

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR (SMC)**

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER

I.T.A. No. 638/Asr/2017

Assessment Year: 2014-15

Suraj Parkash [Through LRs Vishal Dheer & Meenu Kapoor] c/o Krishna Shakti Bhog Bhandar, Mandir Mata Ji Lal Bhawan, Rani Ka Bagh, Amritsar [PAN: AHDPP 5706G] (Appellant)	vs.	Income Tax Officer, Ward-5(5), Amritsar (Respondent)
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Appellant by : Sh. K. R. Jain (Adv.)

Respondent by: Sh. Charan Dass (D.R.)

Date of Hearing: 04.04.2019

Date of Pronouncement: 30.04.2019

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee agitating the Order by the Commissioner of Income Tax (Appeals)-2, Amritsar ('CIT(A)' for short) dated 03.08.2017, dismissing the assessee's appeal contesting his assessment u/s. 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) dated 16.12.2016 for Assessment Year (AY) 2014-15.

2. The appeal raises three issues, which we shall take up in seriatim. The first issue is with regard to the correct amount of capital gains chargeable to tax u/s. 2(24)(vi) r/w s. 45 of the Act in the hands of the assessee. The assessee received a

compensation of Rs.19,57,791/- on the acquisition of his land by the Central Government, i.e., after deducting tax at source thereon at the rate of 10%. The corresponding long-term capital gain (LTCG), returned at Rs.6,44,499 was, however, at one-half share in the property, even as the assessee claimed credit for the full amount of TDS, i.e., Rs.1,95,780 (PB pgs. 19-21). This was considered contradictory, and being not satisfactorily explained, with the assessee having received the full amount of compensation (Rs.19.58 lacs), the entire capital gain was brought to tax in his hands. In appeal, it was explained that the assessee, along with five others, purchased (agricultural) land at village Bhapotwala Kalan, Pargana Jawalpur, Teh. & Distt. Haridwar, on 15.11.1998, as under:

1. Smt. Ram Piyari (Mother)
2. Smt. Rekha Rani (Wife)
3. Smt. Neelam
4. Sh. Satinder Kumar
5. Sh. Ashwani Kumar

Each of the co-owners had an equal (1/6th) share therein. As, however, Smt. Ram Piyari (mother) and Smt. Rekha Rani (wife) died on 02.03.2008 and 25.10.2007 respectively, their shares devolved on the assessee (in-as-much as they did not have any other legal heir), who thus became owner of one-half share in the property. A General Power-of-Attorney (GPOA) had earlier been executed by the other five co-owners in assessee's favour on 21.5.2004 (copy of record). It is under these circumstances that the entire amount came to be received by the assessee, and which also explains the deduction of tax at source thereon. The claim of TDS at full amount, despite the assessee being the owner of one-half share; the balance amount being received only for and on behalf of the other three co-owners, is valid

in law, as explained in *CIT v. Ganesh Narayan Brijlal Ltd.* [2017] 292 CTR 518 (Cal).

3. Before me it was claimed that the assessee had paid one-half share belonging to the other three co-owners to them in cash, affidavits from two of whom, i.e., Sh. Ahwani Kumar, Chella Mata Lal Devi, and Smt. Neelam (wife of Sh. Ashwani Kumar), had been furnished. The Assessing Officer (AO) was bound by these affidavits, i.e., unless he disproves them through cross examination, for which reliance was placed on *Mehta Parikh & Co. v. CIT* [1956] 30 ITR 181 (SC). The assessee, it was admitted by the Id. counsel for the assessee, Sh. Jain, on enquiry by the Bench, had been unable to adduce affidavit from the fourth co-owner, i.e., Sh. Satinder Kumar. The Id. Departmental Representative (DR), Sh. Charan Dass, would object, stating that the terms of the GPOA dated 21.5.2004, on the basis of which the assessee claims to have received the entire amount, are explicit, leaving one in no manner of any doubt. *The assessee cannot only sell, lease, mortgage, etc. the shares of the other co-owners, but also gift the same, as well as raise structure thereon.* There has clearly been relinquishment/transfer of their rights by the other co-owners in the assessee's favour vide the said GPOA, and the amount therefore received by him is in his own right and not for and on behalf of another/s.

4. I have heard the parties, and perused the material on record.

The issue arising, thus, is the correct amount at which the capital gain is to be assessed in the assessee's hands, i.e., at one-half share, as claimed by the assessee, or in whole, as contended by the Revenue. The assessee's case is based on the amount having been received for and on behalf of the other three co-owners, being only by virtue of GPOA dated 21.5.2004.

The assessee's case is clearly untenable, whichever way one may look at it. *To begin with, what is the basis or the reason for executing the GPOA?* Sh. Jain, on being so asked during hearing, would submit that the same was to facilitate acquisition and receipt of compensation there-against. This is surprising as the attorney does not state so and, rather, there was no need to, in that case, execute a GPOA. Where so, only a simple POA would suffice. Why, the amount of compensation, i.e., the consideration for transfer in such as case being fixed and, further, not disputed, there is no need to execute any attorney, much less a GPOA, the purpose of which is itself not clear, except where construed as an instrument whereby the other co-owners divest themselves of all their rights in the subject property, including possession, in the assessee's favour. Sh. Jain could not furnish any satisfactory answer/s. He, in fact, could not even state the date or the period when the acquisition proceedings commenced; the GPOA having been executed on 21.5.2004, i.e., nearly 10 years prior to the receipt of the compensation.

Continuing further, even assuming a power of attorney was executed, describing it as a GPOA, why should, one may ask, it authorize the assessee to mortgage or lease the subject property; the same being nowhere envisaged by the co-owners. Why should it, again, authorize the assessee to raise a structure/s thereon? Not only that, the GPOA also authorizes the assessee to gift the same, which could only be of one's own property. Sh. Jain had no answers to any of these questions put forth by the Bench during hearing. It is clearly an instrument of transfer, even the purpose of executing which has not been explained, much less satisfactorily.

It is then claimed that the amount has been paid over to the three co-owners at the rate of 1/6th each, filing affidavits from two of them (PB pgs. 36, 37). The assessee's written submissions before the AO and the Id. CIT(A) are on record (PB pgs. 38; 1A & 1B). *There is no reference therein of any payment having been made*

of the balance one-half share, received by the assessee on their behalf, by the assessee to the other co-owners. There is also no statement in this regard in the return (or computation) of income (PB pgs. 19-21). There is accordingly no reference to this argument in their orders by the Revenue authorities; the furnishing of affidavits before the AO itself being after the close of the hearing, with there being nothing to show that the same were furnished upon being asked by the AO, which could not be the case in view of no plea as to payment of their shares having been made by the assessee before him. Then, even so, the production of the deponents for cross-examination, would be the first plea that the assessee shall adopt in advancement of his case before the first appellate authority. In other words, the same is only a plea being now raised, with a view to take advantage of the fact of being not crossed. That is, a fact, which would be ordinarily be the first thing that an assessee would state, has been raised for the first time only at the second appellate stage. Why? What value, then, the said affidavits, which are no more than self-serving statements? Further, the 'affidavits' are dated 15.12.2016, so that, clearly, there is no contemporaneous evidence of payment. Any person settling a claim would obtain a proper receipt, duly witnessed, absence of which is intriguing. Why did, one wonders, the assessee, whose accounts are audited, not pay by cheque/s, obtaining receipt/s, stating the nature/purpose thereof, as any reasonable person would? The payment/s, rather, ought to be reflected in the assessee's accounts, which is admittedly not the case. There is further nothing on record to suggest that the assessee had the requisite cash available with him on the relevant date, i.e., 15.02.2014, on which date the amount is stated to be paid (to the co-owners). Further still, the affidavits being much after the date of the death of the assessee on 06.11.2015, how did his legal representatives, prosecuting the assessee's appeal before the Tribunal, know that the amount/s had (or had not) been paid by the assessee to the other co-owners? That is, what is the basis of their

knowledge? Clearly, the legal representatives, bereft of any positive material with them, are only filing the affidavits by way of defending the assessee's return of income as filed. The filing of the affidavits also confirms that even the payees have no evidence of payment, so that, clearly, no document or receipt was executed upon payment, which is incomprehensible in the normal course of events. Also, how do they remember the date of payment, stated to be 15/2/2014, i.e., nearly three years after the receipt? Needless to add, there is no mention in the affidavits, or even otherwise any explanation by the deponents, of the basis or the reason for executing GPOA and, further, *with such absolute terms*. There is also no positive evidence on record of the availability of cash, in the stated sums, with the 'payees'. Rather, being a capital receipt, in lumpsum, received by the couple, the avenue of its' utilization by them, viz. deposit in bank or purchase of property, etc., which is not stated, would itself prove the receipt.

The assessee's reliance on the decision in *Mehta Parikh & Co.* (supra) is misplaced. An affidavit is, firstly, not an evidence. In fact, the same can be furnished only at the instance of the court and, further, to state such facts as are only in the personal knowledge of the deponent, being not amenable to being documented or otherwise evidenced, which is clearly not so in the present case. If a GPOA was executed even when it was not required, it is most surprising that the parties did not deem it proper to settle the accounts/dues upon receipt of money realized by virtue of the said GPOA. The affidavits, which are only from two (of the three) payees are, in the given facts and circumstances, of no consequence and, even otherwise, do not qualify as valid affidavits inasmuch as they lack particularity of facts. The decision in *Mehta Parikh & Co.* (supra) is not applicable in-as-much as the addition in that case was *qua* a cash deposit, the onus to establish which is primarily on the Revenue. The receipt of the compensation, in full, is admitted in the present case, and the burden is on the assessee to show that the

same was not received in his own right. There is no explanation in the affidavit as to why a GPOA was executed and, further, allowing the assessee the right to gift the subject property. A gift could only be of one's own property and of one's own free will. Rather, in the given circumstances, including conduct; the material on record; and the preponderance of probabilities, even assuming that payment/s was made, the same can only be regarded as an application of income. Nothing thus turns on the non cross-examination of the affidavits, being only self-serving documents, created later. Even as the matter is principally factual, to be decided on the basis of findings of fact, having regard to the totality of the facts and circumstances of the case, reference may be made to the decision in *Ramesh Khosla v. ITO* [1985] 155 ITR 556 (P&H), wherein, again, the affidavit/s was regarded by the Hon'ble Court, in the given facts and circumstances of the case, not rebutted, as a self-serving document, bereft of any evidentiary value. The affidavit, it explained, is to be considered along with the other material, and not *de hors* the same, i.e., in arriving as the findings of fact. In fact, even where the affidavit is found to be valid, its non cross-examination would only lead to a remission back to the file of the AO for the purpose (*ITO v. M. Pirai Choodi* [2011] 334 ITR 262 (SC)).

Finally it may possibly be contended that the GPOA being not a registered document, the same cannot be in law given cognizance to in view of the decision in *CIT v. Balbir Singh Maini* [2017] 398 ITR 531 (SC). The same is a valid argument, albeit with respect to a transfer u/s. 2(47)(v) of the Act. The transfer in the instant case, on the other hand, is by way of relinquishment of the rights in the property by the other co-owners without any consideration, i.e., a gift by definition, which in fact is even prior to the date/s on which a part of the property is stated to have devolved on the assessee on the death of his wife and mother. The same, accordingly, constitutes a transfer u/s. 2(47)(i) of the Act. It is for this reason that

the cost of acquisition of the land has been taken as that to the said co-owners. Section 49 provides for the cost to the previous owner as the deemed cost of the capital asset transferred to the assessee, which includes a gift u/s. 49(1)(ii). The said decision would thus have no application in the facts and circumstance of the instant case.

5. In view of the fore-going, I have no hesitation in upholding the assessment of the capital gains on the entire property, as against one-half share therein, in the hands of the assessee. Needless to add, the assessee shall be allowed credit for the full amount of the tax deducted at source from the consideration paid to him. I decide accordingly.

6. The next issue is with regard to the disallowance u/s. 2(24)(x) r/w s. 36(1)(va) of the Act, at Rs.81,722. The same is *qua* Employees' contribution to the Employee Welfare Funds, being the Employees' Provident Fund (EPF) and the Employees' State Insurance Fund (ESI), which is deemed as income of the assessee- employer u/s. 2(24)(x) of the Act, deduction of which is conditional to the payment to the concerned fund within the time allowed under the respective statute and the rules framed there-under, being the 20th and 21st of the subsequent month for which the employees' deduction by the employer *qua* EPF and ESI respectively for a particular calendar month, placing reliance on *CIT v. Gujarat State Road Transport Corporation* [2014] 366 ITR 170 (Guj).

7. I have heard the parties. The facts are not in dispute; the payment in each case has been made by the due date of filing the return for the relevant year u/s. 139(1), which stands extended upto 30.11.2014 (vide CBDT notification dated 26/9/2014). The Revenue's case is unexceptional. So, however, the Hon'ble jurisdictional High Court has in the case of *CIT v. Hemla Embroidery Mills (P.)*

Ltd. [2014] 366 ITR 167 (P&H), taken a view that the deduction in respect of Employees' contribution to the employees' welfare funds, which is deemed as income of the employer u/s. 2(24)(x), provided for u/s. 36(1)(va), shall be deductible where the payment is made in terms of section 43B of the Act, i.e., by the due date of the filing the return. As such, the assessee is entitled to deduction in its respect in view of the said binding judicial precedent. I decide accordingly.

8. The third and last Ground is with regard to the assessment of other income, including bank interest, not disclosed by the assessee per his return of income, in the sum of Rs.19134. The only plea raised during hearing by Sh. Jain was that the bank interest is exigible to deduction u/s. 80TTA of the Act. Toward this he would draw attention to the assessee's audited accounts, clearly referring to the impugned sum as bank interest (at Rs.14546) and amount received against property sale (Rs.4588) (PB pgs. 22-35, at Pg. 34). Deduction u/s. 80TTA is only exigible on bank interest. Accordingly, the assessee be allowed deduction u/s. 80TTA *qua* the said bank interest. I decide accordingly.

9. In the result, the assessee's appeal is partly allowed.

Order pronounced in the open court on April 30, 2019

Sd/-

(Sanjay Arora)

Accountant Member

Date: 30.04.2019

/GP/Sr. Ps.

Copy of the order forwarded to:

- (1) The Appellant: Suraj Parkash Through L/H Vishal Dheer & Meenu Kapoor
C/o Krishna Shakti Bhog Bhandar, Mandir Mata Ji Lal Bhawan,
Rani Ka Bagh, Amritsar
- (2) The Respondent: Income Tax Officer, Ward-5(5), Amritsar
- (3) The CIT(Appeals)-2, Amritsar

- (4) The CIT concerned
- (5) The Sr. DR, I.T.A.T

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By Order