

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC" MUMBAI**

**BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4819/MUM/2017
Assessment Year: 2013-14**

Shri Bonifacio D'souza,
Shop No. 1, La Link CHS
Ltd, Jamuna Sunder Lane,
Orlem, Malad West,
Mumbai-400064.

PAN No. AUOPD5097J
Appellant

ITO-30(1)(2),
Pratyakshakar Bhavan,
Vs. Bandra Kurla Complex,
Mumbai-400051.

Respondent

Assessee by : Mr. Haridas Bhat, AR
Revenue by : Mr. Chaitanya Anjaria, DR

Date of Hearing : 09/05/2019
Date of pronouncement: 06/08/2019

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2013-14. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-41, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

1. On the facts and circumstances of the case an in law, the Ld. CIT(A) erred in confirming the addition of Rs.26,75,724/- in the income of Mr. Bonifacio D'

souza being the amount of long term capital gains on the immovable property transferred during the year by invoking Section 50C of the Income Tax Act.

2. The Ld. CIT(A) failed to appreciate the facts that :
 - a) The appellant has transferred the asset to a relative at a price lower than the market value.
 - b) The difference between the market price and the transaction value is the gift made by the assessee to his relative.
 - c) The relative is covered u/s 56(2)(vi) of the Act.
 - d) The affidavit filed by the appellant, explaining that the transaction was a gift was ignored by CIT(A).

3. Briefly stated, the facts are that the assessee filed his return of income for the assessment year (AY) 2013-14 on 03.01.2014 declaring total income of Rs.3,48,000/-. During the course of assessment proceedings, the Assessing Officer (AO) noticed that the assessee has not shown any capital gains from sale of property ; however, as per ITS details, the assessee had sold an immovable property for Rs.28,00,000/- under the registration No. 2982/2012 and the stamp valuation of the property was Rs.41,64,500/-. In response to a query raised by the AO to explain why provisions of section 50C should not be applied in this case, the assessee filed the copy of the sale agreement and purchase agreement along with computation of capital gains and explained that the accountant, through oversight, missed out on including the capital gains while filing the return of income, as the assessee was out of station at that time. The assessee submitted a revised computation of income, calculating the capital gains on sale of property viz. flat No. 804, Malhar Building, Gaurav Garden CHSL, Kandivali West, Mumbai (in short 'Flat No.804') and the same is as under :

Sale consideration	Rs.28,00,000
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Cost of acquisition	Rs.7,09,440
Indexed cost 852/406	Rs.14,88,776
Long Term Capital Gain	Rs.13,11,224

The assessee further submitted before the AO that the property was sold to his brother-in-law and brother-in-law's wife and hence at lower than the market rate and the difference in the amount is gift, which is exempt from tax.

However, the AO was not convinced with the above explanation of the assessee for the reason that the provisions of section 50C are unambiguous and do not discriminate between the sale to a third party or a relative. Thus the AO held that the assessee was required to adopt stamp valuation of Rs.41,64,500/- as full value of consideration for computing the capital gains, which he has failed to do. Therefore, the AO recomputed the Long Term Capital Gains (LTCG) as under :

Full value of consideration	Rs.41,64,500
Cost of acquisition	Rs.7,09,440
Indexed cost 852/406	Rs.14,88,776
Long Term Capital Gain	Rs.26,75,724

The AO further noted that :

“3.6 Accordingly, the long term capital gain of Rs.26,75,724/-, which has not been offered to tax by the assessee in his return of income, is brought to tax and is added to the assessee's total income. The said income has not been offered to tax in the return

of income. The revised computation of income submitted during the course of assessment proceedings cannot be accepted or taken cognizance of as no revised return has been filed by the assessee u/s 139(5) of the Act. Further, the computation of long term capital gain furnished is not voluntary, but has been furnished only after issue of notice u/s 142(1) and also after specific issue raised vide order sheet notings dated 16.11.2015 and 30.11.2015. The contention that the accountant erred in filing the assessee's return of income in his absence is also a futile claim and an after-thought, as the assessee had ample time, to revise his return after filing the original return, which has not been done.”

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). By his order dated 12.05.2017, the Ld. CIT(A) held:

“5. I have considered the submissions of the appellant as well as order u/s 143(3) of the IT. Act. In the assessment order, the Long Term capital gain was computed on sale of flat as per provisions of Section 50C and subjected to tax by the AO. The assessee did not offer any capital gain on sale of the said flat in its return of income. As per deed of transfer [conveyance deed], the premises have been sold and transferred for the price of Rs.28,00,000/-. The transferees have paid in full to the transferor before the execution of the transfer deed. The stamp duty and registration charges payable on the deed of transfer was borne and paid by the transferees which is the norms in any sale transactions. Therefore, to hold the transaction as gift even partially is not at all justified from any angle. In a gift, there is no role of any price or consideration. The plea of partial gift and partial sale is just an after-thought and chance taken by the assessee to minimize the tax liability after being caught. As per transfer deed, the entire price of the premises was paid by the transferees. Therefore, nothing is left to be gifted. The tax liability arises because of application of Provisions of Section 50C on transferor. In view of above, the addition of Rs.26,75,724/- made by the AO as LTCG on sale of flat is hereby sustained. The grounds are rejected.”

5. Before us, the Ld. counsel for the assessee submits that appellant has filed his return of income for the impugned assessment year showing income from business, profession and income from other sources and has paid appropriate tax over the same. It is stated that during the assessment proceedings, the assessee himself agreed to the facts that the income under capital gains had not been offered to tax and the assessee also agreed to pay the tax on the capital gains arising thereon. It is stated that the assessee has transferred the 'Flat No.804' to one of his relative for the sale consideration of Rs.28,00,000/- against the stamp duty valuation of Rs.41,64,500/-. Regarding the action of the AO invoking section 50C of the Act, the Ld. counsel submits that the said property was transferred to the relative below the market rate and the difference between the transaction value and stamp duty value is the gift made by the assessee to the relative. Explaining that the relative is within the definition of section 56(2)(vi) of the Act, it is stated that the difference is not taxable in the hands of the assessee.

In support of the above contentions, the Ld. counsel files a Paper Book (*P/B*) containing (i) documents saying appellant is relative to the recipient of gift, (ii) copy of transfer deed of property transferred during the year and (iii) affidavit by the appellant stating his intentions to gift the property.

It is clarified by him that documents at Sr. No. (i) & (ii) were filed before the AO, whereas the documents at Sr. No. (iii) were filed before the CIT(A).

6. On the other hand, the Ld. DR submits that as per the deed of transfer (conveyance deed), the premises have been sold and transferred for price of Rs.28,00,000/- and the transferees have paid in full to the transferor, before the execution of the transfer deed and finally the stamp duty and registration

charges payable on the deed of transfer was borne and paid by the transferees. Thus it is submitted by him that to hold the transaction as gift even partially is not at all justified from any angle as examined by the Ld. CIT(A). Supporting the order of the Ld. CIT(A), the Ld. DR submits that the plea of partial gift and partial sale is just an afterthought. As per the transfer deed, the entire price of the premises was paid by the transferees and there is nothing left to be gifted. Thus the Ld. DR submits that the order passed by the Ld. CIT(A) be affirmed.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given below.

In the instant case, the assessee has transferred to his relative 'Flat No.804' for sale consideration of Rs.28,00,000/-. As admitted by the assessee in the 'statement of facts' filed before the Ld. CIT(A) along with Form No. 35 dated 11.02.2016, his accountant erroneously omitted to record the said entry in his books of accounts and hence the same could not be offered to tax while filing the return of income on 03.01.2014.

As per the deed of transfer dated 11.04.2012, the assessee (transferor) sold the above immovable property to Smt. Nilufer Casmiro Lobo & Shri Casmiro Leopold Lobo (the transferees) for a sum of Rs.28,00,000/-. The assessee received from the above transferees a sum of Rs.3,00,000/- on 27.02.2012 by 2 cheques both dated 27.02.2012 No. 113041 and 113042 drawn in favour of the transferor on the Zoroastrian Bank Ltd. together with the Pay Order of Rs.25,00,000/- of Zoroastrian Bank Ltd., paid by the said bank on behalf of the transferees aggregating in all to Rs.28,00,000/- (*Ref.: page 16 of the P/B*).

The assessee has filed an affidavit dated 12.05.2017 (*Ref: page 20 of the P/B*) which is reproduced below:

"AFFIDAVIT

I, Shri Bonifacio D'Souza, s/o Bernardo D'Souza, residing at Gaurav Malhar, Gaurav Garden, 96/97 Bunder Pakhadi Road, Kandivali West, Mumbai 400067 having PAN AOUPD5097J, Deponent, do hereby affirm and state as follows:

Out of my natural love and affection I had gifted to my relatives, the property situated at Gaurav Malhar, Gaurav Garden, 96/97 Bunder Pakhadi Road, Kandivali West, Mumbai 400067 to Smt. Nilufer Casmiro Lobo (wife of my wife's brother) and Shri Casmiro Lobo (my wife's brother), both residing at 782-Patef Building, M. Joshi Road, Parsi Colony, Dadar, Mumbai 400014. I had collected Rs.28,00,000/- from them.

Further I have registered the transfer of property as sale deed and registered same on 11th April, 2012.

My intention was to gift he property, to my relatives, however due to my limited knowledge of the registration procedures I had mistakenly registered the transfer as sales deed.

I hereby solemnly affirm and state that whatever stated above is true and correct to the best of my knowledge.

Solemnly sworn and signed before me on 12th day of May, 2017."

7.1 In the grounds of appeal filed before the Tribunal the assessee has referred to section 56(2)(vi) stating that the relative is cover under the above provisions of the Act. The said section deals with gift of money exceeding Rs.50,000/- received between 01.04.2006 and 30.09.2009 by an individual or a HUF from any person or persons. As per the above section (w.e.f. 01.04.2007) and subsequently amended w.e.f. 01.10.2009, - any sum of money exceeding

Rs.50,000/- which is received without consideration by an individual or a Hindu undivided family from any person or person between 1.4.2006 and 30.9.2009 has been made, in its entirety, chargeable to tax under the head 'Income from other sources', subject to the exceptions enacted in the proviso to that section 56(2)(vi).

It is mandated by the proviso to section 56(2)(vi) that the provisions of section 56(2)(vi) shall not apply to any sum of money received—

- a. from any relative [as defined]; or
- b. on the occasion of the marriage of the individual; or
- c. under a will or by way of inheritance; or
- d. in contemplation of death of the payer.
- e. from any local authority as defined in the Explanation to section 10(20);
or
- f. from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in section 10(23C); or
- g. from any trust or institution registered under section 12AA.

According to the Explanation to section 56(2)(vi), the term 'relative', for the purposes of that section 56(2)(vi), means—

- i. spouse of the individual;
- ii. brother or sister of the individual;
- iii. brother or sister of the spouse of the individual;
- iv. brother or sister of either of the parents of the individual;
- v. any lineal ascendant or descendant of the individual;
- vi. any lineal ascendant or descendant of the spouse of the individual;

vii. spouse of the person referred to in clauses (ii) to (vi).

We are concerned here with AY 2013-14.

7.2 The assessee in the present case has filed an affidavit dated 12.05.2017 stating therein that he had gifted to his relatives the above property. The assessment in the present case was initiated by the AO on 11.09.2014 by issuance of notice u/s 143(2). The assessment was completed by the AO on 12.01.2016. If indeed it was a gift, the assessee could have filed it before the AO. Further, the Ld. CIT(A) passed the appellate order in the case of the assessee on 12.05.2017. The assessee filed the above affidavit before the CIT(A) on 12.05.2017.

7.3 In the case of a gift, the following ingredients are required to be satisfied. There has to be a transfer ; the transfer should be without any consideration; there must be someone to make the gift voluntarily who will be termed as a donor and a person who received it must accept the same. The donor should be a person who is competent to make a gift. If the donee accepts it, then it becomes a complete transaction. As far as immovable property is concerned it requires an execution of document. The document should be signed by the donor as well as the donee and should be attested by at least two witnesses and should be registered. If any of the ingredients as stated above are lacking, the gift cannot be treated as a valid gift under the law. As far as registration is concerned in case of an immovable property, the registration is a must and also stamp duty is payable on the gift deed.

In the instant case, there is no gift deed as it has not been filed before the AO or CIT(A) or the Tribunal.

In absence of a gift deed, the affidavit dated 12.05.2017 filed by the assessee loses significance.

7.4 Section 50C of the Act makes a special provision for determining the full value of consideration in cases of transfer of immovable property. It provides that where the consideration declared to be received or accruing as a result of the transfer of land or building, is less than the value adopted or assessed or assessable by any authority of a State Government (i.e. "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 be deemed to be the value of the consideration, and capital gains shall be computed on the basis of such consideration u/s 48 of the Act.

As per section 45(1) any profits or gains arising from the transfer of a capital asset effected in the previous year, shall be chargeable to Income tax under the head 'Capital Gains' and shall be deemed to be the income of the previous year in which transfer took place unless such capital gain is exempt under provisions of the Act.

7.5 The contentions of the assessee are that provision of section 50C is not applicable because (i) he has transferred the above immovable property to one of his relative and (ii) the difference between the transaction value and stamp duty value is the gift made by the assessee to the relative.

The above contentions are farfetched because the assessee has not filed any gift deed either before the AO or CIT(A) or the ITAT. The attempt to rope in section 56(2)(vi) by the assessee fails because there is no gift deed. All the more, as mentioned earlier, the assessee had not disclosed any capital gains

from the sale of the above property. Only after the AO noticed that the assessee had sold an immovable property as per ITS details for Rs.28,00,000/- under Registration No. 2982/2012 and issued a notice u/s 142(1) dated 11.09.2015 and thereafter followed it on 16.11.2015, the assessee filed a revised computation of income working out the capital gains i.e. LTCG at Rs.13,11,224/- and claimed that provisions of section 50C is not applicable as it was sold to his brother-in-law and brother-in-law's wife. The fact remains that the computation of LTCG filed by the assessee is not voluntary. It has been furnished only after the issue of notice u/s 142(1) dated 11.09.2015 issued by the AO and followed thereafter by order sheet notings dated 16.11.2015.

The Hon'ble Supreme Court in *Vimal Chand Ghevarchand Jain & ors.vs. Ramakant Eknath Jajoo*, 2009 (5) SCALE 59 has observed while dealing with the construction of a commercial contract as under :

"A document, as is well known, must be construed in its entirety".

The assessee in the present case has rightly registered the transfer of property on 11.04.2012 as 'Sale Deed'. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.

Section 50C makes it obligatory on the part of the AO to treat the value adopted by the stamp valuation authority as the deemed sale consideration received or accrued as a result of transfer.

The Hon'ble Supreme Court in *Chuharmal v. CIT* (1988) 172 ITR 250 (SC) pointed out to the following guidelines in *CIT v. Durga Prasad More* (1971) 82 ITR 540 (SC), which reads as under :

“Science has not yet invented any instrument to test the reliability of the evidence placed before a court or tribunal. Therefore, the courts and tribunals have to judge the evidence before them by applying the test of human probabilities. Human minds may differ as to the reliability of a piece of evidence. But in that sphere the decision of the final fact finding authority is made conclusive by law.”

Examined on the touch-stone of the afore-noted legal principles and keeping in mind the facts and circumstances of the case, we uphold the order of the Ld. CIT(A).

8. In the result, the appeal is dismissed.

Order pronounced in the open Court on 06/08/2019.

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 06/08/2019

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai