IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'B' KOLKATA

[Before Hon'ble Shri N.V.Vasudevan, JM & Shri Waseem Ahmed, AM]

ITA No.238/Kol/2016
Assessment Year : 2007-08

M.M.Exports Kolkata (PAN:AAFFM 4426 K) (Appellant)	-versus-	I.T.O., Ward-42(1)[merged with ITA-Ward-43(1),Kolkata (Respondent)

For the Appellant: Shri Raja Ram Chowdhury, CA
For the Respondent: Shri S.Dasgupta, Addl. CIT(DR)

Date of Hearing : 15.01.2018.
Date of Pronouncement : 02.02.2018.

ORDER

PER N.V.VASUDEVAN, JM:

This is an appeal by the Assessee against the order dated 30.1.2015 of C.I.T-(A)-13, Kolkata relating to A.Y.2007-08.

2. The Assessee is a partnership firm. It owned a property in M.G.Road, Bangaluru. By an agreement dated 20.10.2005 the partnership firm .i.e. assessee agreed to sell the property to one Shri Sanjay Todi alias Shri Sanjay Kumar Todi, who is also an incidentally one of the partners in the partnership firm. The sale consideration was agreed between the parties at a sum of Rs. 32,00,000/-. The assessee had paid a sum of Rs.5,00,000/- as advance at the time of signing of the agreement. In the agreement dt. 20.10.2015 in the representations of the vendor to the purchaser the vendor has assured the purchaser that they shall deliver vacant possession of the property on or before the execution of the sale deed. It is thus clear that no possession was handed over to the purchaser at the time when the agreement for sale was entered into between the parties. Under clause 2(b) of the Agreement dt. 20.10.2005, the purchaser agreed to pay the balance consideration sixty days from the

date of katha transfer or execution, registration and delivery of vacant possession in favour of the assessee, whichever is earlier.

3. On 27.03.2007 the assessee and Mr. Sanjay Todi by registered sale deed sold the property to a third party Shri V.V.Kak and Smt. Meeta V.Kak. for a sale consideration of Rs.56,00,000/-. In the assessment of Shri Sanjay Kumar Todi for A.Y.2007-08 the question that arose for consideration was as to whether the difference between the price at which Mr.Sanjay Kumar Todi agreed to purchase the property from the assessee viz. Rs.32,00,000/- and the price at which the property was ultimately sold to a third party viz., Rs.56,00,000/- should be assessed under the head "income from other sources" or "capital gain". The tribunal held that the aforesaid income was to be assessed under the head income under the head capital gain (Short term capital gain).

4. In the assessment of the assessee for A.Y.2007-08 the AO noticed that the property at M.G.Road, Bangaluru which was the subject matter of the discussion in the earlier paragraphs was part of the block of asset "Building" on which the assessee had claimed depreciation. The AO was of the view that there was a transfer of the aforesaid property during the previous year relevant to A.Y.2007-08. The AO was of the view that in view of the provision of section 50(1) of the Income Tax Act, 1961 (Act) the short term capital gain on transfer of the asset should be brought to tax. It is not disputed that the block of assets of building ceased to exist , as a result of the transfer of the property at M.G.Rod, Bangaluru. The AO accordingly computed the short term capital gain invoking the provision of section 50(1) of the Act. The assessee took a stand before the AO that as far as the assessee is concerned the sale consideration receivable by the assessee was only Rs.32,00,000/- and therefore capital gain should be taxed in the hands of the assessee by regarding Rs.32,00,000/- as full value of consideration received on transfer and not Rs.56,00,000/-. The assessee submitted that the difference between Rs.32,00,000/- and Rs.56,00,000/- (price for which property was sold to a third party) should be brought to tax in the hands of Shri

Sanjay Todi. The AO however rejected the contention of the assessee for the following reasons :

> "The contention of the assessee firm in this regard is not tenable, because, Mr.Sanjay Todi , a partner of the assessee firm, neither got registered in his name nor took the possession of the flat. Since the provisions in clauses (v) of section 2(47) were not complied with. Therefore, it is factual correct that the right in the property was not transferred by the assessee firm, M/s. M.M.Export in favour of the Mr.Sanjay Todi and acquired any right in the said property. It is also observed that Mr.Sanjay Todi had interest in the property as a partner of the firm M.M.Exports not as an individual. In the written submission dt.25.06.2014, the assessee firm also admitted that the above facts. Hence, as per provisions of section 50(1) of the I.T.Act,1961, the entire Short Term Capital Gain earned by the M/s. M.M.Export , on the sale of the above Flat of Rs.54,84,3701- (Rs.56,00,000 -115630) is treated as profit and added to the total income of the assessee firm."

5. Aggrieved by the aforesaid order of the AO determining the short term capital gain as per section 50(1) of the Act and treating Rs.56,00,000/- as the full value of consideration received on transfer of the property, the assessee filed appeal before the CIT(A). Before CIT(A) the assessee took a stand that by virtue of agreement dated 22.10.2005 between the assessee and Sanjay Todi, there was a transfer of the property in the previous year relevant to A.Y.2006-07 u/s 2(47)(vi) of the act and therefore there cannot be any assessment of capital gain in A.Y.2007-08. The above argument was put forth by the assessee in the statement of facts filed before CIT(A). Even in the written submission filed before CIT(A) the very same contention was put forth by the assessee. The CIT(A) however rejected the contention of the assessee and he held that the action of the AO in bringing to tax the short term capital gain in A.Y.2007-08 was correct for the following reasons :

> "I have gone through the above contention of the asseessee. In this regard it is to point out that though the 'appellant claims that agreement of sale was entered on 22-10-2005 amongst the Firm and Sanjay Kumar Todi at a price of RS.32,00,000/- and Capital Gain of Rs.30,71,522/- got accrued in F.Y 2005-06 however, this remains a fact that no capital gain was even shown In A.Y 2006-07 and the Asset continued to appear in the Balance Sheet upto subsequent Assessment Years. Therefore, the argument lacks factual basis. The assessee has further claimed that the C.I.T (A) has allowed capital gain in the hands of Shri

Sanjay Kumar Todi for the year 2007-08.whereas A.O had treated the transaction as income from other sources in the hands of Shrl Todi considering the fact that the property was not be the capital asset of the assesee since full payment was not made and possession was not taken. In this regard it is pertinent to mention here that before C.I.T(A) the facts of the case of M.M Export were not placed. Had it been placed before C.I.T(A) that the assessee M/s M.M Export. from where Mr. Sanjay Todi stated to have purchase in F.Y 2005-06. has not shown any transfer in its books of account, no capital Gain/income is shown. the asset has not been taken out from the balance sheet, then the unilateral action of Mr. Sanjay Todi would not have been accepted for treating it capital gain. While adjudicating the case of Mr. Sanjay Todi by C.I.T(A) it has been decided in isolation without taking into consideration the facts of the case M/s M.M Export hence no force and the same is rejected. "

6. Aggrieved by the order of the CIT(A) the assessee has preferred the present appeal before the Tribunal.

7. The assessee has raised several grounds of appeal. The sum and substance of which is that the short term capital gain pertains to A.Y.2006-07 and not A.Y.2007-08. Alternatively the assessee has submitted that Capital Gain should be computed by considering the full value of consideration received or accrued on transfer of capital asset at Rs.32,00,000/-. The ld. Counsel for the assessee submitted before us that there was a transfer of the property in question by the assessee in favour of Shri Sanjay Todi by virtue of an agreement dated 20.10.2005. He placed reliance on the decision of the Hon'ble Bombay High Court in the case of Tata Services Ltd. (1980) 122 ITR 594 (Bom.). In the aforesaid case, there was an agreement for sale between the assessee and a third party. That agreement was cancelled and the property was sold to a third party. The assessee received some money for giving up his rights to purchase the property. The question before the Hon'ble Bombay High Court was whether the assessee had transferred any capital asset or not. The Hon'ble Bombay High Court held that the right to purchase the property and agreement was a capital asset and money received to relinquish such right gave rise to capital gain. In our view the aforesaid decision is not applicable to the facts of the present case because the assessee in this case was the owner of the property and the assessee cannot convey

ownership unless he executes a registered documents. The relinquishment of right under an agreement for sale cannot be equated with transfer of interest in immovable property.

8. The next argument advanced by the assessee was that under section 2(47) (vi) of the act the transfer in relation to a capital asset includes the following transactions :-

> "(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring or enabling the enjoyment of, any immovable property."

The Ld. Counsel for the assesee drew our attention to CBDT Circular No.495 dt. 22.09.1987 explaining the aforesaid provision which reads as follows :-

> "Definition of transfer widened to include certain transactions
>
> 11.1 The existing definition of the word transfer in section 2(47) does not include transfer of certain rights accruing to a purchaser, by way of becoming a member of or acquiring shares in a co-operative society, company, or association or persons or by way of any agreement or any arrangement whereby such person acquires any right in any building which is either being constructed or which is to be constructed. Transactions of the nature referred to above are not required to be registered under the Registration Act, 1908. Such arrangements confer the privileges of ownership without transfer of title in the building and are a common mode of acquiring flats particularly in multistoreyed constructions in big cities. The definition also does not cover cases where possession is allowed to be taken or retained in part performance of a contract, of the nature referred to in section 53A of the Transfer of Property Act, 1882. New sub-clauses (v) and (vi) have been inserted in section 2(47) to prevent avoidance of capital gains liability by recourse to transfer of rights in the manner referred to above.
>
> 11.2 The newly inserted sub-clause (vi) of section 2(47) has brought into the ambit of transfer. , the practice of enjoyment of property rights through what is commonly known as Power of Attorney arrangements. The practice in such cases is adopted normally where transfer of ownership is legally not permitted.A person holding the power of attorney is authorised the powers of owner, including that of making construction. The legal ownership in such cases continues to be with the transferor.

> 11.3 These amendments shall come into force with effect from 1-4-1988 and will accordingly apply to the assessment year 1988-89 and subsequent years.
> [Section 3(g) of the Finance Act]"

9. According to him the effect of the agreement for sale between the assessee and Shri S.K.Todi dated 20.10.2005 was that there was a transfer enabling the enjoyment of immovable property by Shri Todi. We do not find this argument to be acceptable as we have already seen, the assessee never gave possession of the property under the agreement dated 20.10.2005. Shri S.K.Todi at no point of time enjoyed the property in question in any other manner. We fail to see as to how the aforesaid clause in the definition of transfer will be of any assistance to the plea of the assessee that there was a transfer of capital asset under the agreement dated 20.10.2005 between the assessee and Shri S.K.Todi.

10. The ld. Counsel for the assessee relied on Explanation-2 to section 2(47) of the Act. The same reads as follows :

> "Explanation 2 – For the removal of doubts, it is hereby clarified that "transfer "includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;]

11. We are of the view that none of the clause of Explanation-2 are attracted in the present case. We also are of the view that Explanation-2 will not be applicable to the facts of the present case and the same is restricted to cases of transfer of assets of a company pursuant to transfer of shares.

12. The ld. Counsel for the assessee has filed certain decisions in the paper book filed before us but has made reference to only few decisions. The first decision is of

the Hon'ble Madhya Pradesh High Court in the case of CIT vs Laxmidevi Rathani and Ors (2008) 296 ITR 363 (MP).We have perused the aforesaid decision and it is on the same line as that of the decisions of the Hon'ble Bombay High Court in the case of Tata Services Ltd. (supra). It was a case in which the question for consideration before the Hon'ble Court was as to whether giving up right to claim performance extinguishes the right to property so as to attract the rigour of section 2(14) of the act r.w. s.2(47). This decision is of no relevance to the facts of the present case. The ld. Counsel also drew our attention to the decision of the Hon'ble Supreme Court in the case of Suraj Lamps & Industries (P)Ltd vs State of Haryana 340 ITR 1 (SC). We have perused the aforesaid decision and we find that the aforesaid decision was rendered in the context of the transfer of immovable property in the light of provisions of Registration Act. The decision was rendered in the context of sale which usually takes place by executing agreement for sale coupled with an instrument of power of attorney in favour of the purchaser without registration of the sale deed. The court held that such transaction are not in accordance with law. The Hon'ble court however held that the transactions which were being done in the past should be recognised as valid mode of transfer of immovable property. This decision is not applicable to the facts of the assessee's case. Admittedly there was no power of attorney whatsoever given by the assessee in favour of Shri Sanjay Todi. We are therefore are of the view that there is no merit in the contentions put forth by the assessee. We hold that the Revenue authorities were correct in coming to the conclusion that there was a transfer of capital asset by the assessee during the previous year relevant to A.Y.2007-08.

13. The learned counsel for the Assessee made an alternate submission which is to the effect that if for any reason the Tribunal upholds assessment of STCG in the hands of the Assessee for AY 2007-08, then the full value of consideration received should be considered at Rs.32,00,000 which is the agreed consideration which the Assessee has to receive from the purchaser as consideration for sale of the property under the agreement dated 20.10.2005 and not the sum of Rs.56,00,000 for which the property was ultimately sold to a third party.

14. We have considered the alternative submission. Sec.50(1) of the Act is a special provision in so far as it relates to computation of capital gain on sale of a depreciable asset on which depreciation has been claimed. The said provisions read thus:

> **50. Special provision for computation of capital gains in case of depreciable assets.**
>
> Notwithstanding anything contained in clause (42A) of section 2, where the capital asset is an asset forming part of a block of assets in respect of which depreciation has been allowed under this Act or under the Indian Income-tax Act, 1922 (11 of 1922), the provisions of sections 48 and 49 shall be subject to the following modifications:—
>
> (1) where the full value of the consideration received or accruing as a result of the transfer of the asset together with the full value of such consideration received or accruing as a result of the transfer of any other capital asset falling within the block of assets during the previous year, exceeds the aggregate of the following amounts, namely:—
>
> (i) expenditure incurred wholly and exclusively in connection with such transfer or transfers;
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> (ii) the written down value of the block of assets at the beginning of the previous year; and
>
> (iii) the actual cost of any asset falling within the block of assets acquired during the previous year,
>
> such excess shall be deemed to be the capital gains arising from the transfer of short-term capital assets;
>
> (2) where any block of assets ceases to exist as such, for the reason that all the assets in that block are transferred during the previous year, the cost of acquisition of the block of assets shall be the written down value of the block of assets at the beginning of the previous year, as increased by the actual cost of any asset falling within that block of assets, acquired by the assessee during the previous year and the income received or accruing as a result of such transfer or transfers shall be deemed to be the capital gains arising from the transfer of short-term capital assets.

15. In the present case the block of assets ceases to exist and therefore the provisions of Sec.50(2) of the Act would apply. Under Sec.50(2) of the Act, it is only the income received or accruing as a result of transfer that should be reduced from the WDV of the block of building as on 1.4.2006 to arrive at the Short Term capital gain. Admitted factual position is that the Assessee was to receive only a sum of Rs.32 lacs from S.K.Todi as sale consideration in respect of the property. The admitted position is that the difference between Rs.32 lacs and Rs.56 lacs has already been taxed in the hands of S.K.Todi. In this factual background, we are of the view that the STCG on sale of the property has to be determined in the hands of the Assessee by adopting the income received as accruing as a result of transfer as Rs.32 lacs and not Rs.56 lacs. To this extent the plea of the Assessee is accepted.

16. In the result the appeal by the assessee is dismissed.

Order pronounced in the open Court on 02.02.2018.

Sd/- Sd/-

[Waseem Ahmed] [N.V.Vasudevan]
Accountant Member Judicial Member

Dated : 02.02.2018.

[RG Sr.PS]

Copy of the order forwarded to:

1.M.M.Exports, 22, Madan Mohan Tolla Street, Kolkata-700005.
2. I.T.O., Ward-42(1) Kolkata [merged with ITA Ward-43(1), Kolkata].
3. C.I.T.(A)-13, Kolkata 4. C.I.T.-15, Kolkata..
5. CIT(DR), Kolkata Benches, Kolkata.

True Copy

By order,

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches