

THE INCOME TAX APPELLATE TRIBUNAL
D” Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Ravish Sood (JM)
I.T.A. No. 6572/Mum/2018 (Assessment Year 2009-10)

M/s. Devendra R. Goyal HUF Flat No. A/001, Ground Flr New Highway Park CHS Thakur Complex Kandivali East Mumbai-400101. PAN :AACHD6376E (Appellant)	Vs.	ITO-33(1)(4) Bandra Kurla Complex Bandra East Mumbai-400051. (Respondent)
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Assessee by	Shri Amar Ghilot
Department by	Shri D.G. Pansari
Date of Hearing	24.6.2019
Date of Pronouncement	29.8.2019

ORDER

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against order of learned CIT(A) dated 8.8.2018 and pertains to assessment year 2009-10.

2. The grounds of appeal read as under :-

The following grounds are without prejudice to each other :

1. In the facts and circumstances of the case and in law, the LD AO and CIT(A) has erred in reopening the assessment completed u/s. 143(3) of the Income Tax Act, ss. reopening was only on the basis of mere change of opinion, without consider facts and circumstances of the Case.
2. The LD AO and CIT(A) has erred in treating the property as land without considering the fact and circumstances of the case.
3. The LD AO and CIT(A) erred in treating the appellant as owner of the property without considering the facts and circumstances of the case.
4. The LD AO and CIT(A) erred in holding that the appellant has transferred the property in the nature of land to the buyer.

5. The LD AO has erred in not appreciating the fact that the appellant has sold the disputable property, hence provisions of Sec 50C is not applicable.
 6. The Appellant craves leave to add/alter any of the grounds of appeal on or before the date of final hearing.
3. Brief facts of the case are as under the assessment in this case was completed under section 143(3) of the act on 31.3.2009. Subsequently the assessment was reopened for the following reasons recorded :-

“In this case, assessment u/s 143(3) of the IT.Act, 1961 was completed on 22.11.2011 assessing the total Income at Rs.6,17,720/- against the returned Income of Rs.6,07,720/-.

In this case specific information is received from ITO-20(2)(3) stating that during the course of re-assessment proceedings in the case of Shri Nisar Imamuddin Patel (AOCPP2481G) for AY 2009-10 assessed in that charge, it is seen that Shri Nisar Imamuddin Patel through his duly constituted attorney Shri Devendra R Goyal as karta & Manager of M/s Devendra R Goyal HUF has entered into sale agreement for sale of property to Ashok Dvendra Goyal for a consideration of Rs.36,00,000/- whereas the market value of the said property as per Stamp Duty Authority is Rs.1,51,38,000/-, Shri Nisar Imamuddin Patel has denied that he has not received any amount of the sale consideration, however in order to safe guard the interest of revenue, protective assessment is completed in the case of Shri Nisar Imamuddin Patel, Therefore, substantive assessment needs to be done in the case of Devndra R Goyal HUF Further, on perusal of the assessment records of Devendra R Goyal HUF, it is seen that while assessing the capital gains in respect of Devendra R. Goyal HUF, the provisions of section 50C of the I.T. Act 1961 have been overlooked and thereby the income to the tune of Rs. 1,51,38,000/- has escaped assessment.

Considering the above facts involved, I have reason to believe that Income of Rs. 1,15,38,000/- (15138000-3600000) has escaped assessment for AY, 2009-10 in the case of the assessee within the meaning of section 147 of the Income-tax Act, 1961.”

4. Thereafter assessing officer also computed the capital gain by invoking the provisions of section 50C.
5. Upon assessee's appeal Ld CIT(A) considered the assessee's challenge to the reopening. He noted the assessee submission that the issue was examined by the Assessing Officer in the original assessment. In this regard learned CIT(A) observed that it is true that assessing officer vide letter dated 23/3/2015 raised the issue of 50C during the original assessment but learned CIT(A) wondered as to what was the reply of the assessee in response. The

learned CIT(A) never referred to the assessment records but observed that the reply of the assessee can be seen from paragraph 5 of the assessment order, that it was not actually sale of property but sale of development right. Learned CIT(A) opined that by submitting this the assessee misguided the assessing officer. The ld. CIT(A) held that it cannot be said that assessing officer examined the applicability of section 50C as there was misrepresentation. Regarding the nature of transaction/transfer property. Learned CIT(A) rejected the assessee's claim that there was a change of opinion and he also rejected the assessee's reliance upon the Apex court decision in the case of CIT vs. Kelvinator India Ltd .

6. Against this order assessee is in appeal before us.

7. We have heard both the Counsel and perused the records. It transpires that in this case assessee has entered into an agreement with Shri Nisar Patel, who is the owner of the property for the said property by the agreement dated 30.11.2006. The assessee has submitted that this was a development agreement. Thereafter assessee as power of attorney holder of Shri Nisar Patel has sold the property to M/s. Ashoka Developers on 26.8.2008. Assessee has explained this before the assessing officer in the original assessment that this was not a sale by him but it was a development agreement. That there is no case for invocation of section 50 C in as much as this was not a case of property sale but of transfer of development right. The assessing officer had accepted this explanation. The case of the assessee is that after due examination assessing officer has considered the issue and consciously held that provisions of section 50C are not applicable. When this was pointed out to the assessing officer in the reassessment proceedings, he has observed that this was inadvertently overlooked.

8. The learned CIT(A) is finding that this as non application of mind by the assessing officer and that the Assessing Officer did not examine the applicability of section 50C.

9. In our considered opinion on the facts of the case when the assessee was not the owner of the property but he has transferred the property as power of attorney holder of Shri Nisar I. Patel, the explanation that the same was a development agreement was accepted by the Assessing Officer in the original assessment. The acceptance of assessee's explanation that this was not actually a sale of property but transfer of development right cannot be said to be non-application of mind by the assessing officer. The stand of the Assessing Officer now that it was inadvertently overbooked is actually a case of change of opinion. In fact it is a case of application of provision of section 263 by the assessing officer himself that the earlier order of the Assessing Officer is erroneous and prejudicial to the interest of Revenue. Hence this plank cannot enable the Assessing Officer to reopen the assessment. Moreover, learned CIT(A) is blowing hot and cold. He is accepting that vide letter dated 23.3.2015, the Assessing Officer asked the assessee about the applicability of section 50C. Thereafter learned CIT(A) is observing that application of section 50C was not examined by the Assessing Officer. This is a shifting stand taken by learned CIT(A) not sustainable in law.

10. Furthermore, in the reason of reopening it is itself mentioned that Shri Nisar I. Patel has denied that he has not received any amount of the sale consideration. If this confusing observation means that he has accepted the receipt of sale consideration, there was no question of any substantive assessment in the hands of the assessee.

11. In the view of the matter in our considered opinion this is clearly a change of opinion not sustainable in law.

12. Since we have already quashed the reopening, adjudication of merits is only academic significance. Hence we are not adjudicating into the same.

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

Order has been pronounced in the Court on 29.8.2019.

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 29/8/2019

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,

(Assistant Registrar)
ITAT, Mumbai

PS