

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

Before Shri Mahavir Singh Singh(JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.1469/Mum/2017  
(Assessment year: 2007-08)

Late Ushakant C Sheth 3 <sup>rd</sup> Floor, Raja Bahadur Mansion, 22, Mumbai Samachar Marg, Fort, Mumbai-400 023 PAN : AAHPS3788A	vs	ITO, 17(3)(5), Mumbai
<b>APPELLANT</b>		<b>RESPONDENT</b>

Appellant by	Shri Jitendra Jain / Bharat D Damodar
Respondent by	Shri M.V. Rajguru

Date of hearing	21-06-2018
Date of pronouncement	27-06-2018

**ORDER**

Per G Manjunatha, AM :

This appeal filed by the assessee, through legal heirs is directed against order of CIT(A)-28, Mumbai dated 02-01-2017 and it pertains to AY 2007-08. The assessee has raised the following grounds of appeal:-

- “1. On the facts and in the circumstances of the case the Commissioner of Income-tax (Appeals)-28, Mumbai erred in upholding the re-opening of assessment by the assessing officer by issuing the notice under section 148.
2. On the facts and in the circumstances of the case the Commissioner of Income-tax (Appeals)-28, Mumbai erred in not adjudicating the issue of year of transfer although the development agreement was made on 26th October, 2001 and the possession of the property was handed over on 5<sup>th</sup> May, 2005 to the developer.

3. On the facts and in the circumstances of the case the Hon'ble Commissioner of Income-tax (Appeals)-28, Mumbai erred in not restoring the file to the assessing officer as was done by the ITAT, Mumbai in the case of the wife of the appellant Late Mrs. Urmila Ushakant Sheth who was a joint owner to the extent of 50% of the property. In the wife's<sup>1</sup> case, the file was restored to the assessing officer to verify the date of handing over possession and passing over of sale consideration.
4. On the facts and in the circumstances of the case the Hon \*ble Commissioner of Income-tax (Appeals)-28, Mumbai erred in not adjudicating the issue that the capital gain on sale of land having already been offered to tax in Assessment Year 2006-07 and the same also having been assessed u/s 143(3) in A.Y.2006-07 in the case of the other co-owner, the same could not have been again taxed in the Assessment Year 2007-08.
5. On the facts and in the circumstances of the case the Hontile Commissioner of Income-tax (Appeals)-28, Mumbai erred in upholding the applicability of provisions of Section 50C although the land transferred was a leasehold land.
6. On the facts and in the circumstances of the case the HonTDle Commissioner of Income-tax (Appeals)-28, Mumbai erred in upholding the application of provisions of Section 50C to the case of your appellant.
7. On the facts and in the circumstances of the case the HonTDle Commissioner of Income-tax (Appeals)-28, Mumbai erred in confirming that there was no need to refer the valuation to the valuation officer as per the provisions of Section 50C(2) and ignoring the fact that the ITAT, Mumbai in the case of the wife of the appellant Late Mrs. Urmila Ushakant Sheth who was a joint owner to the extent of 50% of the property, the file was restored to the assessing officer for seeking valuation report from the Valuation officer.”

2. The brief facts of the case are that the assessee has filed his return of income for AY 2007-08 on 31-07-2007 declaring total income for AY 2007-08 AT Rs.1,45,744. The case has been reopened u/s 147 of the Act after recording reasons for reopening. In response to the notice, legal heirs of the assessee, vide their letter dated 30-06-2014 submitted that the return of income filed on 31-07-2007 may be treated as return filed in compliance to the notice u/s 148 of the Act. Subsequently, the case has been selected for scrutiny and notices u/s 143(2) and 142(1) of the Act were issued. In response to notices, the assessee has filed various details, as called for. During the course of assessment

proceedings, AO noticed that the assessee has transferred an immovable property, however, no capital gain has been disclosed in the return of income for the year. Therefore, called upon the assessee to explain as to why capital gain shall not be computed in respect of transfer of property. In response to notice, the assessee, vide letter dated 14-03-2015 submitted that he, alongwith his wife jointly entered into a development agreement with M/s Sheth Enterprises for development of property on 26-10-2001 and also executed a power of attorney for development, but the same was not conveyed with possession of the property. The assessee further submitted that the said transaction was approved by the competent authority u/s 269UL(3); however, the possession of the property has been given in 2005-06 and the assessee has considered transfer of property in the assessment year 2006-07 and included resultant capital gain in the return of income filed for AY 2006-07. The assessee further submitted that subsequently because of various reasons, the assessee has entered into an agreement for transfer of its portion developed property to the builder and such agreement has been registered in the financial year relevant to AY 2007-08. Since the assessee has handed over possession of the property in the financial year 2005-06 relevant to AY 2006-07, it has admitted capital gain in that year and accordingly, no capital gain is

liable for tax in the year under consideration. The AO, after considering relevant submissions of the assessee held that as per the agreement dated 08-12-2006, the assessee has conveyed right in the property in favour of the purchaser, therefore, capital gain on transfer of the said property arose for AY 2007-08. Since the assessee has failed to offer any capital gain on said transfer, the AO has computed long term capital gain and determined taxable income of Rs.3,14,889 in the hands of the assessee.

3. Aggrieved by the assessment order, assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee has challenged the reopening of the assessment on the ground that the assessment has been reopened after 4 years and the AO has formed reasonable belief of escapement of income in respect of capital gain without any allegation on the part of the assessee to disclose fully and truly all material facts necessary for computation of income. The assessee also challenged addition made by the AO towards computation of long term capital gain by reiterating its submission made before the AO. The assessee further challenged the action of the AO, applying the provisions of section 50C to determine full value of consideration. The CIT(A), after considering relevant submissions of the assessee rejected ground taken by the assessee, challenging reopening of assessment on the ground that in

assessee's case, the original assessment has been completed u/s 143(1) of the Act, and in view of the judgement of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Ltd 291 ITR 50 (SC) held that processing of return u/s 143(1) is not an assessment and accordingly, the assessee cannot take a plea that he has disclosed all material facts necessary for completion of assessment. Insofar as addition made by the AO towards computation of long term capital gain, the CIT(A) held that the assessee has transferred the property by way of deed of conveyance dated 08-12-2006 and accordingly, any capital gain arising from said transfer is assessable in AY 2007-08, therefore, there is no merit in the arguments of the assessee that the possession of the property had been handed over to the developer on 05-05-2005, that too, without any documentary evidence. The Ld.CIT(A) also rejected the arguments of the assessee insofar as applying the provisions of section 50C by holding that the assessee has not made any request before the AO for referring the matter to the DVO to determine market value of the property. Therefore, at this juncture, the assessee cannot take plea that the AO has not referred the property to the DVO to ascertain correct market value. The relevant portion of the order of the CIT(A) is extracted below:-

“3,These grounds challenged the assessment on merit. The basic facts of the case are that the assessment in the case of late SMT.URM1LA U SHETH

was completed in a scrutiny on 24/12/09 and Rs. 13.49 crores was taken as deemed consideration for the property registered through agreement dated 26<sup>1</sup> of February 2001, held in the joint name of the lady and the appellant. Accordingly, capital gains was worked out at Rs. 6.28 crores half of which belong to the late SMT URMILA U.SHETH and the balance belong to the appellant. This assessment addition already stands confirmed admittedly by FAA through order dated 25<sup>th</sup> of February 2011.

3.1 However, it was observed by the AO that the balance 50% was not offered for tax as capital gains. For the impugned year. That is , assessment year 07 - 08. It was on this basis that the reopening was done. The reopening challenged before the AO was disposed of through a speaking order dated 19/01/15. Show cause notice subsequently issued to the legal heirs stating that the amount of Rs. 13.49 crores is to be taken as deemed consideration of the property registered wide agreement dated 26/2/01, wherein assessee having 50% share and assessee's long-term capital gains, Coming to Rs. 3.14 crores should be assessed as such.

3.2 The appellant made detailed submissions before the AO. After considering the same, The AO notes in para seven that the date of registration of the deed of conveyance was 8/12/06 and it was never brought to the notice of the then assessing officer. All that was placed on record was that the possession in respect of assessed property was given in financial year 05 - 06 and even though there was no documentary evidence to support this the assessee offered LTCG, which in fact, according to the assessee is long term capital loss. The document of registration dated December 06 were never produced before the tax authorities. Accordingly the LTCG was split up artificially in two years to avoid the compliance of application of section 50 C.

3.3 Further in mandating that there was an agreement on part of husband and wife on one side in the capacity of owners one of which is the present appellant and M/S Sheth Enterprises on the other. What was brought into existence was merely a development agreement which conferred development rights to the developer. The absolute title of the property was never conveyed to the opposite party and they had only limited rights to the extent of developing three buildings on the said land. Accordingly, in financial year 01 - 02 no transfer of property took place.

3.4 The objection in respect of appropriate authority passing an order under section 269UL(3) was duly dealt with by the assessing officer, and he mentions that the same was for the limited purpose of the contents of agreement dated 26<sup>th</sup> of February 2001 and the same cannot be extrapolated to apply to the transaction in financial year 06 - 07 in respect of deed of conveyance. The latter is actually wherein the parties entering into agreement are defined as vendors and purchasers and this document conveys absolute title of the property to the purchaser and therefore the provisions of section 50 C squarely apply. Accordingly, taking rupees 13.49 crores to be the full value of consideration long-term capital gains were worked out by the assessing officer.

possession of the property to the developer on 5/5/05 establish that the contention made by the appellant is correct and the transfer took place in the previous assessment year as part performance of the contract

and were duly shown in that year itself capital gains, Accordingly, did not arise, Under the present year. It is further challenge that reference to DVO was not made. The appeal in the case of the lady is pending before the honorable ITAT.

4.1 After careful consideration of the facts I find that there was no challenge

before the AO in respect of valuation. It is settled law now that the challenge which is required in respect of valuation under section 50C(2) has to be mounted by the appellant before the AO demonstrating all the while that the valuation of SVA in fact, exceeds the FMV of the property. Only then the AO is obliged to refer the matter to the DVO who determines the issue and according to the valuation and keeping the provisions of section 50 C in mind the final sale consideration for the purpose of capital gains is determined.

4.2 I find that no such challenges been mounted before the assessing officer and, therefore, this challenge of the appellant must fail. As regards the issue on merit I find that the provisions of section 50 C admit of no exception. In the exhaustive submissions placed before me. The appellant has been singularly unable to demonstrate as to how the provisions of the said section are not applicable in its case. In fact, the submissions of the appellant are contradictory, inasmuch as the appellant claims in the relief claimed part of the papers relating to appeal, that section 50 C is not applicable in its case and on the other hand in the pleadings

the appellant states that the issue should have been referred to valuation officer by the AO. This attitude of running with the hare and hunting with the hound is of no help to the cause of the appellant and in fact, exposes the confused state of mind as to whether the appellant requires the relief if any, which is provided by the reference to the valuation officer should be taken, or whether the applicability of section 50 C itself **should** be challenged.

4.3 In view of the complete inability of the appellant to demonstrate as to how the impugned section is not applicable in this case I'm unable to interfere in the issue at all. The provisions of section 50 C do not admit of any deviation/controversy and it is held, on the facts of the case, that the said section was indeed applicable in the case of the appellant and therefore the AO was correct in applying the same. The appellant has brought to my notice that The order of the honorable tribunal in the case of the wife, wherein as per the appellant, The issue has been restored back to the assessing officer;The fact of the matter in the instant case is that the facts of the instant case had to be taken into consideration. It is not clear as to what documentation was submitted in the **case of** the wife before the AO and whether he was legally obliged to refer to the matter of the valuation officer and still he failed to do so. The present case has to be decided on its own set of facts and reliance on the case of the wife is of no use to the appellant in my **considered** view."

4. The Ld.AR for the assessee, at the time of hearing, referring to the decision of ITAT, Mumbai Bench "F" in the case of Mrs. Urmila Ushakant Sheth in ITA No.3972/Mum/2011 dated 17-12-2015 submitted that the assessee is the co-owner of the property in which he is having 50% share and his wife is having 50% share. In the case of assessee's wife, the ITAT has set aside both the issues to the file of the AO to ascertain the date of transfer in the light of the claim of the assessee that possession of the property was handed over to the developer in the financial year relevant to AY 2006-07 and also determination of sale consideration by applying the provisions of section 50C by referring the matter to the DVO. Since the facts are identical in this case also as the assessee is having 50% share in the impugned property on which capital gain has been levied by the AO in assessee's wife's case, this issue requires to be sent back to the file of the AO with similar directions to be considered afresh.

5. The Ld.DR, on the other hand, strongly supporting the order of the Ld.CIT(A) submitted that the assessee failed to make out a case for sending back the matter to the file of the AO, as the lower authorities have considered relevant facts to complete the assessment. Therefore, there is no reason to give one more chance to the assessee before the AO.

6. We have heard both the parties and perused the materials available on record. We find that the co-ordinate bench in assessee's wife, Mrs. Urmila Ushakant Sheth in ITA No. 3972/Mum/2011 dated 17-12-2015 has set aside the issue to the file of the AO for fresh consideration in the light of claim of the assessee that capital gain on transfer of property would arise for the financial year relevant to AY 2006-07, but not for AY 2007-08 as well as the issue of determination of full value of consideration by applying the provisions of section 50C of the Act. Although, the co-ordinate bench has set aside both the issues to the file of the AO, we find that there is no reason as to on what basis the matter has been set aside to the file of the AO. But fact remains that since the assessee is one of the co-owners of the property on which capital gain has been levied by the AO in the hands of the assessee as well as his wife's case, we are of the considered opinion that this case needs to go back to the file of the AO for fresh consideration alongwith assessee's wife's case. We further make it clear that the assessee has not filed any evidence to justify his argument that the possession of the property had been handed over to the builder in the financial year relevant to AY 2006-07. Hence, we set aside the issue to the file of the AO and direct him to consider the assessment de novo in accordance with law after affording a reasonable opportunity of hearing to the assessee.

7. In the result, appeal filed by the assessee is allowed, for statistical purpose.

Order pronounced in the open court on 27<sup>th</sup> June, 2018.

Sd/-

sd/-

(Mahavir Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 27<sup>th</sup> June, 2018

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Sr.PS, ITAT, Mumbai