

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री भागचंद, लेखा सदस्य एवं श्री कुल भारत न्यायिक सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, AM & SHRI KUL BHARAT, JM

आयकर अपील सं./ITA No. 357/JP/2015
निर्धारण वर्ष/Assessment Year : 2008-09.

Shri Raghudev Singh Tanwar, A-46, Ganesh Nagar-I, New Sanganer Road, Sodala, Jaipur.	बनाम Vs.	The Income Tax Officer, Ward-4(3), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAVPT6189J		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Mahendra Gargia (CA)
राजस्व की ओर से / Revenue by : Shri R.A. Verma (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 10.02.2017
उदघोषणा की तारीख / Date of Pronouncement : 10/03/2017

आदेश / ORDER

PER SHRI KUL BHARAT, J.M.

This is an appeal filed by the assessee against the order of Id. CIT (A)-2, Jaipur, dated 27.03.2015 pertaining to A.Y. 2008-09. The assessee has raised the following grounds of appeal :-

- 1.1 "The very action taken u/s 147 r/w 148 is bad in law without jurisdiction and being void ab-initio, the same kindly be quashed. Consequently the impugned assessment framed u/s 143(3)/148 dated 10.03.2014 also kindly be quashed.
- 1.2 The impugned order u/s 143(3)/148 dated 10.03.2014 is bad in law and on facts on the case, for want of jurisdiction and various other reasons and hence the same kindly be quashed.

2. The Id. CIT(A) erred in law as well as on the facts of the case in rejecting the contention that there was no sale effected as such by the appellant and it was only a mere gift already made and possession handed over in AY 2005-06, which couldn't have legally given rise to any capital gain tax liability in absence of "transfer" as contemplated by Sec. 50C of the Act, in any year and in any case, in this year. Hence, addition made on account of capital gain kindly be deleted.
3. **Rs. 1,73,43,456/-:** The Ld. CIT(A) erred in law as well as on the facts of the case in considering the sale consideration at Rs. 1,73,43,456/- as valued by the Departmental Valuation Officer (DVO) in his report on objections filed u/s 50C of the Act as against the (assumed declared) sale consideration the objections raised and the expected sale price/Fair Market Value (FMV) of the property was not to be extent as stated by the Ld. DVO. The increased full value of sale consideration so deemed, based on the valuation report by the Id. CIT(A) being contrary to the provisions of law and facts, the sale consideration as declared be directed to be considered for the purposes of Long Term Capital Gain and the impugned addition be deleted.
4. The Id. DVO erred in law as well as on the facts of the case in not judiciously appreciated the objection raised and in particular of the admitted fact that in record of the Jaipur Development Authority (JDA), the character of the land still continues to be a residential property and the Id. DVO could not have again relied upon the valuation made by the Stamp Duty Authorities considering it a commercial land. He being an independent expert/authority, must have determined the (full value of) sale consideration representing the Fair Market Value (FMV) considering the objection so raised hence, the report of the DVO suffers from legal and factual infirmities, being perverse, deserves to be quashed and ignored.
5. The Id. AO further erred in law as well as on the facts of the case in charging interest u/s 234A, 234B, 234C, & 234D of the Act and as also in withdrawing of interest u/s 244A of the Act. The appellant totally denies its liability of charging and withdrawal of any such interest. The interest so charged/withdrawn, being contrary, to the provision of law and acts, kindly be deleted in full.
6. The appellant prays your honour indulgences to add, amend or alter of or any of the grounds of the appeal on or before the date of hearing."

2. Briefly stated the facts are that the case of the assessee was re-opened for assessment and the assessment under section 148 read that section 143(3) of the Income Tax Act, 1961(hereinafter referred to as the Act) was framed vide order dated 10th March, 2014. While framing the assessment the Assessing Officer observed that the assessee had declared long-term capital gain at Nil after claiming deduction under section 54F of Rs. 12,78,400/-. The Assessing Officer, however, observed that the value adopted by the Stamp Valuation Authority at Rs. 1,95,15,472/-. The Assessing Officer did not accept the explanation of the assessee that there was no transfer by this sale deed, the property was already gifted to the society. The Assessing Officer, therefore, computed long term capital gain at Rs. 1,73,43,456/- and also made addition of Rs. 4,78,000/- for making investment in cash and disallowed a sum of Rs. 17,875/- claimed that deduction under section 80C of the Act. Aggrieved by this, the assessee preferred an appeal before Id. CIT(A), who after considering submissions partly allowed the appeal thereby, the Ld. CIT(A) confirmed the addition made on account of computation of long-term capital gain of Rs. 1,73,43,456/-. Aggrieved by this, the assessee is in further appeal before this Tribunal.

