IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI SANDEEP GOSAIN , JUDICIAL MEMBER

ITA No. 5414/Mum/2015
(Assessment Year 2010-11)

Balkrishna P. Wadhwan,
Bunglow No.4, Vasant Vihar Complex,
Dr.C.G.Road, Chembur,
Mumbai 400074
PAN:AAAPW1802G ..... Appellant

Vs.

The DCIT,Cen.Cir.36,
Aaykar Bhavan,M.K.Road,
Mumbai 400020. .... Respondent

Appellant by : S/Shri B.V.Jhaveri/A.N.Shah
Respondent by : Shri Suman Kumar

Date of hearing : 10/01/2018
Date of pronouncement : 28/ 02 /2018

ORDER

PER G.S.PANNU,A.M:

The captioned appeal filed by the assessee pertaining to assessment year 2010-11 is directed against the order passed by CIT(A)-53, Mumbai dated 31/07/2015, which in turn arises out of an order passed by the Assessing Officer under section 143(3) of the Act of the Income Tax Act, 1961 (in short 'the Act') dated 19/03/2013.

2. In this appeal assessee has raised the following Grounds of appeal:-

" (1) On the facts and in the circumstances of the case and in law, the Learned C.I.T, (A) erred in holding that though there was a sale of asset, same was not held as capital asset and further erred in not holding that the indexed cost of Rs.79,15,886/- as claimed by your appellant was not deductible in computing capital gain.

(2) On the facts and in the circumstances of the case and in law, the Learned CIT (A) erred in denying the deduction of Rs.74,23,333/-being the expenses incurred relating to the property sold being cost of improvement."

3. Before we proceed to adjudicate the specific Grounds of appeal raised, we may briefly touch upon the background of the case. The appellant before us is an individual, who filed his return of income for the assessment year 2010-11 declaring an income of Rs.2,56,29,804/-. In the course of assessment proceedings, the Assessing Officer noted that assessee had shown an income of Rs.2,21,60,781/- under the head long term capital gain on sale of a property for a consideration of Rs.3,75,00,000/-. It was also noted that indexed cost of acquisition was claimed by considering the year of acquisition as 1972, and further expenses of Rs.74,23,333/- was claimed as cost of improvement of the said property. The Assessing Officer further noted that in spite of giving opportunities, assessee could not furnish the purchase and sale agreements of the property in question and, therefore, he was unable to verify the long term capital gain declared by the assessee. For this reason, the Assessing Officer considered the receipt of Rs.3,75,00,000/- as 'income from other sources' and not as a long term capital gain.

4. Before the CIT(A) assessee furnished the copies of the purchase and sale agreements of the property and also explained the reasons why it could not be produced in the course of assessment proceedings. The CIT(A) after allowing appropriate opportunity to the Assessing Officer admitted the additional

evidence in the light of Rule 46A of the Income Tax Rules, 1962. On that basis the CIT(A) came to conclude that the consideration of Rs.3,75,00,000/- was received by the assessee on sale of an immovable property but according to him the same was not a 'capital asset' and, therefore, he disagreed with the assessee that the profit on sale of such property is assessable under the head 'capital gain'. Instead, CIT(A) concluded that the profit on sale of property was assessable as 'business income'. Concurrently, the CIT(A) also observed that if in further appellate proceedings, the property in question was to be treated as a 'capital asset', the provisions of section 50C of the Act would be triggered and he directed the Assessing Officer to recompute the capital gain, after considering the provisions of section 50C of the Act, if such a need arises. On the aspect of computation of capital gains, the CIT(A) disagreed with the assessee with regard to his claim for expenses of Rs.75,23,333/- as cost of improvement, as according to him, the assessee had failed to establish the incurrence of such expenditure. In this background, now the assessee is in appeal before us.

5. The first and foremost plea of the assessee is that the CIT(A) erred in not treating the profit earned on the sale of impugned property as capital gain and thereby erroneously not allowing the benefit of deduction of indexed cost of acquisition of Rs.79,15,886/- as claimed by the assessee. The Ld. Representative for the assessee explained that the property was initially purchased by a partnership firm M/s.Ram & Co in 1972, wherein assessee's father was a partner and on the death of this father in 1987, the partnership firm automatically dissolved and the property devolved to the assessee. The Ld. Representative for the assessee pointed out that the CIT(A) has erroneously considered that the property was not to be treated as 'capital asset' since it

was a business asset in the hands of the erstwhile partnership firm. The Ld. Representative for the assessee pointed out that the said inference of the CIT(A) is based on mere conjuctures and surmises and there is no material to suggest that the property in question was a stock-in-trade in the hands of the erstwhile partnership firm. Even otherwise, the Ld. Representative for the assessee pointed out that the business asset so held by a concern cannot be straightway treated as 'stock-in-trade' and for that matter referred to the ratio of the judgment of the Hon'ble Gujarat High Court in the case of H.Mohammed & Co. vs. CIT, 107 ITR 637 (Guj). It was asserted that there is nothing to suggest that the land was a 'stock-in-trade' in the hands of the erstwhile partnership firm and so far as the assessee is concerned, he has not undertaken any business activity upon such land and, therefore, it was to be taken a 'capital asset' in the hands of the assessee, thereby requiring the assessment of profit on sale of such property under the head 'capital gain'.

5.1 On this aspect, the Ld. Departmental Representative has merely reiterated the stand of the CIT(A), which is to effect that the property in question could not be straightway considered as a 'capital asset' without establishing that it was not held as 'stock-in-trade' by the erstwhile partnership firm.

6. We have carefully considered the rival submissions. The order of the CIT(A) and the other material on record shows that during the year under consideration assessee has sold a plot of land admeasuring 966.40 sq.mts. for a consideration of Rs.3,75,00,000/-. The submissions and material led by the assessee before the CIT(A), copies of which have been placed in the Paper Book before us, also reveal that the plot of land sold during the year was a part

of the four plots, which admeasured in total 4648.70 sq.mtrs. It is factually emerging that the four plots admeasuring 4648.70 sq.mtrs devolved on the assessee after the death of his father in February, 1987 as a consequence of the automatic dissolution of the partnership firm M/s. Ram & co., in which his father was a partner. To further straighten the record, it is noted that the share of assessee's father devolved on his wife, two sons and four daughters, and it was only by way of Deed of Release registered on 16/1/2008, that assessee obtained complete ownership of the plot of land from the other co-inheritors. Be that as it may, the question for consideration is as to what is the nature of the asset in the hands of the assessee – whether it is a 'capital asset' or 'stock-in-trade'. The expression 'capital asset' has been defined in section 2(14) of the Act; and, shorn of other details, so far as it is relevant for our purpose, the definition prescribes that a capital asset means property of any kind held by an assessee but does not include stock-in-trade *"held for the purposes of his business or profession"*. Therefore, what is required to be established in the instant case is whether the plot of land sold was held by the assessee 'for the purposes of his business or profession'. We have perused the computation of total income for the year under consideration and find that neither the assessee has declared income from any business and nor any income under the head 'business' has been determined by the Assessing Officer. Even at the level of CIT(A), we find that there is no material to suggest that assessee is engaged in the business of dealing in lands and for the matter we find that the sources of income detailed in the return of income are on account of salaries, capital gain and income from other sources.

6.1 The basis for the CIT(A) to treat the impugned plot of land as 'stock-in-trade' is the fact that the property devolved to the assessee from the

erstwhile partnership firm, where assessee's father was a partner. As per the CIT(A), the property was acquired by the partnership firm in 1972 and assessee's father died in February, 1987. As per the CIT(A), the final accounts of the erstwhile partnership firm were not available for examination, therefore, the manner in which the impugned plot of land was accounted for i.e. whether as capital asset or not, could not be verified. For the said reason, he proceeded to presume that the land was held by the erstwhile partnership firm as a "*business asset for the purpose of its business*". As per the CIT(A), the onus to establish the character of a land is on the assessee , which according to him was not discharged by the assessee. We have carefully considered the aforesaid presumption by the CIT(A) and find it wholly untenable. Firstly, even if it is assumed that the impugned plot of land was a 'stock-in-trade' in the books of account of the erstwhile partnership firm, yet that by itself is not conclusive to treat it as stock-in-trade in the hands of the assessee. Ostensibly, it is anybody's case that upon dissolution of the erstwhile partnership firm, its business devolved on to the assessee, the fact is that only the land devolved to the assessee. So far as assessee is concerned, there is nothing to establish that the same has been held by him for the purpose of his business so as to be construed as stock-in-trade. In fact, at the time of hearing, the Ld.Representative for the assessee explained that only one plot admeasuring 966.40 sq.ft. out of the four plots of land totalling to 4648.70 sq.mts., has been sold in this year. It has been explained that the other three plots were sold by the assessee in assessment year 2008-09 for a total consideration of Rs.4,07,76,687/- and the gain arising there-from was declared as capital gain and the same has also been accepted by the Assessing Officer while framing an assessment under section 143(3) of the Act dated

30/11/2009. In this context our attention has been drawn to pages 66 -76 of the Paper Book, wherein are placed the computation of total income, copy of the income tax return filed and the assessment order passed by the Assessing Officer for assessment year 2008-09. At pages 77 to 107 of the Paper Book are also placed sale agreements evidencing sale of other three plots of land in assessment year 2008-09. Thus in assessment year 2008-09 the land devolved on the assessee from his father has already been accepted as a 'capital asset'. The entire conspectus of facts on record also bring out that there is nothing to suggest that assessee has undertaken any business activity vis-à-vis the impugned plot of land, so as to construe the profit on its sale as 'business income'. Therefore, in our considered view, having regard to the facts and circumstances of the case there is no justification to treat the plot of land in question as 'stock-in-trade' and that the assessee was justified in treating the gain on sale of the plot to be assessable under the head 'capital gain'. Thus, on this aspect assessee succeeds.

7. The other dispute in this appeal is with regard to the decision of the CIT(A) in denying the deduction of Rs.74,23,333/- being expenses claimed to have been incurred as cost of improvement of the property sold. In this context, relevant discussion is contained in paras 4.3.5 to 4.3.7 of the order of the CIT(A). We have perused the same and find that the claim of the assessee was that an expenditure of Rs.74,23,333/- was incurred on levelling and construction of boundary wall on the plot of land. In support of the expenditure, assessee furnished bills/invoices raised by Mr. Nelson A. D'cruz proprietor of M/s.D'cruz Sons & Developers. A confirmation from the said concern was also filed before the CIT(A). The CIT(A) has called for a Remand Report from the Assessing Officer, whose comments have been reproduced by

him para 4.3.5 of his order. Pertinently, as per the report of the Assessing Officer, the examination of the return of income of Mr. Nelson A. D'cruz downloaded from the system showed total credits to the P&L Account of Rs.62,83,943/- and, therefore, as per the Assessing Officer the cost of land development of Rs.74,23,333/- claimed to have been paid by the assessee to the said developer was not established. The CIT(A) has concurred with the said stand of the Assessing Officer. The CIT(A) also examined the bills issued by the said concern and he was not satisfied with the detailing of the work done therein. He also noticed that no tax was deducted at source by the assessee. The CIT(A) also doubted the expenditure on the ground that assessee was a director in an infrastructure company and therefore, he could have utilized the services of the said company instead of hiring a contractor. For all the said reasons, the CIT(A) held that the claim for incurrence of expenditure of Rs.74,23,333/- as cost of improvement was not substantiated and, therefore, he denied the claim of deduction.

8. Before us, the Ld. Representative for the assessee pointed out that the discrepancy noted by the Assessing Officer in the Remand Report was adequately explained before the CIT(A). It is explained that during the year under consideration, assessee had paid only an amount of Rs.30,00,000/- to Mr. Nelson A. D'cruz and, therefore, the claim of the Assessing Officer that the gross receipts reported by Mr. Nelson A. D'cruz did not include the payment made by the assessee is wrong. It was pointed out that there is no requirement on the part of the assessee to deduct TDS on the payment made to Mr. Nelson A. D'cruz. It has been explained that for such reason the name of the assessee was also not appearing in the details of TDS as downloaded from the system. In any case, the Ld.Representative for the assessee pointed

out that a confirmation from the said party was filed before the CIT(A) and there was no repudiation to the same.

9. On the other hand, the Ld. Departmental Representative has relied upon the order of the CIT(A), which we have already detailed above, therefore, the same is not being repeated for the sake of brevity.

10. We have carefully considered the rival submissions. In this case, cost of improvement is claimed by the assessee on account of expenditure incurred on leveling of land and construction of boundary wall. The assessee furnished the details of the contractor, who has undertaken the work and in support, the bills raised on the assessee were furnished. The total claim was made for Rs.74,23,333/-, out of which Rs.30,00,000/- is said to have been actually paid during the period under consideration. In this context, we have carefully perused the points brought out by the CIT(A) and find that the same are quite potent. Undoubtedly, for a claim to be admissible, the same is required to be verified and for that matter the onus is on the assessee to produce necessary evidence to justify the incurrence of the impugned expenditure, especially considering the fact that in the instant year complete payment for the expenditure has not been made. The Remand Report of the Assessing Officer, which has been reproduced by the CIT(A) also brings out that the attempt to issue summons to the party did not fructify as Mr. Nelson A. D'cruz was not available at the given address. Considering the entirety of facts and circumstances of the case, in our view, it would be in the fitness of thing that this aspect is required to be examined by the Assessing Officer afresh and for that matter the onus shall be on the assessee to justify the incurrence of the impugned expenditure on levelling and construction of boundary wall on the

land in question. Therefore, we set-aside the order of the CIT(A) and remand the matter to the file of Assessing Officer for a decision afresh on the limited aspect of deduction of Rs.74,23,333/- as cost of improvement of the property sold. Needless to mention, the Assessing Officer shall allow the assessee a reasonable opportunity of being heard before passing an order afresh as per law.

11. Resultantly, we direct the Assessing Officer to compute the income under the head 'capital gains' in view of our aforesaid directions.

12. In the result, appeal of the assessee is partly allowed, as above.

Order pronounced in the open court on 28/02/2018.

Sd/-	Sd/-
(SANDEEP GOSAIN)	(G.S. PANNU)
JUDICIAL MEMBER	ACCOCUNTANT MEMBER

Mumbai, Dated 28/02/2018
Vm, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai