

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A' NEW DELHI**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 2595/Del/2015
Assessment year: 2010-11**

Shri Vinod Kumar Chugh, R/o K-24, Sector-25, Noida-201301 (PAN: ADCC9024H)	vs	ITO, Ward 33(4). New Delhi-110008
Appellant		Respondent

**Assessee by : Shri Ved Jain, Adv.
Department by: Shri Raghunath, Sr. DR**

**Date of hearing : 15.01.2019
Date of pronouncement : 18.03.2019**

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER :

This is an appeal filed by the assessee against order dated 20th January, 2015 passed by the Ld. CIT (Appeals) – 17, New Delhi {CIT (A)} for Assessment Year (AY) 2010-11. The only grievance in this appeal is the addition of Rs. 78,40,062/- made by the Assessing Officer and confirmed by the Ld. CIT(A) on account of the capital gain.

2.0 The brief facts leading to the present appeal are that the assessee, during the year under consideration, was engaged in

consignment sales of products of M/s Haldia Petro Chemicals Ltd. on commission basis. The assessee filed his return of income for the assessment year under consideration declaring an income of Rs.18,94,797/-. As per the AIR Information, the assessee had executed one transaction of sale of one immovable property at A-34, Sector 30, Noida for Rs.83,70,000/- on 23rd June, 2009 and the Assessing Officer (AO) noted that this transaction had not been reflected in the Return of Income. The assessee was asked to explain the same. It was submitted by the assessee before the AO that he had purchased the a vacant plot in the year 1987 through a General Power of Attorney (GPA) from the original allottee Smt. Lilavati Kapur for Rs. 1,35,000/- on which the assessee had constructed the ground floor and sold the house on 03.08.1991 to Smt. Santosh Sareen for a consideration of Rs. 4,55,000/- under a registered "Agreement to Sell" along with the possession of property. However, as per the AO, there was no proof of valid sale on 03.08.1991. Therefore, the AO proceeded to hold that the transaction in the assessment year under consideration attracted Long Term Capital Gains (LTCG) on the sale of property and was taxable u/s 50C of the Income Tax Act, 1961 (hereinafter called 'the Act'). The LTCG was computed at Rs.

78,40,062/- after allowing the benefit of indexation to the assessee.

2.1 The Ld. CIT (A) confirmed the action of the assessing officer.

2.2 Now, the assessee has approached the ITAT and has raised the following grounds of appeal:

“1. (A) On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in confirming the addition of Rs. 78,40,062 made by the A.O. under the head Long Term Capital Gain on sale of property No. A/ 34, Sector-30, Noida.

(B) That the Ld. CIT(A) and A.O. has failed to appreciate the factual position, of having sold the property A-34, Sector-30, Noida on 03.08.1991 having received the consideration, having handed over the physical possession and confirmation by the purchaser of the said property at various occasions for having purchased , taken over possession residing in the said property, having obtained permission from Noida Authority and also having sold the property in A.Y. 2011-12.

(C) It is highly unjustified and against equity to hold that the date of transfer u/s 2(47) for working out the capital gain is 23.06.2009 and not 03.08.1991.

(D) It is denied that the Agreement to Sell dated 03.08.1991 was not a property registered document. The document was registered vide document no-87 volume no-679 book no-740 pages 41 to 50.

2. To the above extend of above objection the order passed u/s 143(3) by the A.O. & further confirmation by the Id. CIT(A) is bad in law.

3. That ‘A’ prays that the addition be deleted in full to meet both ends of justice.

4. That appellant prays that he be allowed to adduce, deduce, alter, amend, withdraw or rectify any grounds of appeal during or before the final hearing.”

3.0 It was contended by the Ld. Authorised Representative (AR) that the addition made by the AO was unsustainable in law and also on facts. The Ld. AR submitted that the assessee had purchased a plot bearing no. A-34, Sector-30, Noida in 1987 from Smt. Lilawati Kapur as per the agreement to sell dated 22nd June, 1987 (placed at Paper Book pages 56-58). It was further submitted that the assessee had also obtained GPA (placed at Paper Book pages 47-55) from Smt. Lilawati Kapur, who was the original allottee in the records of Noida authority. The Ld. AR submitted that the assessee constructed the ground floor on the said plot and, thereafter, sold the property to Smt. Santosh Sareen on 03.08.1991 for Rs.4,55,000/-, vide agreement to sell dated 3rd August, 1991 (placed at Paper Book pages 6-12). It was submitted that the sale deed could not be executed at the time when the assessee had purchased the plot from Smt. Lilawati Kapur in 1987 and also when the assessee had sold the property to Smt. Santosh Sareen in 1991, as the plot was on leasehold. The Ld. AR further submitted that subsequently in 2009, the Noida authority accorder the approval for transfer and

consequent to such approval for transfer, Smt. Santosh Sareen, the buyer, approached the assessee to get the Sale Deed executed in her favour on the basis of the General Power of Attorney held by the assessee from the original allottee Smt. Lilawati Kapur. Thus, the sale deed executed on 23.06.2009 in favour of Smt. Santosh Sareen was in the capacity of the GPA Holder and, thus, it was not appropriate for the AO to consider the sale of this property in the hands of the assessee in 2009.

3.1 The Ld. AR further submitted that during the course of assessment proceedings, the assessee requested the AO to issue notice u/s 133(6) of the Act to Smt. Santosh Sareen, and the address of the party was also provided by the assessee to the AO. It was submitted that in response to the notice issued by the AO u/s 133 (6) of the Act, Smt. Santosh Sareen had filed a reply dated 12.03.2013 (placed at Paper Book page 66), whereby she confirmed that she had purchased the property and had taken the possession of the property on 03.08.1991. It was further submitted that along with the said reply, Smt. Santosh Sareen had also filed the Acknowledgment of ITR along with the computation of income in respect of A.Y. 2010-11 (Paper Book pages 110 – 111) and had also furnished copy of her bank

statement, her post office saving account, her demat account, her PAN allotment letter, wherein also the address of Smt. Santosh Sareen has been mentioned as A-34, Sector-30, Noida (Paper Book pages 113 – 123). It was submitted by the Ld. AR that a perusal of the computation of income of Smt. Santosh Sareen for A.Y. 2010-11 would show that during the year under consideration, Smt. Santosh Sareen has further sold the property, and in the computation of income under the head 'capital gains', she has also shown the acquisition of the property to have taken place in 1991 only, and has further shown the payment of freehold duty during the year under consideration. It was further submitted that Smt. Santosh Sareen has, thereafter, again filed a reply on 18.03.2013 before the assessing officer whereby she has also submitted the bank statements available with her along with her PAN details.

3.2 It was further submitted by the Ld. AR that the fact that the possession of the property was already handed over to Smt. Santosh Sareen in 1991 also corroborates the fact that the transfer of the property had already taken place in the year 1991, and not in the year in which the sale deed has been executed by the assessee as the GPA-Holder. The Ld. AR invited our attention

to the sale deed executed on 23.06.2009 (placed at Paper Book page 15) whereby the seller is Smt. Lilawati Kapur, the original owner, and the assessee has executed the sale deed as her general power of attorney holder. On the basis of this it was contended that even if it is assumed that sale has taken place on 23.06.2009, still the assessee cannot be considered as a seller so as to charge capital gain in his hand on the basis of this sale deed. It was submitted that the fact that the assessee or Smt. Santosh Sareen could not produce their bank statements or ITRs for the year 1991 cannot be the basis for an drawing adverse inference especially considering the fact that the said records being almost 20 years old were difficult to be traced.

3.3 It was further submitted that the agreement to sell was executed by the assessee in the year 1991 itself and the sale deed was executed in the year 2009 only for the reason that the Smt. Santosh Sareen had to further sell the property and for that purpose she wanted to convert the leasehold property into freehold property.

3.4 As regards the application of Section 50C of the Act by the AO, which has been upheld by the Ld. CIT (A), it was submitted by the Ld. AR that the provisions of the said section were

introduced in the Act by Finance Act, 2002 with effect from 01.04.2003. Since, in the case of assessee, the property was transferred in the year 1991, the provisions of the said section will also not be applicable. As regards the adverse observations made by the AO in the assessment order as well as the in the remand report and the by the Ld. CIT (A), it was submitted by the Ld. AR that the said observations are contrary to the facts prevailing in assessee's case. The Ld. AR contended that the findings of the AO as well as the Ld. CIT (A) were based on incorrect facts and findings and, thus, were liable to be reversed.

4.0 In reply, the Ld. Senior Departmental Representative (Sr. DR) supported the orders passed by the Authorities below. It was contended that the Sale Deed having been executed by the Assessee during the year under consideration, the AO was justified in considering the transfer in this year and computing capital gain tax accordingly. The Ld. Sr. DR placed reliance on the order passed by the Authorities below. It was contended that both the AO and the Ld. CIT (A) has examined the issue and the facts in detail and, therefore, no interference was called for on the issue.

5.0 We have considered the rival submissions and have also perused the material on record. On going through the records, we note that the assessee has purchased a plot bearing no. A-34, Sector-30, Noida from Smt. Lilawati Kapur in terms of the agreement to sell dated 22.06.1987. The assessee also obtained a General Power of Attorney in his favour from Smt. Lilawati Kapur. The assessee, thereafter, constructed a house having only the ground floor thereon. Thereafter, the assessee sold the property to Smt. Santosh Sareen through an agreement to sell dated 03.08.1991 for a sum of Rs.4,55,000/- which was received by cheque. In the year under consideration, Smt. Santosh Sareen obtained approval for the transfer of the above plot from the Noida Authority in her favour and asked the assessee to execute a proper Sale Deed in her favour, being the General Power of Attorney holder of Smt. Lilawati Kapur, the original owner. The assessee, accordingly, executed the Sale Deed in his capacity as the General Power of Attorney holder as is evident from the Sale Deed (placed at Paper Book Pages 13-45) executed on 23.06.2009. The assessing officer has assumed this as sale by the assessee during the year and has taxed the capital gain in the assessee's hand. From the facts, it is clear that the assessee had

purchased the property through an agreement to sell in 1987 and had sold the same again through an agreement to sell in 1991. The assessee had given possession to the buyer in the year 1987. The buyer had also confirmed the same in response to the enquiry conducted by the AO. The buyer has also filed evidences to support that she was in possession all along from the year 1991. The AO has not brought any material to the contrary to rebut the evidences submitted by the assessee and by the buyer Smt. Santosh Sareen. The contention of the assessee is supported by the definition of transfer in section 2(47) clause (v) of the Act whereby 'transfer' in relation to capital assets includes any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act. As per section 53A of the Transfer of Property Act, as applicable in the year 1991, an agreement to sell need not be registered if the transferee has, in part performance of the contract, taken possession of the property and continues in possession of the same. In the present case, the transferee has taken possession in the year 1991 and has continued to be in possession of the property and hence, transfer was complete in

the year 1991 in view of clause (v) of section 2(47) of the Income Tax Act.

5.1 We also note that in the sale deed the total consideration has been stated at Rs. 4,50,000/- and the details of the cheque and mode of payment is stated in this sale deed at internal page 8 Paper Book page 24. This fact supports the case of the assessee that the assessee had sold this property way back in the year 1991. In view of these facts, the AO and the Ld. CIT (A), both, were not justified in drawing an adverse inference merely on the ground that the assessee had failed to produce the bank statement for the year 1991. From the assessment order, it is also evident that the assessing officer has made a direct inquiry from the buyer Smt. Santosh Sareen and she also has confirmed having bought this property from the assessee in the year 1991.

5.2 The allegation of the assessing officer that the property has been sold in the year 2009, when the assessee has executed the sale deed also ignores the fact that the sale deed has been executed by the assessee in the capacity of General Power of Attorney holder and not as an owner. This fact is evident from the sale deed itself which is between Smt. Lilawati Kapur, the

original owner as the seller and Smt. Santosh Sareen as the buyer.

5.3 In view of the above facts, we hold that the sale of this property by the assessee has taken place in the year 1991 and the AO was not justified in taxing the capital gain arising on the sale of this property in the year under consideration. As regards invoking the provision of section 50C of the Act, the same will come to be attracted only when sale has taken place during the year. As we have held that the sale by the assessee stood completed in the year 1991, there is no question of invoking the provision of section 50C. Accordingly, the addition made by the assessing officer of Rs. 78,40,062/- as long term capital gains is directed to be deleted.

6.0 In the final result the appeal of the assessee is allowed.

Order pronounced in the open court on 18th March, 2019.

Sd/-

**(R.K. PANDA)
ACCOUNTANT MEMBER**

Sd/-

**(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER**

Dated: 18th March, 2019

Copy forwarded to: -

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

True Copy

By Order

ASSTT. REGISTRAR

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	