3. Ground No. 1.1 to 1.2 is against reopening of the assessment.

4. At the time of hearing, the Id. Counsel for the assessee relied upon the submissions made in the written submissions. The Ld. Counsel submitted that the action initiated under Section 147 is invalid. The submissions made in the written brief are reproduced as under:

"Facts: The assessee originally filed return of income u/s 139 at total income of Rs. 2,92,714/- on dated 03.10.2008 showing no LTCG. Thereafter, a notice u/s 148(PB10) was issued on 26.03.2013 based on the reasons recorded (PB 9). In response thereto, the assessee filed another return of income on dated 23.09.2013 at total income of Rs. 2,92,714/-. The appellant directly but the Idj. CIT (A) rejected summarily. Hence this ground.

Submission: The settled judicial guideline on this aspect is first submitted.

1. Reason to believe and not reason to suspect:

- 1.1.** It is submitted that even under the amended law the bedrock condition or words, which continue right since inception till date, are "reason to believe" and not "reason to suspect". The word "believe" has to be understood in contradistinction of suspicion or opinion. Belief indicates something concrete or reliable. Kindly refer **Gangasharan & Sons Pvt. Ltd. v/s ITO & Ors. (1981) 130 ITR 1/22 CTR 112(SC) and ITO v/s Lakhmani Mewal Das (1976) 103 ITR 437 (SC).**
 - 1.2.** Further, the belief must be of an honest and reasonable person based upon reasonable grounds. The officer may act on direct or circumstantial evidence, but his/her belief must not be based on mere suspicion, gossip or rumour. The Id. AO would be acting without jurisdiction if the reason for his/her belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the provisions of law. The court can always examine this aspect though the declaration of sufficiency of the reasons for the belief cannot be investigated by the court. Held in **Sheo Nath Singh v/s AAC (1971) 82 ITR 147 (SC).**
2. In the instant case however, the **AO proceeded on mere suspicion.** The only information which the AO disclosed in the impugned reasons (**PB**

9) is that though the assessee declared sales consideration at Rs. 21 lakh however as per section 50C it should have been Rs. 1,95,15,472/- and as against the Nil LTCG declared, the LTCG of Rs. 1,73,43,456/- should have been declared.

Applying the settled judicial guideline, it is submitted that

2.1 At the outset, we may submit that there was no occasion for the assessee to declare any capital gain (based on the alleged sale consideration of Rs. 21 lakhs) in as much as there was **no transfer of any property effected this year** because the said property had **already been gifted** to the said society vide a gift Deed dated 19.12.2005 (**PB 11-14**) and the assessee had **already parted with the possession** and also ownership of the said property **in A.Y.2006-07 itself** hence, there was no LTCG in this year.

In fact, the assessee neither in the original return (**PB 51-60**) nor in the return filed u/s 148 (**PB 61-68**) declared any sale consideration and rather Nil LTCG was declared. The AO however, appears to have taken this fact from a computation prepared and filed by the assessee vide his letter dated 26.11.2010 (**PB 130-132**) in the alternate only when required by the AO during the course of assessment proceedings. **Thus, the very reason that the assessee has declared less sale consideration was a misconception of fact and thus, was a non-existent reason.**

2.2 There apart, merely because the original assessment was not framed under scrutiny, is not a good ground being relevant only to the proviso to Sec. 147. Otherwise, the basic conditions laid u/s 147 (1) must have been complied with by the AO.

2.3 From the impugned reasons it is not known how and where from the AO could have noticed the higher FMV at Rs. 1,95,15,472/- being the DLC rated in as much as there is nothing to show the source of such information and therefore, even prima facie, the authenticity and the correctness of such figure is doubtful. The AO might have heard such DLC rated for subjected area but as against his personal knowledge, at least some material giving rise to some cause or justification [i.e. reason to believe], must be available.

Thus, action u/s 147 was based on mere suspicion and on non-existent reason.

3. Reassessment – Sanction for issue of notice-Non mentioning in the reasons that approval has been obtained from the CIT vitiates the reopening. [Sec/ 147,148].

In GTL Limited v/s ACIT (2015) 37 ITR 376 (Mum Trib.) (DPB 1-11), it was held.

"Another major discrepancy noticed during the course of arguments is that there is no mention of authorization of a higher authority to initiate the current reassessment proceedings. Hon'ble Bombay High court in the case of DSJ communications vs DCIT, reported in 22 Taman 129 (Bom), held that approval of CIT is mandatory. Since there is no mention of the approval sought from the CIT on the reasons, as recorded by the AO to imitate reassessment proceedings, the entire initiation has been vitiated and become bad in law"(para 24)"

4.1. On the contrary, the Ld. Departmental Representative opposed the submissions.

4.2. We have heard the rival contentions, perused the material available on record. The reason for reopening of the assessment was that the assessee had filed income tax return for the assessment year under consideration on 31/10/2008 declaring income of Rs. 2,92,074/-. Subsequently, a notice u/s 148 was issued for reopening of assessment. It was observed that during the period under consideration the assessee had sold a plot of land situated 76B, Vishveshria Nagar Extention, Triveni Nagar, Gopal Pura By Pass, Jaipur to Tilak Education Society, Jaipur on 11/5/2007 for a sale consideration on Rs. 21 lakhs. However, the registration authority had taken the sale consideration at Rs. 1,95,15,472/- as per the DLC rate. Therefore, the capital gain of Rs. 1,73,43,456/-, escaped the assessment on this basis, the assessment was

reopened. The fact that the Stamped Valuation Authority has adopted a different sale consideration. Therefore, in terms of section 50C the assessing Officer was justified for reopening the assessment for the purpose of computing the capital gain. Accordingly, we do not see any reason to interfere into the order of the Ld. CIT (A). The case laws relied on by the Ld. Counsel for the assessee in support of his contentions are not applicable on the facts of the present case. The ground no. 1.1 to 1.2 are dismissed.

5. Now, we take up the ground no. 2. to 4. Ground no. 2 is against taking the value by invoking the provisions of section 50C of the Act. The Ld. Counsel for the assessee reiterated the submissions as made in the written brief. He submitted that the authorities below failed to appreciate the fact that the transfer had not taken place by the sale deed dated 5/11/2007 since the property was already gifted to the society. The Ld. Counsel for the assessee reiterated the submissions as made in the written brief. It is contended that there was no transfer of any property effected during the year under appeal as said property had already been gifted to the society vide irrevocable gift dated 19/12/2005 and the assessee has already parted with the possession and also ownership of the said property in the assessment year 2006-07 itself only, hence the assessee remained no more a legal owner of the property on dated 5/11/2007. It is also contended that sale was also immediately got cancelled through cancellation deed executed on 7/11/2007,

he drew our attention to paper book pages 28 to 30. He further submitted that the society had never paid sale consideration of Rs. 21 lakhs. He submitted that the sale is not real but a mere formality. He further submitted that it was only meet to procedural requirements made by different Education Department of the Government of Rajasthan, who were continuously insisting that society must show itself to be the owner of the said property and the same should appear in its audited balance sheet. The factum of the donation by the appellant to the said society was recognized even by the Education Department. The assessee is Secretary and the founder of the society. He is devoting his time and skill for the development of the said society since its existence and was fully devoted. He submitted that long-term gain is not dependent upon registration which is illegal transfer of property. He submitted that the only infirmity was that such gift deed was not got registered but that clearly conveyed the intention of the party. The law is well settled that the computation and charge of tax with respect to capital gain is not dependent on a transfer. In strict legal sense he submitted that the law is well settled that where the seller had already parted with the possession of the property and has also made part performance pursuant to the written contract between the seller and the buyer, the transfer shall be deemed to have taken place. Merely, on the happening of this events and the revenue need not wait till the tacking place of the formal registration of the property and the

depriving it of the legitimate tax. In sum and substance the contention of the Ld. Counsel for the assessee is that merely the document registration in the form of sale deed can not be the basis for making the assessee liable for long-term capital gain tax. He submitted that the intention of the party should be inferred from the contract of the parties. He further challenged the valuation adopted by the DVO. On the ground that the property in question was a residential property and the DVO has wrongly valued the same as a commercial property leading to a vast different. This contention however, was not appreciated either by the DVO or by the Ld. CIT(A). He further submitted that neither the appellant nor the society ever applied for conversion /change of user from residential to commercial at any point of time. He further submitted no commercial activity was carried out only a school was being run therein and this fact is over stressed by the Ld. DVO. He submitted that no commercial activities are admittedly reported in the surroundings or in the adjacent plots/property. Simply because school is being run does not ipso facto increases its fair market value in manifold that is from residential at Rs. 4,400/- per sq. yd. to commercial at Rs. 19,800/- per sq. yd. He submitted that it is also a fact that the property situated 2 km away from the main road. He submitted that the DVO is merely based its valuation on the basis of the DLC rate he submitted that DVO has not applied his mind he further submitted that the assessee was also denied deduction

under section 54F of the Act. He further submitted that the assessee made investment of Rs. 12,78,400/- claiming exemption under section 54F of the Act and even the AO as allowed the same. However, the assessing officer agreed with the allowability of the claim so made, however, he restricted the claim up to Rs. 12,78,400/-.

5.1 On the contrary, the Ld. Departmental Representatives opposed the submissions and submitted that the entire argument is based upon a cooked-up story. The assessee ought to have placed a valuation report if he was so aggrieved by the valuation conducted by the DVO. He submitted that there is a categorically finding that school was being run on the premises which was essentially for commercial purpose. He further submitted that admittedly the gift deed was existed prior to registration of sale deed and was not unregistered document as per the registration Act would not confirm any right on the society. Therefore, same has no validated in the eyes of law.

5.2 We have heard the rival contentions, perused the material available on record. We do not see any merit into the contention of the Ld. Counsel for the assessee that by virtue of gift deed the assessee had transferred the rights and titles of the property in question by the un-registered gift deed. As the law is well settled un-registered document does not transfer title of immovable property. Another contention of the Ld. Counsel for the assessee is that as per the JDA records, this property is a residential property. He

submitted that under the identical facts, the coordinate bench in the case of Anita Sodhi Vs. ITO in ITA No. 169/JP/2014 wherein the Tribunal was pleased to restore the issue of valuation of property to the file of assessing officer for fresh decision. There is no dispute with regard to the fact that the property as per the JDA records remains residential. The revenue has not placed any material as to what was the basis of the Stamp Valuation Authority for treating the property as the commercial property for the purpose of Stamp Valuation . It is also un-rebutted fact that the assessee has been running a school on the land in question. It is stated by the Counsel for the assessee that even if it is presumed that on the date of transfer a school was being run in that event also the property in question can not be treated as a commercial property as running of school is not a commercial activity. At the most the valuation can be made on the basis of the institutional rates. We find merit into this contention of the Ld. Counsel for the assessee it is also not clear under these facts when the school was being run and the property remain as residential property in the records of Jaipur Development Authority, which is a competent authority for this purpose. It is not clear from the records, as to why the stamp valuation authority have adopted the value on the basis of the commercial rates. The DVO has merely adopted on the basis of land and building area method. In the light of the above discussion it would be appropriate to set aside the issue of valuation with regard to ascertaining the

fair market value on the date of transfer. These grounds of the assessee's appeal (ground nos 2 to 4) are allowed for statistical purposes.

6. Ground no. 5 relates to charging of interest which is consequential. The ground raised is dismissed.

7. Ground no. 6 is general in nature needs no separate adjudication.

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

Order pronounced in the open court on 10/3/2017

Sd/-

Sd/-

(भागचंद)

(कुल भारत)

(BHAGCHAND)

(Kul Bharat)

लेखा सदस्य / Accountant Member

न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 10 /03/2017.

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

1. अपीलार्थी / The Appellant- Shri Raghuvveer Singh Tanwar, Jaipur.
2. प्रत्यर्थी / The Respondent-The Income Tax Officer, Ward-4(3), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 357/JP/2015)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

