आयकर अपील य अ धकरण, ''डी'' ायपीठ, चे नई

IN THE INCOME-TAX APPELLATE TRIBUNAL 'D' BENCH, CHENNAI

ी अ ाहम पी. जॉज, लेखा सद य एवं ी धु वु आर.एल रे डी, याियक सद य के सम

Before Shri Abraham P. George, Accountant Member &
Shri Duvvuru RL Reddy, Judicial Member

आयकर अपील सं./**I T.A. No. 1740/Chny/2013**

िनधार ण वष/**Assessment Year:2006-07**

&

C.O. No. 166/Chny/2013 [In I.T.A. No. 1740/Chny/2013]

The Income Tax Officer, Non-Corporate Ward 20(5), Chennai 34.	Vs.	Late Shri B. Kailasam Represented by L/H Smt. Geetha Kailasam, Flat No. 2A, Vinayaga Apartments, No. 34, Bhakthavachalam Salai, Mylapore, Chennai 4. **[PAN:AACPK6092Q]**
(**Appellant**)		(**Respondent/Cross Objector**)

अपीलाथ क ओर से / Appellant by	:	Mrs. S. Vijayaprabha, JCIT
यथ क ओर से/Respondent by	:	Shri R. Vijayaraghavan, Advocate
सुनवाई क तारीख/ Date of hearing	:	07.02.2018
घोषणा क तारीख /Date of Pronouncement	:	06.03.2018

आदेश /O R D E R

PER DUVVURU RL REDDY, JUDICIAL MEMBER:

This appeal filed by the Revenue is directed against the order of the ld. Commissioner of Income Tax (Appeals) VI, Chennai dated 22.02.2013 relevant to the assessment year 2006-07. The Revenue has raised two effective grounds viz., (i) the ld. CIT(A) erred in deleting the addition made towards long term capital gains at ض1.68 crores and (ii) the ld. CIT(A) erred

in holding that the assessee is eligible to claim cost of improvement amounting to ضي24.11 lakhs for the purpose of computation of long term capital gains. Against the order of the ld. CIT(A), the assessee has filed Cross Objection and challenged that the ld. CIT(A) failed to adjudicate on the ground that the Assessing Officer has not considered the cost of construction of improvements made by the assessee on his property while computing capital gains on sale of said property and (ii) the ld. CIT(A) erred in disallowing the capital loss of ضي77,27,840/- resulting out of sale of shares of M/s. Min Bimbingal Productions Pvt. Ltd. [MBPPL] by the assessee.

2. Brief facts of the case are that the assessee has filed his return of income on 31.10.2006 admitting total income of ضي1,07,448/-. The return filed by the assessee was selected for scrutiny and notices under section 143 (2) and 142(1) of the Income Tax Act, 1961 [ñActò in short] were served on the assessee on 31.0-8.2007.

2.1 With regard to the issue of income from long term capital gain, the Assessing Officer noticed that the assessee sold the property at 17A, Karpagambal Nagar, Mylapore for a consideration of ضي1,75,00,000/-, which was not admitted by the assessee in the return of income. When the details were called for, it was the submission of the assessee that the assessee has mortgaged the property owned by him at Karpagambal Nagar, Chennai for the loan granted by Indian Overseas Bank (IOB) to Min Bimbangal

Productions Pvt. Ltd. [MBPPL] around the year 2001-02. As it was only as additional collateral security extended by the assessee, the assessee did not receive any consideration at that time of the mortgage of the property with IOB. Since the MBPPL failed to repay the loan availed from IOB, the IOB issued notice for disposal of the property for recovery of the loan extended to MBPPL and subsequently the property was sold and the entire consideration was recovered by the bank. The contention of the assessee that the assessee has not received a pie from the transfer and the entire sale proceeds realized on transfer of the mortgaged asset has been appropriated towards discharge of mortgage was not accepted by the Assessing Officer since, when, the property belonging to the assessee is sold in discharge of the mortgage created by the assessee himself, then irrespective of the amount actually received by the assessee, the capital gain has to be computed on the full price realized [less admissible deduction] on transfer of the asset. Accordingly, the Assessing Officer worked out the income from capital gain and brought to tax.

3. The assessee carried the matter in appeal before the ld. CIT(A). By considering the submissions of the assessee as well as by following various case law, the ld. CIT(A) allowed the ground raised by the assessee

4. Aggrieved, the Revenue is in appeal before the Tribunal. By relying upon the decision in the case of CIT v. Attilli N Rao 252 ITR 880 (SC), the ld.

DR has submitted that the issue is squarely covered in favour of the Revenue and pleaded that the order of the ld. CIT(A) should be set aside. On the other hand, the ld. Counsel for the assessee strongly supported the order passed by the ld. CIT(A).

5. We have heard both sides, perused the materials available on record and gone through the orders of authorities below. The assessee has pledged his property to IOB as a collateral security to loan availed by MBPPL. No lay man can execute a deed of mortgage of his property against the loan availed by a third party, a private limited company, until and unless the individual has substantial interest over the said company. Even though MBPPL is a registered company, this company is owned partly by the assessee as observed by the ld. CIT(A). Thus, it is clear that the assessee availed loan from the IOB under the banner of MBPPL by mortgaging assessee's own property and MBPPL (partly owned by the assessee) failed to repay the loan, the bank sold the property and the entire consideration was recovered by the bank. Thus, it cannot be held that the assessee has not received any consideration directly or indirectly, which were liable to tax.

5.1 We have gone through the judgement in the case of CIT v. Attilli N. Rao (supra), which was relied upon by the Assessing Officer, wherein, the Hon'ble Supreme Court has observed and held as under:

"4. The assessment year with which we are concerned is the assessment year 1982-83. The assessee carried on abkari business. In the course of the financial year 1970-71 he mortgaged to the Excise Department of the State of Andhra Pradesh immovable property belonging to him at Waltair. He did so to provide security for the amounts of "kist" which were due by him to the State. The State, in the assessment year with which we are concerned, sold the immovable property by public auction, without the intervention of the court, to realise its dues. A sum of Rs. 5,62,980 was realised at the auction. Thereout, the State deducted the amount of Rs. 1,29,020 due to it towards "kist" and interest and paid over the balance to the assessee.

5. The Revenue contended that the assessee was liable to capital gains tax on capital gain in the sum of Rs. 3,70,970, having regard to the cost at which the said immovable property had been acquired by the assessee. According to the assessee, the sum of Rs. 1,29,020 due by him to the State on account of "kist" was required to be deducted from the amount of Rs. 5,57,980 realised at the auction before computing the capital gain. According to him, the capital gain was only Rs. 85,130. Neither the Income-tax Officer nor the appellate authority agreed with the assessee and the assessee went up in further appeal to the Income-tax Appellate Tribunal.

6. The Tribunal upheld the assessee's claim. According to it, the full sale price realised by the sale of the immovable property had two components; the first represented the price which could be ascribed to the interest of the assessee in the immovable property and the rest represented the arrears of debt and interest due to the State. In its opinion, as there was a clear charge or mortgage over the immovable property, the amount realised under the charge or mortgage was an amount which never reached the hands of the assessee but which reached the Government by overriding title.

7. From out of the judgment and order of the Tribunal, the questions aforestated were placed before the High Court for its consideration. The High Court observed that the undisputed fact was that the immovable property was mortgaged to the State. Thereby, an interest in the property was created in favour of the State. When the immovable property was sold by public auction, its value had to be reduced to the extent of the interest that was created in favour of the State by reason of the mortgage.

8. We are of the view that the Tribunal and the High Court were in error. What was sold by the State at the auction was the immovable property that belonged to the assessee. The price that was realised therefore belonged to the assessee. From out of that price, the State deducted its dues towards "kist" and interest due from the assessee and paid over the balance to him. The capital gain that the assessee made was on the immovable property that belonged to him. Therefore, it is on the full price realised (less admitted deductions) that the capital gain and the tax thereon has to be computed.

9. In these premises, the first question is answered in the negative and in favour of the Revenue. The other questions do not arise for consideration."

From the above judgement, it is clear that the mortgaged property sold, in discharge of the mortgage created by the assessee himself, belonging to the assessee and the price realized there-form belonged to the assessee and capital gain is very much warranted on the full price [less admissible deduction]. The ld. CIT(A) has not distinguished the above judgement of the Hon'ble Supreme Court, which was relied upon by the Assessing Officer in his assessment order, while taking a different view. When the law laid down by the Hon'ble Supreme Court and relied on by the Assessing Officer is very much available on the identical facts, the ld. CIT(A) should have distinguished it before taking a different view by following a different decision, which is not directly on the point. Otherwise also, availing loan itself is consideration and in this case, constructive benefit was very well accrued to the assessee when the loan was availed by MBPPL, which was owned partly by the assessee. Accordingly, we set aside the order of the ld. CIT(A) on this issue and restored that of the Assessing Officer. Thus, the ground raised by the Revenue is allowed.

6. The next ground raised in the appeal of the Revenue is that the ld. CIT(A) erred in holding that the assessee is eligible to claim cost of improvement amounting to ضي24.11 lakhs for the purpose of computation of

long term capital gains. The assessee acquired the said property vide settlement deed dated 19.07.1979. The cost of improvement had taken place during the year 1990-91. Details of improvement were called for during the course of assessment proceedings. However, the assessee could not produce the evidence for the claim of expenditure towards cost of improvement of ضي24,11,842/-. Since the assessee could not produce any evidence for the claim of the cost of improvement, the Assessing Officer has not considered the same for computation of capital gains. On appeal, the ld. CIT(A) allowed the ground raised by the assessee.

6.1 We have heard rival contentions. By reiterating the submissions as made before the ld. CIT(A), it was the submission of the ld. Counsel that the said property has been received by the assessee from his mother by way of settlement in the year 1979 as a vacant land and subsequently, in the financial year 1990-91, the said improvements costing to ضي2,11,842/- has been incurred. Due to passage of time, the assessee could not produce any bills/vouchers before the Assessing Officer, but, by producing collateral evidences, the assessee pleaded before the ld. CIT(A) that the cost of improvements be allowed. After considering the submission of the assessee, the ld. CIT(A) has observed and held as under:

> *"8. Coming to the arguments about the cost of construction of improvements on the said property, it can be seen from the sale deed executed by the assessee on 20.02.2006 that the property transferred is a land of 3,759 sq.ft. and building measuring 7,745 sq.ft. whereas the*

assessee has received only a vacant land of about 4,000 sq.ft. through 'settlement in the year 1979 through a settlement deed registered with SRO, Mylapore. It is imperative that the assessee must have spent monies for bringing this 7,745 sq.ft. of building from 1990 onwards. The fact and date of construction can be readily inferred from the details of the plans approved, even if the trial balance filed in the year 1998 cannot be relied upon. On this count also the assessee's arguments are to be accepted as the building of 7,745 sq.ft. could not be ignored nor it can come without spending monies. It is seen that the AO has done no such exercise, but has simply chosen to reject the materials and claim. However, since the provisions of Ss.45 and 48 are held not applicable this argument is considered only for academic purpose. Thus the addition is directed to be deleted."

6.2 From the observations of the ld. CIT(A), it is not disputed that as per sale deed dated 20.02.2006, the assessee has executed the property of land of 3,759 sq.ft. and building measuring 7,745 sq.ft., whereas, the assessee has received only a vacant land of about 4,000 sq.ft. through settlement in the year 1979 through a settlement deed registered with SRO, Mylapore. Further, the ld. CIT(A) observed that the assessee must have spent monies for bringing the 7,745 sq.ft. of building from 1990 onwards and the fact and date of construction have been noted from the details of the plan approval. Since the assessee could not file any evidence for the claim of expenditure towards cost of improvement of ضي24,11,842/-, the Assessing Officer rejected the claim. To admit any claim of expenditure, the assessee is required to furnish bills/ vouchers. However, the ld. Counsel for the assessee has submitted that due to passage of time, the assessee could not produce the bills/vouchers, etc. for the expenditure incurred towards cost of improvement. While executing the mortgage deed in favour of the bank as

collateral security, the assessee should have furnished valuation of the property of land and building, against which the bank has sanctioned loan of ضي1,75,00,000/- to MBPPL. Accordingly, in the absence of evidence for cost of improvement and the fact that cannot be ignored that without spending monies, the assessee could not have raised the building of 7,745 sq.ft., we direct the Assessing Officer to verify the valuation report as the assessee might have submitted at the time of executing the collateral security in favour of the bank and decide the issue afresh after allowing an opportunity of being heard to the assessee. Thus, the ground raised by the Revenue is allowed for statistical purposes.

7. In the Cross Objection, the first ground raised by the assessee is that the ld. CIT(A) failed to adjudicate on the ground that the Assessing Officer had not considered the cost of construction of improvement made by the assessee on his property, while computing capital gains on sale of said property. This ground is the second ground of subject matter in appeal of the Revenue before the Tribunal raised in the ground No. 3, 3.1, 3.2 & 3.3. While adjudicating the above ground, we have reproduced the findings of the ld. CIT(A) given in para 8 of the appellate order. Therefore, it cannot be said that the ld. CIT(A) has not adjudicated the issued raised by the assessee. Accordingly, the objection raised by the assessee stands dismissed.

8. The second objection raised in the CO is that the ld. CIT(A) erred in disallowing the capital loss of ضي77,27,840/- resulting out of sale of shares of MBPPL by the assessee. The assessee has claimed LTCG loss of ضي77,27,940/- during the year 2006-07. He has transferred 780600 numbers of shares for ضي78,060/- to his wife Smt. Geetha Kailasam, the face value per share was 0.10/- paise each, total value of shares being ضي78,06,000/-. The Assessing Officer observed that the sale of shares in the value of ضي10/- as low as a price at ضي0.10 per share is nothing but a colourable transaction to avoid taxation of capital gain and accordingly ignored the claim of loss on sale of shares. On appeal, the ld. CIT(A) sustained the disallowance.

8.1 We have considered the rival submissions. The assessee has not filed any working on the sale of shares and therefore, the Assessing Officer disallowed the loss claimed by the assessee. After examining the working on the valuation of the equity shares in MBPPL and the balance sheet of the MBPPL, the ld. CIT(A) noticed that the company was having substantial audio video equipment, video rights which were not appropriately valued. Therefore, the ld. CIT(A) has not accepted the valuation adopted by the assessee. The assessee is one of the directors in M/s. Minbimbangal Productions Pvt. Ltd. along with his wife Smt. Geetha Kailasam. The beneficial owners of shares holding not less than 10% of the voting power during the previous year relevant to the assessment year are Smt. Geetha

Kailasam [58.13%], B. Prasanna, [brother 9.27%] and Pushpa Kandasamy, [sister 10.24%]. The company in which the assessee is a director, is a private limited company in which public are not substantially interested. The shareholders are only assessee's family members and more of a family concern. We find that the shares are not quoted, listed or sold through any authorized stock exchange. Thus, we are also of the same opinion that the sale of shares in the value of ضي10/- as low as a price at ضي0.10 per share is nothing but a transaction to avoid taxation of capital gain. In view of the facts and circumstances, the objection raised by the assessee stands dismissed.

9. In the result, the appeal filed by the Revenue is partly allowed for statistical purposes and the Cross Objection filed by the assessee is dismissed.

Order pronounced on the 6th March, 2018 at Chennai.

Sd/-	Sd/-
(ABRAHAM P. GEORGE)	(DUVVURU RL REDDY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Chennai, Dated, the 06.03.2018

Vm/-

आदेश क□ □ित□ल□प अ□ेषित/Copy to: 1. अपीलाथ□/Appellant, 2.□ □यथ□/Respondent, 3. आयकर आयु□त (अपील)/CIT(A), 4. आयकर आयु□त/CIT, 5. □वभागीय □ित□नि□ध/DR & 6. गाड□फाईल/GF.