IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A': NEW DELHI

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 4209/Del/2013
ASSTT. YEAR: 2009-10

Shri Baljeet Singh Yadav, SB-133, Shastri Nagar, Ghaziabad.	vs	Income Tax Officer, Ward No. 1(2), Ghaziabad.
(Appellant)		(Respondent)

Appellant by : Shri Kapil Goel, CA
Respondent by : Shri R.C. Dandey, Sr.DR

Date of Hearing : 28.08.2017
Date of Pronouncement: 29.09.2017

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER:

This present appeal has been filed by the assessee against the order of the Ld. CIT (Appeals), Ghaziabad who vide order dated 18.02.2013 has dismissed assessee's appeal for AY 2009-10.

2. The facts, in brief, are that the assessee is engaged in the business of manufacturing and trading of SS Tubes. The return of income was filled on 30.09.2009 disclosing income of

Rs.41,260/- and agriculture income of Rs.95,750/- which was processed and subsequently selected for scrutiny. During the course of assessment proceedings it was noticed that the assessee had sold a property for a consideration of Rs. 1,92,16,000/-. The return reflected the calculation of the capital gain as under:

Sales Consideration	Rs.1,92,16,000/-
Indexed cost of Acquisition	Rs. 10,06,301/-
Cost of Improvement after indexation	Rs.1,82,72,582/-
Expenditure on transfer	0
Balance	(-)Rs. 62,883/-

2.1 During the course of assessment proceedings, the assessee was asked to furnish copy of purchase deed, copy of sale deed and documentary evidence/s in support of cost of improvement shown. The assessee submitted the bifurcation of the cost of improvement as under:-

Indexed cost of land filing, Site development, ground levelling and boundary walls in the year 2001	Rs. 26,35,200/-
Compensation paid to M/s U.P. Bone Mills (P) Ltd.	Rs. 1,56,37,380/-

2.2 The assessee was further asked by the AO to show cause as to why the amount shown as paid as compensation to M/s U.P. Bone Mills (P) Ltd. amounting to Rs.1,56,37,380/- be not disallowed. The assessee in his reply before the AO submitted that he had paid the amount on account of breach of purchase agreement dated 01.07.2008 which he had executed with the said company and that he was forced to pay said compensation to safe guard his rights on the said property. It was the assessee's submission that the same should be considered as cost incurred by the assessee for protecting his rights in the said land. However, the AO was of the opinion that the claim of the assessee could be accepted in the light of the legal provisions. According to the AO, what the law permitted to be deducted from the sale consideration, while computing long term capital gain, was the cost of improvement whereas the assessee had deducted the compensation paid for the cancellation of agreement for sale of property. As per the AO, the assessee had neither made any alteration nor any additions to the asset. The sum paid by the assessee was on account of compensation due to cancellation of agreement by the assessee himself which was not at all deductible from the capital gain. The AO relied on the case of

Ambat Echkutty Menon vs CIT (1978) 111 ITR 880 (Ker) wherein the Hon'ble Kerala High Court has held that sum spent to clear encumbrance is not cost of improvement. The AO also relied on the case of CIT Vs Roshanbabu Mohammad Hussein Merchant (2005) 275 ITR 231 (Bom) wherein the Hon'ble Bombay High Court has held that expenditure incurred by an assessee to remove an encumbrance created by the assessee himself (on a property which was acquired by him without any encumbrance) shall not be allowed as a deduction under section 48. The AO observed that in this case the property was without any litigation. The AO further observed that the assessee had entered into an agreement to sell the property with M/s U.P. Bone Mills (P) Ltd and later on the agreement was cancelled by the assessee himself. The AO concluded that the assessee had to pay compensation as per the terms of the agreement, which in no circumstances could be treated either as cost of acquisition or as cost of improvement and hence could not be allowed as a deduction under section 48 of the Income Tax Act, 1961 (hereinafter called 'the Act'). Accordingly, considering the above facts, the amount of Rs. 1,56,37,380/- paid by the assessee to

M/s U.P. Bone Mills Pvt. Ltd. and shown as cost of improvement was disallowed and added back to assessee's total income.

2.3 Further, during the course of assessment proceedings, the assessee was also asked to furnish documentary evidence/s in respect of boundary wall and levelling of the land shown at Rs.19,28,859/- The assessee submitted that the said amount was incurred by the assessee for site development of the land purchased by him in the year 2001 and included cost of land levelling, earth filling, boundary wall and other related site development activities to protect the undue trespassing by the anti social elements. The assessee also submitted that as the said amount was incurred by the assessee in the F.Y. 2001-02, the evidence for the same cannot be produced immediately. The AO was of the opinion that as no supportive document/s in respect of site development, boundary wall etc. were furnished, assessee's claim could not be accepted and, accordingly, cost of improvement shown at Rs.19,28,859/- was also disallowed.

2.4 Aggrieved, the assessee filed an appeal before the Ld. CIT (A) and reiterated before the Ld. First Appellate Authority that he had paid the amount of Rs. 1,56,37,380/- to M/s U.P. Bone Mills (P) Ltd on account of breach of purchase agreement dated

1.07.2008, which the assessee had executed with the said company for sale of part of land. It was reiterated that the assessee apprehended that the proposed buyer was planning to take forceful possession of the entire piece of land i.e. even the piece of land which was not a part of said agreement and he was, thus, was forced to pay the said compensation. However, the Ld. CIT (A) was of the opinion that the explanation offered by the assessee as very cursory, devoid of much logic and also devoid of the requisite documentary evidence. The Ld. CIT (A) opined that the entire explanation regarding purchase agreement with M/s U.P. Bone Mills (P) Ltd., subsequent termination of any such agreement, the payment of such a huge compensation etc. were all without any piece of requisite document, so as to lend even reasonable credence to such explanation. The Ld. CIT (A) observed that the entire story of any such apprehension of forceful possession and payment of compensation, were all cooked up story for the purpose of camouflaging payments made on some other projects or for some other purpose business-or non business, legal or illegal and that the entire explanation was worth rejecting at the first instance itself. The Ld. CIT (A) further observed that in the present case, neither the fact of any real

threat or title has been evidenced, nor any such compensation/claimed in respect of M/s U.P. Bone Mills (P) Ltd. which could require such huge compensation, been adduced. The Ld. CIT (A) upheld the action of the A.O. in disallowing the claim of Rs. 1,56,37,380/-. Similarly, in respect of the cost improvement of Rs. 19,28,859/- also, the Ld. CIT (A) rejected the assessee's claim on the ground that no details or documentary evidence/s have been furnished either before the A.O. or even before him.

2.5 Now the assessee has approached the ITAT and has raised the following grounds of appeal-

1. That the learned the following grounds *CIT (Appeal) has erred in upholding the order passed by the Assessing Officer in the instant case even through the Assessing Officer did not have any valid jurisdiction to pass the impugned assessment order.*

2. That the learned CIT (Appeals) has erred in upholding the disallowed of Rs.1,56,37,380/- made by the Assessing Officer while computing income from long term capital gains.

3. That the learned CIT (Appeals) has erred in upholding the disallowance of Rs.26,35,200/- being the indexed cost of land filing, site development, ground level ling and expenditure on boundary wall amounting to Rs.19,28,859/- made by the Assessing Officer while computing income from capital gains.

4. That the appellant craves the right to amend, append, delete any or all grounds of appeal."

3. The Ld. AR assailed the action of both the lower authorities in rejecting the assessee's claim of deduction of Rs.1,56,37,380/- as allowable deduction u/s 48 of the Act as genuine cost of improvement. The Ld AR vehemently submitted that the only point which was raised by the AO in the assessment proceedings was the allowability of the impugned payment as cost of improvement within the meaning of section 48 of the Act. The Ld AR referred to the assessment order and submitted that the following aspects were not called in question by the AO i) that there was a written agreement dated 1/07/2008 (paper book pages 39 to 41) for sale of given land on a Rs 100 stamp paper; ii) that said agreement contained a covenant that in event of land being not sold to the buyer, the seller will compensate the buyer at the agreed sum; iii) that ultimately the assessee sold the land to some other buyer and could not sell the land to the proposed buyer as the land was mortgaged with State Bank of India and No Objection Certificate (NOC) could not be obtained as agreed; iv) that the aforesaid amount is duly disclosed as income in the hands of the recipient buyer in its audited Profit/Loss account (paper book pages 22).

