a Registered Relinquishment Deed before the appropriate authority. It appears in the facts of the present case that the land has been sold with the sisters giving their Power to Sell to their brother by executing a General power of Attorney in his favour. Hence, in the facts of the present case as per pleadings made, it becomes incumbent upon the assessee to demonstrate its claim before the AO that after the receipt of the sale consideration by the brother on behalf of the sisters they were given their share in the sale proceeds of the land. Affidavits in support of the said claim are stated to have been filed by the sisters. Ordinarily an affidavit cannot be used as an evidence where primary facts capable of being placed on record are available. The primary fact is proof of actual evidence of transfer to the sister's of their share of sale proceeds. No doubt, the primary fact can further be fortified by affidavits if so deemed fit. However, as per the record, the tax authorities have not found any such evidence from the bank account of the assessee. In the facts of the present case filing of an affidavit is not a statutory requirement, nor is there any direction of any Court to do so. In the facts of the present case, it is a *suo moto* decision of the assessee to file affidavits of the sisters affirming that they have received their share of the sale consideration. Thus, the affidavits in the facts of the present case are only written sworn statements of facts filed voluntarily by the deponents under an oath or affirmation administered by a person authorized to do so by law. Such statement is witnessed as to the authenticity of the deponents signature by a taker of oaths such as notary public or Commissioner of oaths. Thus, in the facts of the present case the legal position as understood in law is that in the absence of primary supporting fact the affidavit cannot be said to be an evidence of a fact. It can be used as

an evidence only by permission of the Court for sufficient reasons wherein the right of the opposite party to have deponent produced for cross-examination is protected. Thus, facts which are capable of being demonstrated by evidence cannot be generally concluded by way of filing affidavits. In the facts of the present case, I find that critical facts and documents relevant for deciding the issue have neither been examined nor even been produced or directed to be produced for examination in reference to the bare affidavits filed by the assessee. I find that there is no discussion on the contents of affidavits whatsoever. Thus any conclusion without ascertaining the correctness of the affidavits is not permissible. It is further seen considering the doubts of the tax authorities that whether the specific piece of land was ancestral land which devolved on the assessee and his sisters by way of inheritance is a basic fact which too is not coming out from the record. It is noted that the AO has given a finding that from the bank statement of the assessee the payments to the sisters of their share is not reflected. In the circumstances it is deemed appropriate to address these obvious and patent shortcomings and thus restore the issue back to the AO for addressing the facts and the affidavits of the sisters on record.

5.1. Accordingly after hearing the Ld.Sr.DR and considering the peculiar facts and circumstances of the case on the basis of material on record, the issue for the reasons given herein above is restored back to the file of the AO with a direction to pass a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard.

6. In the result, the appeal of the assessee is allowed for statistical purposes.

The order is pronounced in the open court on 28th October 2016.

**Sd/-
(DIVA SINGH)
JUDICIAL MEMBER**

Amit Kumar

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR,
ITAT NEW DELHI