

आयकर अपील[य अधकरण, अहमदाबाद ँयायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
"SMC" BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
AND
Ms MADHUMITA ROY, JUDICIAL MEMBER

अपील सं./ITA No.2072/Ahd/2015

And

ITA No.3285/Ahd/2016

अधकरण वर्ष/Asstt. Year:2007-2008

Sarlaben R. Arora, C/o, Milin J. Jani & Co., 306, Shital Varsha Arcade, Girish Cold Drink Cross Road, C.G. Road, Ahmedabad-380 009 PAN No. ACQPA2981G	Vs.	Income Tax Officer, Ward-10(3), Ahmedabad
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(Applicant)	(Responent)
Assessee by :	Shri Biren Shah, A.R
Revenue by :	Shri Apoorva Bhardwaj

सुनवाई का ताराख/Date of Hearing : 06/12/2018

घोषणा का ताराख /Date of Pronouncement: 28/02/2019

आदेश/O R D E R

PER Ms MADHUMITA ROY, JUDICIAL MEMBER:

These instant appeals filed by the Assessee are against the order dated 11.11.2014 passed by the Learned Commissioner of Income Tax(Appeals)-XVI, Ahmedabad, arising out of order dated 17.01.2014 passed under section 143(3) r.w.s 147 of the Income Tax Act, 1961 (in short :-the Act) passed by the ITO Ward-10(3) Ahmedabad for the Assessment Year 2007-08 and against the order dated 03.10.2016 passed by the Commissioner of Income Tax

(Appeals)-5 arising out of the penalty order passed by the ITO, Ward-5(2)(3) Ahmedabad u/s.271(1)(c) of the Act respectively for the Assessment Year 2007-08.

2. Since both the appeals relates to the Assessment Order of the same assessee and consequential to each other, these are heard analogously and are being disposed of by this common order.

3. An application for condonation of delay of 160 days in filing the appeal on the behalf of the appellant has also been filed. It appears from the said application that the order in appeal was passed on 11.11.2014 which was received by the appellant on 27.11.2014. Hence the last date of filing such appeal was 26.01.2015. However, the same was filed on 13.07.2015 due to certain reasons which has been properly explained by the assessee in the said application for condonation of delay. Also an affidavit affirmed by the assessee has been filed along with the said application. It was contended by the assessee that the relevant papers relating to the filing of appeal were sent by the appellant through courier to the consultant at Ahmedabad for taking necessary steps thereon but due to negligence on the part of courier service provider the same was not received by the consultant. Ultimately the papers were again sent to him at Ahmedabad and necessary steps were taken thereafter as it appears from the explanation made by the assessee.

4. We have gone through the entire application. We find there is no malafide intention on the part of the assessee in not filling the appeal within the prescribed period. No other laches and/or fault is found on the part of the appellant by us. We find sufficient cause for such delay in preferring the instant

appeal before this Honøble Tribunal by the assessee . In that view of the matter we condone the delay.

5. Now we proceed to deal with the merit of the matter. The appellant is an individual declaring income from long term capital gain and other sources of income by filing return of income on 26.12.2007 declaring total income at Rs.3,42,781/- in the Assessment Year 2007-08. Upon scrutiny the matter was re-opened for Assessment u/s.143(3) r.w.s 147 of the Act. Notice u/s.148 of the Act was issued on 05.11.12 upon the assessee followed by further notice dated 06.02.2013 u/s.148 of the Act.

6. The AO was prima facie of the opinion that income might have escaped Assessment and thus the case was re-opened after recording the reasons receiving approval from the Commissioner of Income Tax concerned.

6.1 Thereafter the assessee filed a letter dated on 27.02.2013 requesting the authority to consider the original return of income as deemed to be filed in respect of notice issued u/s.148 of the Act. Further that the assessee also requested to provide the reasons recorded for such re-opening of the case of the assessee. Needless to mention the assessee was provided with such reasons by and under the letter dated 04.03.2013 issued by the authority which is as follows.

".. It is seen that the assessee has sold property named Kailash nagar on 06/09/2006 at Rs.36,20,000/- and has offered Rs.2,48,197/- as LTCG after claiming deduction of indexed cost of acquisition at Rs.18,71,803/- and investment of Rs.15,00,000/- in REC bonds. However, it is observed that the property was acquired on 10/11//2005 as per Sale Deed dated 10/11/2005 and as such, there would be STCG of Rs.25,20,000/- as against the LTCG of

Rs,2,48,000/- shown by the assessee. Thus, there is reason to believe that the income chargeable to tax to the extent of Rs.25,20,000/- has escaped assessment for the period relevant to A.Y.2007-08... "

6.2 The assessee thereafter filed a letter dated 18.03.2013 stating that he acquired such property by way of Power of Attorney as on 30.12.1966 for a consideration of Rs.11,00,000/- payment whereof were already been made through cheques on 10.04.1996 and 01.01.1997. The assessee further clarified that the sale deed was executed finally on 22.07.2004 through the constituted Attorney appointed by and under power of Attorney executed on 30.12.1996 by the vendors of the property. It was further explained that the possession of such property was handed over to the assessee by the vendors in the year 1996 itself. The copy of each of the sale deed executed on 22.07.2004, the Power of Attorney executed on 30.12.1996, the copy of the Municipal tax receipts for the year 1999, credit card, dividend warrant dated 06.11.2000 were also placed on record along with the said letter dated 18.03.2013 written by the assessee. Apart from that the assessee further stated the following:

“... Part-performance of the contract of sales” recognized as Complete Sales of Land and building under Section 53A of the Transfer of Property act, 1882...”

6.3 According to the assessee he has complied all the conditions of section 53A to acquire the property under consideration in the year 1996. Such explanation as forwarded by the assessee was not found acceptable by the Revenue particularly the explanation to the claim of long term capital gain on the basis of the actual date of sale as on 1996 instead of short term capital gain as sought to be determined by the Revenue on the basis of registered deed on 22.07.2007 relying on section 53A of the Act transfer of property Act 1882 and

therefore show cause was issued as to why the long term capital shown by the assessee at Rs.2,48,000 arising on sale of immovable property should not be treated as short term capital gain of Rs.25,20,000/- as per the reasons recorded for re-opening of the case by and under letter dated 04.03.2013 issued by the Revenue and added to the total income of the assessee. In response to the same the assessee submitted a reply dated 04.01.2014 *inter alia* narrating the followings:

- “...1. The assessee has acquired such property by way of Power of Attorney as on 30th December, 1996.
2. POA registered in the name of Mr. Rajendrakumar Arora Husband of the assessee for which assessee has made payment Rs.11,00,000/- in favour of Mr. Meraj Husain Sabri Husain Goghai & Julfikar Ali Sabir Husain Goghal.
3. It's appear from the POA that the assessee has acquired all the rights related to the property under consideration and appointed her Husband to deal with such property in her behalf.

Consideration of the said POA to acquire rights related to the assets under consideration was made by the assessee as under.

Particulars	Rs.
Bank of Baroda, Ashram Road Br. Ch. No.107150 dated 10.04.1996	4,00,000 / -
Bank of Baroda, Ashram Road Br. Ch. No.17301 dated 10.04.1996	2,00,000 / -
Bank of Baroda, Ashram Road Br. Ch. No.017304 dated 1.1.1997	2,50,000/-
Bank of Baroda, Ashram Road Br. Ch. No.017305 dated 1.1.1997	2,50,000/-
Total Consideration	11,00,000/-

Copy of the Said Power of Attorney is attached herewith. Refer Annexure I.

1. *The assessee has obtained all rights in A.Y. 1997-1998 through power of attorney registered on behalf her in the name of her husband.*

In the A. Y. 2004-05, the assessee has got register sale deed in her name on 22/07/2004 from her husband who holds the POA on her behalf which appears from the POA dated 30/12/1996 and register sale deed dated 22/04/2004.

Register Sale Deed executed between the assessee and her husband for which her husband has not received any kind of consideration as he was appointed as POA holder of this property on behalf of the assessee.

By executing register sale deed the assessee received registered title of the property, which she owned through the POA.

Further no separate sales consideration had been made to his/her original sellers i.e. Mr. Meraj Husain Sabri Husain Goghai & Julfikar All Sabir Husain Goghai as they have already been paid for in A.Y. 1997-98 by the assessee to acquire rights through the POA.

Copy of Register sale deed dt. 22/04/2004 given in Annexure II.

It appears from the POA & register sale deed the property has been transferred in the name of the assessee in A.Y, 1997-98 and got register title in A.Y. 2005-06.

The assessee in the said submission, thereafter, reproduced the Definition of Short Term Capital Asset as per Section : 2(42A) from (a) to (hb)(ii) with Explanation 1, 2 & 3 of the Income Tax Act, 1961.

In the said submission, the assessee further stated that

- "i) *The assessee holding such Assets rights since 30.12.1996 through POA.*
- ii) *The Assessee has got registered of such right into ownership on 22/04/2004 thorough register sales deed.*
- iii) *Period of holding for short terms counts from date on which assessee holding right in the property i.e. 30.12.1996.*

iv) *Possession of the property has been handed over to the assessee by the seller in the year 1996/- which can be substantiated by the assessee by payments of*

a) *Municipal tax Yr. 1999 Refer Annexure III*

b) *Statement of credit card dated OS/10/96 & 7/4/97, Refer Annexure IV*

c) *Dividend warrant dated 6/11/2000 Refer Annexure V*

d) *Ration Card Copy Refer Annexure VI*

v) *Part-performance of the contract of sales'' recognized as Complete Sales of Land and building under Section 53A of the Transfer of Property act, 1882...''*

6.4 The assessee also placed reliance on the certain judicial pronouncements on this aspect. The contention as made by the assessee was not accepted. According to the Ld.AO since there is no mentioning of any sale consideration to be paid or payable or paid in accordance of /sale and/or purchase of said property. The Power of Attorney is only a document which referred only to the agreement to transfer the right title and interest of property by appointing Shri Rajendrakumar Arora in future in the name of the assessee and thus property has not been transferred wholly in the name of the assessee as on 30.12.1996. The power of Attorney further mentioned about the possession given to the assessee and hence the Ld.AO was of the opinion that the assessee has never got possession of the said property on the date of Power of Attorney i.e in the year 1996 which the assessee claimed to have acquired.

6.5 As per the observation made by the Ld.AO the assessee failed to fulfill the conditions of section 53A of the Act since there is no contract between the seller and the purchaser i.e the assessee as on 30.12.1996 when the power of Attorney was constituted only between the owner and Attorney holder and not executed between the owner and the assessee. The Power of Attorney does not

bear the signature of assessee on accepting rights title and interest of the property. Neither the same confer any right of the property to the assessee. The judgment cited by the assessee was not applicable to the case of assessee as also found by the Ld.AO. According to him the assessee has received the possession of property in question as on 22.07.2004 as it appears at page 10 para 4 of sale deed. Ultimately the AO came to the conclusion that by virtue of the Power of Attorney dated 30.12.1996 Shri Rajendrakumar Arora remained the owner of the property from 30.12.1996 to 21.07.2004 and only on 22.07.2004 consequent upon the registered deed of sale the assessee become the owner of the said property. Prior to that the assessee did not acquire any right, title and interest of the property as claimed. The assessee since sold such property on 06.09.2006 at a cost of Rs.36,20,000/- though offered Rs.2,48,197/- as long term capital gain after claiming deduction of cost acquisition and cost of indexation at Rs.18,71,803/- and investment of Rs.15,00,000/- in REC bonds, short term capital gain considering the period of holding instead of long term capital gain offered by the assessee at Rs.2,48,197/- was negated. Finally short term capital gain was assessed at Rs.25,20,000/- and since the assessee offered Rs.248197/- the balance amount of Rs.22,71,803/- was added to the income of the assessee as short term capital gain against which appeal was preferred before the Ld.CIT(A) who in turn dismissed the same. Hence instant appeal before us.

7. At the time of hearing of the instant appeal the Ld.counsel appearing for the assessee vehemently argued before us contending that the transaction of sale was practically completed in the year 1997 when the payment was made by the assessee and possession thereof was handed over to him. Therefore though property was sold out in the year 2006 the capital gain out of such sale will be considered as long term capital gain and not short term capital gain. On

that score alone, he submitted that the order passed by the authority is liable to be quashed. It was further added that there was no laches on the part of the assessee to get the property registered in his name by constituted Attorney. Since the property situated in a sensitive zone only upon the approval granted by the Collector property could have been transferred in the name of the assessee which is also evident from such approval of the concerned authority being part of the paper book before us.

8. On the other hand the Ld.representative of the Revenue submitted before us that since the transaction was finalized by way of registered sale deed dated 22.07.2004 the possession hence handed over to the assessee only on 1996 is not correct. In that view of the matter the order passed by the authorities below has been prayed to be confirmed by us.

9. We have heard the respective parties and perused the relevant materials available on record. It is evident from the records that the property in question was acquired by the assessee in the year 1996 and the same was practically confirmed upon the payment of final consideration through cheque on 01.01.1997 to the vendors. It is a fact that the power of Attorney was executed by those vendors on 30.12.1996 to transfer the right, title and interest upon the assessee and the same was ultimately transferred by virtue of registered deed of sale executed on 22.07.2004. It appears from the statements of fact so placed by the assessee before the Ld.CIT (A) that the property since situated in a notified area under Disturbed Area Act in financial year 1996-1997 for that purpose possession of said property was handed over to him by virtue of the Power of Attorney. It is relevant to mention that the property situated in a disturbed areas is only permitted to be transferred upon prior sanction and/or approval of the collector concerned.

9.1 In the instant case permission of transfer of said property was received from Dy. Collector Madhyahan Bhojan Yojna Ahmedabad by and under order No.AMD/Disturbed Area/SRN 76/2003 dated 01.05.2003 the same is also reflecting at clause 18 of the sale deed dated 22.07.2004 being part of the record before us. The building thereon was constructed under the year 1979 as also evident from the said deed of sale. It is therefore cannot be said that the property is transferred only on 22.07.2004 by virtue of the deed of sale.

9.2 Once the consideration is paid to the vendors there would have been no reason in not transferring the property in question to the purchaser unless there is legal bar to that effect. Since the approval/sanction by the concerned authority is the condition precedent of such transfer it can be concluded that the power of attorney was executed by the vendors constituting Shri Rajendrakumar Arora being the husband of the assessee as the Attorney to transfer the right, title and interest of the property to the assessee in order to confirm such transaction in the absence of any deed of sale.

9.3 Thus virtually, the appellant acquired the possession of the property from the vendors on payment of consideration in the F.Y 1996-1997. The same is also evident from the Municipal receipt where the name as appearing in the Municipal record was of the Attorney and not of the original vendors because of the particular reason that by 1999 the original vendors had handed over their possession over the property to the registered Attorney by relinquishing their rights. We find no fault on the part of the assessee, since the assessee is in possession of the property from 1996 the natural corolary would be that the sale or transfer of right title interest has been completed by virtue of handing over possession to the assessee by the vendors upon payment of consideration.

The possession of the property has been handed over to the assessee by the vendors in the year 1996 which was be substantiated by the assessee by payment of consideration of Rs.11,00,000/-. If that be so, then the capital gain arising out of such property needs to determined as long term capital gain taking into consideration the date of the possession of the property by the assessee as on 1996 and not short term capital gain as held by the authorities below.