3.1 The Ld AR further submitted that once no doubt was cast on the said agreement by the AO during assessment, the only question requiring consideration at this stage was the allowability of the payment under section 48 of the Act made to the proposed buyer as per the agreement. It was the submission of the Ld. AR that the burden to establish that the said agreement was sham or bogus was on the revenue and the same has not been discharged. It was further submitted that the lower authorities have not been able to controvert, by any positive material, the agreement on record. Ld AR further submitted that no enquiry u/s 131/133(6) of the Act was conducted by any of the lower authorities before rejecting the claim of the assessee.

3.2 The Ld AR further submitted that the Hon'ble Kerala High Court's decision in the case of Ambat Enchkuty Menon reported in 111 ITR 880 and relied upon by the AO while making the disallowance, was no longer a good law as the same had been overruled by the Hon'ble Apex Court in the case of RM Arunachalam reported in 227 ITR 229 wherein the aforesaid judgment of the Hon'ble Kerala High Court has been expressly disapproved. The Ld. AR also referred to an order of the Kolkata ITAT in the case of Satyabrata Dey vs DCIT (at paper book pages

69 to 78) and relied on the said order and submitted that when title is any where defective, incomplete or imperfect, any payment to make the title complete is allowable u/s 48 of the Act. The Ld. AR also strongly relied on Hon'ble Apex Court's decision in case of Sanjeev Lal reported in 365 ITR 389 (SC) to highlight the importance of agreement. The Ld AR also read out the provisions of section 48 of the Act to highlight that section 48(ii) uses the phrase "any" before improvement, which must be given due weightage. Ld AR pleaded that the Ld. CIT (A) has failed to consider the issue from an objective criteria and has mixed his personal views into the legal aspects to decide against the assessee. Ld AR stated that Ld. CIT (A)'s personal and oral perception about no threat existing cannot demolish the assessee's averment which is supported by un-assailed documentary evidence/s.

3.3 The Ld. AR further submitted that merely on order sheet, a vague and arbitrary reason was put forth to the assessee, as evident from page 2 of the impugned order, which was completely inadequate to foist any tax liability on assessee. Ld AR submitted that the importance of specific and valid show cause notice could not be substituted by a ritualistic "order sheet" entry. He placed

reliance on the CBDT Instruction no. 20 of 2015 dated 29/12/2015 which clarified the existing and prevalent legal position on show cause notice that a valid show cause notice is a must before making any addition. Ld AR stated that since no show cause notice was issued before making subject additions, the same may be deleted on this short count itself. Ld AR relied on following case laws to support his plea:

i) Delhi High court in Kuldeep Singh (12/08/2014)

ii) Kolkata ITAT in Satyabrata Dey (14/05/2013)

iii) Delhi High Court in Eagle Theatres 205 Taxman 449

iv) Bombay High Court in 190 ITR 56

v) Madras High Court in 261 ITR 222

3.4 Apropos the second issue of Rs 19,28,859/-, the Ld AR submitted that since the matter was old and the cost of improvement was genuinely incurred, just for want of specific documentary evidence/s, the AO cannot reject it where it has been expressly submitted that said cost was incurred in year of acquisition of land i.e. in financial year 2001-2002 towards land levelling, earth filling, boundary wall etc. It was also submitted that as per the statutory prescription of Rule 6F (5) of the Income Tax Rules, 1962, the limitation to keep the books and records

expired for the previous year 2001-2002(AY 2002-2003) on 31.3.2009 i.e. before the return filing date u/s 139 of the Act on 30.09.2009 and also before the issuance of statutory notice u/s 143(2) which was dated 22.09.2010. In the alternate, the Ld AR pleaded that a suitable view may be taken in the overall factual situation.

4. The Ld. DR opposed the arguments of Ld AR. Ld DR argued that the assessee did not establish his claim for cost of improvement of Rs 156,37,380/- on tenable legal grounds. Ld DR argued that mere agreement was not good enough to establish assessee's case qua the claim of Rs 156,37,380/-. Ld DR countered the argument of the Ld AR that the AO was incorrect in disallowing the assessee's claim. It was submitted that the claim was not maintainable u/s 48 at all. Ld DR relied on orders passed by the AO and the Ld. CIT (A). On the second issue of Rs 19,28,859/-, Ld DR reiterated that nothing concrete was filed by the assessee in this regard. Summing up his arguments, Ld DR prayed for the dismissal of the assessee's appeal.

5. We have heard the rival submissions and have also perused the material on record. As far as the first issue before us is

concerned, it is seen that the AO rejected the claim of the assessee on the ground that the assessee had neither made any alteration nor any additions to the asset. The AO was of the opinion that the amount paid by the assessee was on account of compensation due to cancellation of agreement by the assessee himself which was not deductible from the capital gains under the provisions of section 48 of the Act. However, the Ld. CIT (A), while dismissing the assessee's appeal, did not actively consider the pleadings of the assessee *vis-a-vis* the deductibility of the amount paid as compensation u/s 48 of the Act but held against the assessee by questioning the very genuineness and the necessity of the impugned payment. Thus, the Ld. CIT (A) failed to examine the claim of the assessee in light of the provisions of section 48 of the Act.

5.1 As far as the evidentiary value of such type of agreements is concerned, the Hon'ble Apex Court had an occasion to deal with the evidentiary value of an agreement to sell and purchase and the rights created there-from in the case of Sanjeev Lal reported in 369 ITR 389 (SC). The Hon'ble Apex Court observed as under:

> *"...23. Consequences of execution of the agreement to sell are also very clear and they are to the effect that the appellants could not have sold the property to someone else. In practical*

life, there are events when a person, even after executing an agreement to sell an immoveable property in favour of one person, tries to sell the property to another. In our opinion, such an act would not be in accordance with law because once an agreement to sell is executed in favour of one person, the said person gets a right to get the property transferred in his favour by filing a suit for specific performance and therefore, without hesitation we can say that some right, in respect of the said property, belonging to the appellants had been extinguished and some right had been created in favour of the vendee/transferee, when the agreement to sell had been executed...".

5.2 Coming to the facts of the present case, the Ld. CIT (A) has doubted the genuineness of the agreement and has even hinted at the possibility of the assessee having fabricated the story to suit his ends. However, these observations of the Ld. CIT (A) are not backed by any cogent evidence but are more in the realm of surmises and conjectures. Even the Ld DR, during the course of arguments before us, did not put any sort of argument to remotely doubt the genuineness of the agreement. The Ld. DR could not refute the assertion of the Ld. AR that the payee had duly accounted/disclosed the said amount as income in its hands. However, a perusal of the assessment order shows that this aspect has not been looked into at all by the AO. Thus, the findings by the AO and the Ld. CIT (A) are based on two different footings. Further, the AO, while disallowing the assessee's claim has relied upon the Hon'ble Kerala High Court's decision in the

case of Ambat Enchkuty Menon reported in 111 ITR 880. However, this judgment of the Hon'ble Kerela High Court is no longer a good law as the same has been overruled by the Hon'ble Apex Court in the case of RM Arunachalam reported in 227 ITR 229 wherein the aforesaid judgment of the Hon'ble Kerela High Court has been expressly disapproved. It remains undisputed that the assessee was not specifically confronted on this issue and a simple order sheet entry was made before making the disallowance. Therefore, on an overall appreciation of the circumstances, which include the AO's reliance on a judgment of the Hon'ble Kerela High Court which had been over-ruled, the failure of the AO to issue a show-cause notice before making the proposed disallowance, the failure of the Ld. CIT (A) to specifically adjudicate on the issue of admissibility of assessee's claim u/s 48 of the Act coupled with the AO not examining the sale agreement to test its veracity, we are of the considered opinion that the entire issue needs to be restored to the file of the AO for re-examining the issue in light of the evidences filed by the assessee as well as the settled judicial precedents. Accordingly, we restore the issue of determination of the deductibility of Rs. 1,56,37,380/- as an admissible deduction to the file of the AO to

be decided in terms of our observations above after giving a proper opportunity to the assessee.

5.3 As far as the second issue of Rs 19,28,859/- expended towards the cost of improvement is concerned, we are of the view that to meet ends to justice, taking into account holistic consideration of all the facts, we are of the opinion that half of the amount claimed may be treated as allowed as the *factum* of improvement by incurring expenses is not doubted and we accordingly sustain 50% of the same. Accordingly ground no. 3 is partly allowed.

6. In the result, the appeal of the assessee stands partly allowed in terms of our directions.

Order is pronounced in the open court on 29.09.2017.

Sd/-	Sd/-
(PRASHANT MAHARISHI)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 29th SEPTEMBER, 2017
'GS'

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

BY ORDER

ASSISTANT REGISTRAR
ITAT NEW DELHI