

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.506/Ind/2016
Assessment Year: 2008-09**

Smt. Chandravati Kaithwas C-30, Banjari, Kolar Road Bhopal (Appellant)	<u>बनाम/</u> Vs.	ITO-1(1), Bhopal (Revenue)
P.A. No.BEEPK8616R		

**ITA No.508/Ind/2016
Assessment Year: 2007-08**

Shri Ashok Kumar Kaithwas C-30, Banjari, Kolar Road Bhopal (Appellant)	<u>बनाम/</u> Vs.	ITO-1(1), Bhopal (Revenue)
P.A. No.ABYPK9156G		

Appellant by	Shri Sumit Nema, Sr. Adv. & Shri Ayush Gupta, Adv.
Respondent by	Shri V.J. Boricha, Sr.DR
Date of Hearing:	25.10.2018
Date of Pronouncement:	11.12.2018

आदेश / O R D E R

PER KUL BHARAT, J.M:

These two appeals by two different assesseees pertaining to different assessment years i.e. 2007-08 & 2008-09 are against order of the CIT(A)-2, Bhopal dated 10.2.2016. Since the issues are common, both the appeals were heard and taken up together for the sake of convenience and brevity.

2. First we take up ITA No.506/Ind/2016 filed by Smt. Chandravati Kaithwas. The assessee has raised following grounds of appeal:

- 1. That on the facts and circumstances of the case, the order of the Learned lower authorities is vitiated on several grounds, hence the same may kindly be quashed.*
- 2. That the order passed is illegal, unlawful and opposed to provisions of law.*
- 3. That the learned Assessing Officer erred and was not justified in reopening the assessment of the appellant u/s 147 of the Act.*
- 4. That the learned Assessing Officer erred and was not justified in further assessing the long term capital gains at Rs.11,15,057/- and the Learned CIT (A) erred and was not justified in upholding the action of the Learned A.O.*

5. *That the learned Assessing Officer erred and was not justified in not allowing the deduction u/s 54F of the Act at Rs.2,64,724/- and the Learned CIT(A) erred and was not justified in upholding the action of the Learned A.O.*
6. *That the learned Assessing Officer erred and was not justified in making an addition of Rs.3,00,000/- u/s 69 of the Act as unexplained investment and the learned CIT(A) erred and was not justified in upholding the action of the Learned A.O.*

3. Ground Nos.1 to 3 are against reopening of the assessment. At the time of hearing, Ld. Counsel for the assessee submitted that he does not wish to press these grounds. Ld. D.R. has no objection. Hence, ground Nos.1 to 3 are dismissed as not pressed.

4. The facts giving rise to the present appeal are that case of the assessee was reopened and the assessment u/s 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter called as 'the Act') was framed vide order dated 18.3.2013. The A.O. after considering the facts applied stamp valuation value in respect of property purchased and made addition of Rs.11,15,057/-. The A.O. also made addition in respect of unexplained investment in the purchase of

second hand bus and second hand Hyundai Santro Car amounting to Rs.1,40,000/- and Rs.1,20,000/- respectively. The A.O. also disallowed the claim of the assessee made u/s 54F of the Act.

5. Aggrieved against this, the assessee preferred an appeal before Ld. CIT(A), who after considering the submissions dismissed the appeal. Now the assessee is in further appeal before this Tribunal.

6. Apropos to ground No.4, Ld. Counsel for the assessee submitted that the authorities below failed to appreciate the facts in right perspective. He submitted that in this case, there was an encroachment and the assessee had to enter into a registered agreement to sale, which was executed on 31.5.2007 and possession was given. He submitted that transfer for the purpose of income tax was completed on 31.5.2007 and if at all, stamp valuation rates were to be applied on the date of execution of agreement to

sale but not on the date when the sale deed was executed. He has drawn our attention to the circle rates prevailing on the date of execution of sale deed and execution of sale agreement. He submitted that the coordinate bench of this Tribunal in the case of Dara Singh Vs. ITO Ward-1(2), Ghaziabad and ITA No.2213/Del/2018 has ruled that there was no reason to believe that income of the assessee escaped assessment u/s 147 of the Act. In view of the fact that in the remand report assessing officer accepted the fact that circle rate on the date of registered agreement to sale was relevant for the purpose of section 50C of the Act. The Tribunal while ruling so has relied upon the judgement of the Hon'ble Allahabad High Court and the judgement of Hon'ble Supreme Court rendered in the case of Sanjeev Lal Vs. CIT 365 ITR 389. Ld. counsel for the assessee submitted that the authorities below have wrongly

construed the provisions of section 50C of the Act and applied on the facts of the assessee's case.

7. Per contra, Ld. D.R. opposed the submissions and supported the orders of the authorities below.

8. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. Undisputed facts as emerged from the report as placed before us are that the assessee had executed a registered agreement to sale and also a Power of Attorney on 23.5.2007 and 31.5.2007 respectively. As per the agreement to sale dated 31.5.2007, it is stated that the entire sale consideration has been received on 20.3.2007. The sale deed was executed by the registered power of attorney of the assessee on 25.3.2008. It is also on record that proceedings before the revenue authority in the court of Tahsildar Govindpura circle, Bhopal was pending before the execution of sale deed. The order dated 7.12.2007 of

the Nyayalay Tahsildar Nazul, Govindpur Bhopal is also enclosed in the paper book at page Nos.50 to 57. The issue before us is that whether the stamp value as on the date when agreement to sale was executed or otherwise when the sale deed was executed i.e. on 25.3.2008 is applicable. For the sake of clarity, section 50C of the Act is reproduced hereunder:-

“50C. Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed [or assessable] by any authority of a State Government (hereafter in this section referred to as the “stamp valuation authority”) for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed [or assessable] shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

[Provided that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer.

Provided further that the first proviso shall apply only in a case where the amount of consideration, or a part thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account, on or before the date of the agreement for transfer.] “

9. A bare reading of the above provision speaks that where the consideration received or accruing as a result of

the transfer by an assessee of a capital asset being land or building or both is less than the value adopted or assessed by an authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or asset shall be for the purpose of section 48 of the Act deemed to be the value of the consideration received or accruing as a result of such transfer. Now the crucial word in the provision is 'transfer' of a capital asset. The Hon'ble Supreme Court in the case of Sanjeev Lal Vs. CIT (supra) has held as under:

“21. Now in the light of definition of "transfer" as defined under Section 2(47) of the Act, it is clear that when any right in respect of any capital asset is extinguished and that right is transferred to someone, it would amount to transfer of a capital asset. In the light of the aforesaid definition, let us look at the facts of the present case where an agreement to sell in respect of a capital asset had been executed on 27th December, 2002 for transferring the residential house/original asset in question and a sum of Rs. 15 lakhs had been received by way of earnest money. It is also not in dispute that the sale deed could not be executed because of pendency of the litigation between Shri Ranjeet Lal on one hand and the appellants on the other as Shri Ranjeet Lal had challenged the validity of the Will under which the property had devolved upon the appellants. By virtue of an order passed in the suit filed by Shri Ranjeet Lal, the appellants were restrained from dealing with the said residential house and a law-abiding citizen cannot be expected to violate the direction of a court by executing a sale deed in favour of a third party while being restrained from doing so. In the

circumstances, for a justifiable reason, which was not within the control of the appellants, they could not execute the sale deed and the sale deed had been registered only on 24th September, 2004, after the suit filed by Shri Ranjeet Lal, challenging the validity of the Will, had been dismissed. In the light of the aforesaid facts and in view of the definition of the term "transfer", one can come to a conclusion that some right in respect of the capital asset in question had been transferred in favour of the vendee and therefore, some right which the appellants had, in respect of the capital asset in question, had been extinguished because after execution of the agreement to sell it was not open to the appellants to sell the property to someone else in accordance with law. A right in personam had been created in favour of the vendee, in whose favour the agreement to sell had been executed and who had also paid Rs.15 lakhs by way of earnest money. No doubt, such contractual right can be surrendered or neutralized by the parties through subsequent contract or conduct leading to no transfer of the property to the proposed vendee but that is not the case at hand.

22. In addition to the fact that the term "transfer" has been defined under Section 2(47) of the Act, even if looked at the provisions of Section 54 of the Act which gives relief to a person who has transferred his one residential house and is purchasing another residential house either before one year of the transfer or even two years after the transfer, the intention of the Legislature is to give him relief in the matter of payment of tax on the long term capital gain. If a person, who gets some excess amount upon transfer of his old residential premises and thereafter purchases or constructs a new premises within the time stipulated under Section 54 of the Act, the Legislature does not want him to be burdened with tax on the long term capital gain and therefore, relief has been given to him in respect of paying income tax on the long term capital gain. The intention of the Legislature or the purpose with which the said provision has been incorporated in the Act, is also very clear that the assessee should be given some relief. Though it has been very often said that common sense is a stranger and an incompatible partner to the Income Tax Act and it is also said that equity and tax are strangers to each other, still this Court has often observed that purposive interpretation should be given to the provisions of the Act. In the case of [Oxford University Press v. CIT \[2001\] 247 ITR 658/115 Taxman 69](#) this Court has observed that a purposive interpretation of the provisions of the Act should be given while considering a claim for exemption from tax. It has also been said that harmonious construction of the provisions which subserve the object and purpose should also be made while construing any of the provisions of the Act and more particularly when one is concerned

with exemption from payment of tax. Considering the aforesaid observations and the principles with regard to the interpretation of Statute pertaining to the tax laws, one can very well interpret the provisions of Section 54 read with Section 2(47) of the Act, i.e. definition of "transfer", which would enable the appellants to get the benefit under Section 54 of the Act.

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 immovable 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.*

24. *Thus, a right in respect of the capital asset, viz. the property in question had been transferred by the appellants in favour of the vendee/transferee on 27th December, 2002. The sale deed could not be executed for the reason that the appellants had been prevented from dealing with the residential house by an order of a competent court, which they could not have violated.*

25. *In view of the aforesaid peculiar facts of the case and looking at the definition of the term "transfer" as defined under Section 2(47) of the Act, we are of the view that the appellants were entitled to relief under Section 54 of the Act in respect of the long term capital gain which they had earned in pursuance of transfer of their residential property being House No. 267, Sector 9-C, situated in Chandigarh and used for purchase of a new asset/residential house."*

10. In the present case also, the assessee could not have executed the sale deed without clearing encroachment. For clearing encroachment, assessee had approached the

competent court, therefore, ratio laid down by the Hon'ble apex court in the case of Sanjeev Lal Vs. CIT (supra) would be applicable on the facts of the present case. The assessing officer is therefore directed to adopt the valuation as prevalent on the date of agreement to sale and compute capital gain accordingly. There is another aspect of this matter that valuation for the purpose of stamp duties and adoption of the stamp valuation under the income tax laws would stand on different footing. Keeping in view of such factors in mind, revenue has brought an amendment w.e.f. A.Y. 2010-11 to fix such lacunas.

11. Ld. CIT(A) discarded claim of the assessee on the ground that power of attorney and agreement to sale were executed subsequent to receipt of sale consideration by the assessee. He was of the opinion that these documents were prepared to justify the cash deposits. In normal circumstances, the suspicion of Ld. CIT(A) may be correct

but in the present case, where the property is not free from encumbrance, sale consideration of such property would always be lower than the market value. Moreover, no enquiry is conducted from the buyers of the property with regard to the date of payment of sale consideration. Undisputedly, in the registered sale deed, date of receipt of sale consideration does not find any mention. It merely states that entire sale consideration has been received. Under such circumstances, the A.O. ought to have made enquiries from the buyers of the property. In the absence of such enquiry and bringing some material suggesting actual date of payment of sale consideration, it cannot be considered with certainty that sale consideration was not paid prior to execution of the sale deed. We therefore, are unable to affirm the finding of the authorities below. Ground No.4 of the assessee's appeal is allowed.

11. Ground No.5 is against rejection of the claim made u/s 54F of the Act. Apropos to this ground, Ld. Counsel for the assessee contended that assessee and other owners had constructed a residential house at plot Khasra 198/1/5 situated at Dhamkeda. For construction of this floor M/s. Ram Traders was appointed as a contractor. On 28.4.2008 he raised a bill of Rs.11 lakhs after completing construction till plinth level work. The amount was paid in instalments through cash withdrawals from Allahabad bank operated by Smt. Lalitha Devi Kaithwas and also from her personal savings. This amount was claimed as deduction u/s 54F of the Act. He submitted that the A.O. ought to have given the benefit of section 54F of the Act. The Ld. Counsel for the assessee submitted that the A.O. has disallowed the claim merely on the basis that no satisfactory evidence was produced. In support of this, he submitted that Ld. CIT(A) confirmed this finding on the

basis that the builder was not paid by cheque. During the course of hearing, Ld. Counsel for the assessee drew our attention to the bill raised by Shri Ram Traders of Rs.11 lakhs enclosed at paper book page No.67. Ld. Counsel also drew our attention to the bank statement where there is a cash withdrawal of Rs.30 lakhs and Rs.70 lakhs. Apart from that a sum of Rs.1,70,000/- is paid to Mr. Ashok. As per assessee, this amount was utilised for the payment of construction. Further, the assessee had withdrawn a sum of Rs.98,888/- The bill is dated 28.2.2008.

12. Ld. D.R. opposed the submissions of the assessee.

13. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. The assessee has not brought any material to prove nexus between the withdrawal of money and payment to the contractor. It is noticed that the withdrawals pertain to the assessment year 2006-07.

Except one entry, other entries are related to earlier years. No explanation or nexus with the payment made to the contractor and withdrawal of money. Therefore, the finding of the Ld. CIT(A) is not justified. Ground No.5 of the assessee's appeal is rejected.

14. Ground No.6 is against confirming addition of Rs.3 lakhs u/s 69 of the Act. Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. It is stated that assessee had purchased a second hand bus for Rs.1,40,000/- out of which Rs.50,000/- was paid in cash out of her savings and balance was paid out of old savings. Cash drawn by her husband from Allahabad bank in which sale proceeds of the property is credited.

15. Ld. D.R. opposed the submissions.

16. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. The Ld. CIT(A) discarded the explanation of the assessee on the ground that the authorised representative neither filed any explanation nor filed any documentary evidence in respect of source of income. During the course of present proceedings, the assessee has filed bank statement that suggests withdrawal of the money. Therefore, keeping the totality of facts in view and the evidence placed before us, we therefore direct the A.O. to delete this addition. Ground No.6 of the assessee is allowed.

17, Ground un numbered is general in nature and needs no separate adjudication.

18. In the result, appeal filed by the assessee in ITA No.506/Ind/2016 is partly allowed.

19. Now we take up ITA No.508/Ind/2016. Ground Nos.1, 2 & 3 are not pressed by the Ld. Counsel for the assessee and the same are dismissed as not pressed.

20. Ground No.4 is against confirming the addition of Rs.12 lakhs made u/s 68 of the Act. The brief facts of the case are that case of the assessee was reopened and the assessment u/s 143(3) of the Act r.w.s. 147 of the Act was framed vide order dated 18.3.2013. While framing the assessment, the assessing officer made addition of Rs.12 lakhs on account of cash deposits in the SB account in SBI and Allahabad banks. The assessing officer made addition on the ground that no source of deposit was explained.

21. Aggrieved against this, the assessee had preferred an appeal before Ld. CIT(A). Before the Ld. CIT(A), it was contended that a sum of Rs.12 lakhs was received as a sale consideration which was deposited in the bank account. However, the Ld. CIT(A) did not accept this contention of

the assessee. On the basis of that the agreement to sale was executed subsequent to the receipt of sale consideration. Against this, the assessee is in present appeal. Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. The submissions of the assessee are reproduced as under:

“3. During assessment proceedings appellant informed the Learned assessing officer that the Allahabad Bank account is the joint bank account with mother Smt. Lalitha Devi and this amount belongs to her. But the submission of the appellant was not considered and Rs.12,00,000/- was added u/s 68 of the Act, in the returned total income of the appellant.

4. *Regarding sale transaction of land it is submitted as under:-*

- *On 23.5.2007 power of attorney for sale of land at Village Damkheda, was given by Smt. Lalita Devi (Mother), Rajendra Kumar Kaithwas (Brother), & Smt. Chandravati Kaithwas (Wife) to Mohammad Shafiq Quereshi for sale of agricultural land at Khasra No.196/16 0.44 Acres & Khasra No.196/17 0.26 Acres,. Totalling to 0.70 Acres. PB Pg.No.7-20.*
- *An agreement to sale of land was executed on 31.5.2007 for sale of this land to Smt. Radha Moochandani for Rs.16,50,000/-. The sale proceeds of Rs.16,50,000/- was received in cash on 20.3.2007. PB Pg.No.21-23.*
- *On 25.3.2008 sale deed of this land was registered in which there is a reference of sale price Rs.16,50,000/- received in cash by the sellers. However, the government valuation of the property worked out to Rs.42,01,000/-. PB Pg.No.24-40.*
- *In Assessments proceedings of all the three coowners the Learned Assessing Officer has added the difference in sale proceeds of Rs.16,50,000/- and stamp duty valuation of Rs.42,01,000/- in the total income of the sellers. PB Pg.no.41*

5. *It is therefore submitted that Rs.12,00,000/- cash deposited in the Bank account of the appellant was deposited by her mother being joint account. The source of deposit is sale proceeds from sale of land which has been duly offered as capital gains by the respective co-owners. Hence the addition made is incorrect, un-lawful and deserves to be deleted by your Honours. “*

22. Ld. D.R. opposed these submissions.

23. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. The question whether sale consideration was received by the assessee also came up for our consideration in the case of Smt. Chandravati Kaithwas in ITA No.506/Ind/2016, wherein we have after considering the submissions accepted the ground of the assessee on the basis that the A.O. had not carried out any verification from the buyer of the land to ascertain the actual date of payment of sale consideration. In the present case also, no verification is made by the authorities below. Under these facts, we are unable to affirm the finding of the authorities below. The A.O., therefore, is

directed to delete this addition. Ground raised in the appeal is allowed.

24. Ground un numbered is general in nature. No separate adjudication is required.

25. In the result, the appeal filed by the assessee in ITA No.508/Ind/2016 is partly allowed.

Order was pronounced in the open court on 11.12.2018.

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-
(KUL BHARAT)
JUDICIALMEMBER

Indore; दिनांक Dated : 11/12/2018
VG/SPS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Assistant Registrar, Indore