9.4 The gain arising out of a transfer of a capital asset if, is the consideration for determining capital gain then in this particular case we can safely conclude that the gain arising out of the receipt towards purchase of the property took place and/or finalized on 01.01.1997 ought to have been considered. Virtually right title interest of the property was transferred upon the assessee upon payment of consideration in 1996. Certain limitations were imposed by the statue towards sale of property by way of registered deed of sale prevailing at that material point of time and only upon approval of the concerned Collector the said property was registered on 22.07.2004. Thus capital gain, in this particular case, relates back to 1996 when the payment and /or consideration was fully paid by the assessee to the vendors. Doctrine of relating back is the principle be applied here. Thus, the claim the assessee, in this particular case, that he sold the property on 06.09.2006 at a cost of Rs.36,20,000/- and offered Rs.2,48,197/- as long term capital gain taking into consideration of the date of payment made and acquired possession thereof and offering long term capital gain after claiming deduction of cost of acquisition and cost of indexation of Rs.18,71,803/- and investment of 50 cr in REC bond does not suffer from any ambiguity. Merely non registration of the deed of sale would not change the actual date of transfer of the property.

9.5 We find both the parties below failed to consider this particular aspect of the matter taking into consideration the peculiar fact and circumstances of the matter and wrongly identified capital gain as short term capital gain considering the date of acquisition of the property by the assessee as on 22.07.2004 instead of 30.12.1996.

9.6 The judgment cited by the Ld.AR, on this aspect reported in (2011) 15 (115) (Mum.) ITAT Mumbai in case of Sureshchandra Agarwal Vs Income-tax Officer has been carefully considered by us. The ratio of judgment is as follows:

“...Section 2(47), read with section 54, of the Income-tax Act, 1961 -Capital gains - Transfer - Assessment year 2005-06 - Whether amendment made in section 53A of Transfer of Property act, 1882, by which requirement of registration of transfer deed has been indirectly brought on statute need not be applied while construing meaning of 'transfer' with reference to section 2(47) - Held, yes

Assessee sold a building on 30-4-2004 - He claimed deduction under section 54 in respect of capital gain arising on sale of building contending that he had purchased a new flat on 25-6-2003, i.e. within one year from date of transfer of building - Assessing Officer found that date of registration of transfer deed of building was 26-8-2004 - He thus opined that assessee sold building as on 26-8-2004 and, consequently, his claim for deduction under section 54 could not be allowed - Whether in view of fact that assessee and buyer had performed their part of obligations as on 30-4-2004, in such a situation, mere non-registration of transfer deed would not change date of transfer of building to 26-8-2004 - Held, yes...”

9.7 Taking into consideration the entire facts of the case, the records lying before us, and respectfully following the judgment cited above, we find it fit

13

and proper to delete such addition made by the authorities below for the reasons mentioned above treating the capital gain as short term capital gain. We further direct the AO to calculate the capital gain as long term capital and passed order in accordance with law. Assessee's appeal is thus allowed.

10. In the result, the appeal of the assessee is allowed.

11. Since the penalty appeal bearing no.ITA No.2072/Ahd/2015 for Assessment Year 2007-08 is allowed in favour of the assessee the other appeal bearing no.3285/Ahd/2016 for Assessment Year 2007-08 arising out of the penalty order dated 03.10.2016 passed by the Ld.CIT(A) arising out of the Assessment Order dated 17.01.2014 passed by the Ld.AO becomes infructuous and hence dismissed as infructuous.

Order pronounced in the Court on 28/02/2019 at Ahmedabad.

**-Sd-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

(True Copy)

**-Sd-
(Ms MADHUMITA ROY)
JUDICIAL MEMBER**

Ahmedabad; Dated 28/02/2019

Manish

आदेश का प्रतिलिपि अपेक्षित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. व्रभागीय प्रतिलिपि, आयकर अपीलार्थी अधिकरण / DR, ITAT,
6. गार्डफाइल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलार्थी अधिकरण, अहमदाबाद / ITAT, Ahmedabad