

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.482/Coch/2016 : Asst.Year 2011-2012

M/s.Ayyappa Roller Flour Mills Limited C/o.Prima Agro Limited Door No.V-679-C, Industrial Development Area, Muppathadam Post Edayar, Kochi-683 110. PAN : AACCA6840M.	Vs.	The Dy.Commissioner of Income-tax, Circle 1(1) Kochi.
(Appellant)		(Respondent)

Appellant by : Sri.P.Sathisan
Respondent by : Smt.A.S.Bindhu, Sr.DR

Date of Hearing : 13.08.2019	Date of Pronouncement : 04.09.2019
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ORDER

Per George George K, JM

This appeal at the instance of the assessee is directed against the CIT(A)'s order dated 04.08.2016. The relevant assessment year is 2011-2012.

2. The brief facts of the case are as follows:

The assessee is a public limited company. It is engaged in the business of manufacture of wheat products. For the assessment year 2011-2012, the return of income was filed on 13.09.2011 declaring total income at Rs.`Nil' and current year's loss to be carried forward amounting to Rs.2,37,39,601. Subsequently, the assessee filed revised return on 12.12.2011 declaring total taxable income at Rs.`Nil' and current year's

loss to be carried forward at Rs.2,24,12,466. The assessment was taken up for scrutiny by issuance of notice u/s 143(2) of the I.T.Act and the assessment order u/s 143(3) of the I.T.Act was completed vide order dated 27.03.2014 by disallowing certain claims by the assessee and making additions to the total income. The total income assessed by the Assessing Officer was at Rs.35,88,80,850 as against returned loss of Rs.2,24,12,466. Aggrieved by the order passed by the Assessing Officer, the assessee preferred an appeal to the first appellate authority. The CIT(A) vide his order dated 04.08.2016 partially allowed the appeal. Aggrieved by the order of the CIT(A), the assessee has filed the present appeal before the Tribunal.

We shall adjudicate the issues argued by the learned AR as under:

3. Sale of land whether exigible to Long Term Capital Gain (LTCG) in assessment year 2011-2012 (Rs.38,82,19,823)

3.1 The Assessing Officer in the course of assessment proceedings noted that the assessee had entered into an agreement for sale on 10.11.2010 with M/s.Maruti Suzuki India Limited (MSIL). The assessee received Rs.8.50 crore on signing the agreement for sale. The agreement for sale was a registered document with Sub Registrar Office, Edappally, Ernakulam. The Assessing Officer was of the view that the assessee through the agreement for sale had handed over the physical possession of the property and the purchaser, namely,

MSIL had taken over absolute control of the entire property. The Assessing Officer explained in detail that all the conditions stipulated in section 53A of the Transfer of Property Act, 1882 has been fulfilled in the assessee's case, and therefore, as per the provisions of section 2(47)(v) of the I.T.Act, the assessee was liable for long term capital gains in the relevant assessment year, viz., A.Y. 2011-2012.

3.2 Aggrieved by the order of the Assessing Officer bringing to tax the long term capital gain in the current assessment year, the assessee preferred an appeal to the first appellate authority. It was contended before the CIT(A) that as per the clauses of the sale agreement, the provisions of section 2(47)(v) of the I.T.Act is not applicable because only a small portion of land was given as symbolic possession. It was stated that possession was handed over as security for the amount received on execution of the sale agreement. It was submitted that the sale agreement culminated in execution of sale deed dated 29.09.2011 and all the conditions for a transfer has been satisfied only in the subsequent assessment year, viz., A.Y. 2012-2013. The CIT(A) held that the Assessing Officer has analyzed the entire issue in great detail and has categorically observed that the conditions mentioned in section 53A of the Transfer of Property Act, 1882 r.w.s. 2(47)(v) of the I.T.Act is applicable in assessee's case. The relevant finding of the CIT(A) reads as follow:-

"10.5 It is observed from the above discussions of the Assessing Officer that the appellant through the "agreement to sale", has handed over the physical possession of the

property and the MSIL has taken over the absolute control of the entire property. The Assessing Officer has also explained in detail that all the conditions stipulated in section 53A of the TP Act has been fulfilled in the appellant's case. Therefore I agree with the views of the Assessing Officer and I am of the opinion that the provisions of section 2(47)(v) of the I.T.Act is squarely applicable in the appellants case. Hence it is held that the Assessing Officer was legally correct in invoking the provisions of section 2(47)(v) and assessed the capital gain in the assessment year 2011-2012 itself."

3.3 Aggrieved by the order of the CIT(A), the assessee has raised this issue before the Tribunal. The learned Counsel for the assessee more or less reiterated the submissions raised before the Income Tax Authorities. It was contended that the capital gain cannot be brought to tax in the relevant assessment year since there is no accrual nor receipt of income during the relevant assessment year. Further, it was submitted that the actual possession was never handed over to the buyers of the property, viz., MSIL on execution of the sale agreement dated 10.11.2010. It was contended that almost 80% of the total consideration was payable only on registration of the sale deed and only on execution of the sale deed, there is a transfer of property. Hence, it was contended that LTCG cannot be taxed in the relevant assessment year. It was further argued that there were many conditions stipulated in the sale agreement dated 10.11.2010 and the willingness to perform on part of transferee was a condition precedent to determine whether there is a transfer effected in the current assessment year or not. The learned AR has filed a paper book containing 241 pages *inter alia* enclosing computation statement, agreement for sale dated 10.11.2010, copies of the orders of the Income-tax authorities and the case laws relied in support

of the contentions raised by the assessee. The learned Departmental Representative supported the order of the Income-tax authorities.

3.4 We have heard the rival submissions and perused the material on record. The assessee had declared long term capital gain and paid due tax in the subsequent year, viz., A.Y. 2012-2013. The only issue raised insofar as the long term capital gain is concerned is whether there is a transfer of property as contemplated u/s 2(47)(v) of the I.T.Act during the relevant assessment year, viz., A.Y.2011-2012. On perusal of the sale agreement dated 10.11.2010, we noticed that there are two sellers. The assessee is represented by the Managing Director Sri.Sanjay Guptha and other seller is Sri.Anun Kumar Agarwal. The assessee had agreed to sell 179.88 cents of land whereas the second seller Sri.Arun Kumar Agarwal had agreed to sell 13.75 cents of land. Both these properties are sought to be purchased by MSIL. The assessee, on execution of the sale agreement dated 10.11.2010, received Rs.8.5 crore out of the total consideration of Rs.39,91,53,835, whereas, the second seller out of the total consideration of Rs.3,05,93,750 received Rs.50 lakh on execution of the sale agreement. On a query from the Bench, both the learned AR and DR pleaded ignorance as regards to the fate of the assessment in the hands of second seller, viz., Sri.Arun Kumar Agarwal (Sri.Arun Kumar Agarwal is a resident of Hyderabad).

3.4.1 To determine whether there is a transfer of property on execution of sale agreement dated 10.11.2010, necessarily, the

clauses in the sale agreement need to be examined (sale agreement dated 10.11.2010 is a registered agreement). The relevant clauses of the sale agreement read as follows:-

".....

8. That on the execution of this Agreement to Sell after the receipt of the part payment towards sale consideration as referred to in the above clause, both the SELLER hereby handed over to the PURCHASER the actual and physical possession of the entire SCHEDULE PROPERTY as described under FIRST AND SECOND SCHEDULE and put the PURCHASER in physical possession and absolute control over the FIRST and SECOND SCHEDULE properties.

9. That the SELLER shall demolish and remove all existing super structures / buildings more specifically described under FOURTH SCHEDULE of this Agreement to Sell, within 3 months from the date of this Agreement to Sell and also remove all debris from the Schedule Property at their cost and expenses. The SELLERS shall obtain all permission or sanction if any required from any local body / authority for demolition / removal of existing buildings / structures as described under FOURTH SCHEDULE.

10. The PURCHASER has granted permission to SELLERS and their authorized officers, persons, employees / workers or any persons working under or engaged by the SELLERS and also their vehicles, to have an easy and uninterrupted access and easy ingress and egress to the Schedule Property for the demolition and removal of all the existing structures / buildings and to remove debris from the Schedule Property and to construct the compound walls by the SELLERS on all four sides, wherever required in the Schedule Property. Such permission shall be granted for 90 days from this day or till the work of demolition, shifting and removal of all the existing structures / buildings, construction of compound walls etc are completed, whichever is earlier.

.....

25. It is hereby expressly provided and agreed to by the parties here to that both parties are entitled to enforce specific performance of the agreement against each other in case of breach of any conditions mentioned in this Agreement to Sell.

26. That the SELLERS agree and confirm that all the obligations required for completion of sale and execution of the Sale Deed shall be complied with by the SELLERS.

.....

29. SELLERS unequivocally agree, confirm and accept that on or after the execution of this Agreement to Sell, if the Schedule Property agreed to be sold under this Agreement to Sell or any part thereof, is lawfully notified for acquisition or requisitioned by any Government, Central or State, or any local body or authority local or otherwise, the PURCHASER alone shall be entitled for and have the right for claiming the compensation in respect of the Schedule Property or any part thereof, notified for such acquisition as aforesaid and the SELLER has no right or any entitlement, whatsoever, to raise any claim in respect of the Schedule Property or any part thereof, notwithstanding any terms of this Agreement to Sell or any delay caused for execution of the Sale Deed.

30. SELLERS have today handed over to the PURCHASER the originals of the available title documents in respect of the Schedule Property, namely, the title documents Nos.4918/2006, 4417/2001, 5112/2001, 3413/1973, 3414/1973 and 3415/1973, all registered at SRO Edappally, Ernakulam. The rest of the original title documents relating to the Schedule Property shall be handed over to the PURCHASER by the SELLERS at the time of the execution of the Sale Deed."

3.4.2 The relevant provisions to determine whether there is transfer of property as per the Income-tax Act, viz., u/s 2(47)(v) r.w. section 53A of the TP Act, 1882, read as follows:-

Section 2(47)(v)

"2(47) 'transfer', in relation to a capital asset, includes,— . . .

(v) 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, 1882."

Section 53A of the T.P.Act, 1882:

"53A : Part performance : Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his

behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

3.4.3 The clauses of the sale agreement dated 10.11.2010 clearly mentions that on execution of sale agreement, both the sellers have handed over to the purchaser actual and physical possession of the entire property and the purchaser is put in physical possession in absolute control of the schedule property mentioned. As per clause of the sale agreement, the sellers were to demolish and remove the existing superstructure within three months from the date of agreement. For easy ingress and egress, the sellers were granted permission to enter property by purchaser (MSIL) (clause 10). Therefore, it is crystal clear that the possession of the property was handed over to the purchaser and the purchaser in turn gave permission to the sellers to enter the impugned property to carry out certain acts in compliance with the conditions such as demolition of factory, building etc. The learned AR had contended that there ought to be willingness to perform as per the terms of the sale agreement and such

willingness of performance was concluded only on execution of the sale deed and receipt of entire sale consideration. We are afraid that such contentions are devoid of any merit. The process of demolishing and clearing of the title deeds of the impugned land though were completed in the subsequent year, there was clear intention / willingness of the parties to comply with conditions stipulated in sale agreement dated 10.11.2010. This is evident from the fact that the assessee had undertaken the process of demolishing the building as stipulated in clause 8 of the sale agreement because in the relevant assessment year, the assessee had incurred Rs.94,18,698 for such expenditure. Moreover, as per clause 25 of the sale agreement, the parties are entitled to enforce specific performance in case of breach of any conditions mentioned in the sale agreement. The conduct / intention of the parties clearly show that there was willingness to perform / comply with clause of the sale agreement and same resulted into execution of sale deed dated 29.09.2011. The Hon'ble Supreme Court in the case of *Shrimant Shamrao Suryavanshi v. Parhlad Bhairoba Suryavanshi [(2002) 3 SCC 676]* has observed that following conditions are to be satisfied if the transferee wants to defend / protect his possession:-

- (1) there must be a contract to transfer for consideration of any immovable property ;

- (2) the contract must be in writing, signed by the transferor, or by someone on his behalf ;

(3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained ;

(4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof ;

(5) the transferee must have done some act in furtherance of the contract ; and

(6) the transferee must have performed or be willing to perform his part of the contract."

The A.O. in detail had explained that all the conditions stipulated in section 53A of the TP Act has been fulfilled in this case (page 11 to 16 of the assessment order). The assessee has not been able to dispel this categorical finding of the A.O. by placing any material / evidence.

3.4.4 The Hon'ble Kerala High Court in the case of *CIT v. Harbour View [(2018) 409 ITR 599 (Ker.)]* had held that when there is physical possession handed over to the buyer of the property and on receipt of part of the sale consideration, the transfer would have been completed as per the provisions of section 2(47)(v) of the I.T.Act r.w.s. 53 A of the T.P.Act, 1882. The learned AR had sought to distinguish this judgment by stating that in the case of *Harbour View (supra)*, the Hon'ble Kerala High Court was considering a case where substantial portion of the sale consideration was paid on execution of sale agreement, whereas, in this case only Rs.8.5 crore was paid out of total consideration of Rs.39.91 crore. Hence, it was

submitted that the Hon'ble Kerala High Court in the case of *Harbour View (supra)* will not have application to the facts of the instant case. We have carefully perused the judgment of the Hon'ble High Court in the case of *Harbour View (supra)*. The Hon'ble Kerala High Court was of the view that when vendee is put in possession of property and is in receipt of part payment of sale consideration on execution of sale agreement, there was transfer as per provisions of section 2(47)(v) of the I.T.Act r.w.s. 53A of the T.P.Act, 1882. The relevant finding of the Hon'ble High Court reads as follow:-

"17. Hence, we find that the Tribunal went wrong in holding that the possession was not handed over in pursuance of the agreement for sale as contemplated under section 53A of the TP Act. Once the sale agreement comes under the provisions of section 53A of the TP Act, handing over of possession takes place and the provisions under section 2(47) would squarely apply. That apart, the argument of the learned senior counsel for the assessee that contract was subsequently rescinded will not be of any help because the contract was rescinded only subsequent to the assessment year and what we are concerned for the purpose of the Act is the transactions which took place during the assessment year. The fact that the contract was subsequently terminated on mutual consent will not improve the case of the assessee to wriggle out of the purview of section 2(47) of the Act and the liability to pay tax on short-term capital gains under section 45 of the Act.

18. Here, to dispel any reasonable doubt which may arise, we extract below one of the conditions stated in *Shrimant Shamrao Suryavanshi (supra)* :

"(6) the transferee must have performed or be willing to perform his part of the contract."

Here the agreement was rescinded between the parties but long after the assessment year in which the agreement was entered into and possession handed over. At least when the returns were filed there was a right conferred on the transferee as per section 53A of the Transfer of Property Act. The transferor though subsequently was absolved from the rigour of section 53A ; in the close of assessment year was obliged to return the capital gains as per section 2(47)(v) of the Income-tax Act. The Income-tax Act by the definition clause includes a transaction in accordance with section 53A as a transfer in relation to a capital asset. The consequence flowing from the inclusive definition has to be given effect to as on the subject assessment year and the transferor being absolved subsequently from the rigour of section 53A as against the transferee is of no consequence in applying the rigour under the

taxation enactment. The transaction failed and the parties settled between themselves, but the voluntary act of the parties cannot efface the tax liability. We hence answer the questions of law on the facts arising in the above case against the assessee and in favour of the Revenue."

3.4.5 In view of the above reasoning and the judicial pronouncement cited (supra), we hold that the assessee is liable to be taxed for long term capital gain in the current assessment year. It is ordered accordingly.

3.4.6 In the result, this issue raised by the assessee is dismissed.

4. Addition of Rs.1,42,266 u/s 41(1) of the I.T.Act :

4.1 The Assessing Officer had made an addition of Rs.1,42,266 by observing as under:-

"3.2 In response, assessee vide letter dated 22.10.2013 submitted that sundry creditors have been fully written off in the subsequent year i.e. A.Y. 2012-13 consequent to the finalization of the sale deed. This explanation is considered as inadequate and unsatisfactory in view of the fact that the finalization of the sale deed has nothing to do with the cessation of liability of creditors. Further assessee vide letter dated 29/10/2013 furnished the list of sundry creditors written off in subsequent years. It was only to the extent of Rs.1,42,266/-. The assessee itself has agreed vide order sheet noting dated 31/10/2013 that "...that the liability ceased to exist in relation to them..... they are not payable." Accordingly the liability in relation to the sundry creditors to the extent of Rs.1,42,266/- is considered as ceased to exist u/s 41(1) of the IT Act, 1961. The same is added to the income of the assessee."

4.2 On further appeal, the CIT(A) confirmed the view taken by the Assessing Officer. The relevant finding of the CIT(A) reads as follow:-

"7.2 I have considered this issue. The Assessing Officer in the impugned order has clearly stated that the liability has seized to exist during the FY 2010-11 itself and the same has been accepted by the appellant during the assessment proceedings. In the above circumstances I am of the opinion that the Assessing Officer was legally correct in assessing a sum of Rs.1,42,266/- u/s 41(1) in the assessment year 2011-12."

4.3 We have heard the rival submissions and perused the material on record. This issue was conceded before the Assessing Officer. Moreover, no serious contention was raised by the learned AR, hence, we confirm the addition of Rs.1,42,266 u/s 41(1) of the I.T.Act.

5. **Disallowance of depreciation of Rs.2,28,470 :**

5.1 The Assessing Officer had made addition of Rs.2,28,470. The relevant finding of the A.O. reads as follow:

"5. Assessee claimed a total amount of Rs.2,28,470/- as depreciation for the block of assets Plant and Machinery u/s 32 of the I.T.Act, 1961. As the block of the assets in the case of Plant and Machinery and Building is considered as NIL on computation of the short term capital loss u/s 50 of the I.T.Act, 1961 as per para 4 above, the depreciation claim on the above assets is disallowed. Assessee made a claim for depreciation allowance of Rs.3,29,519/- for the A.Y. 2011-12. As Rs.2,28,470/- is not an allowable allowance, only Rs.1,01,049 is considered as depreciation allowance allowed. Thus an amount of Rs.2,28,470/- is disallowed being depreciation claim not in order u/s 32 of the I.T.Act, 1961."

5.2 On further appeal, the CIT(A) confirmed the addition made by the Assessing Officer. The relevant finding of the CIT(A) reads as follow:-

"8.2 It is observed from the impugned order that the Assessing Officer has worked out the short term capital loss at Rs.13,38,670/- and the same has been allowed u/s 50 of the IT Act. As a result the written down value (WDV) of the

block of assets consisting of plant and machinery and building becomes NIL. Therefore the Assessing Officer was legally correct in disallowing the claim of depreciation of this block of assets whose WDV is NIL. Hence the addition of Rs.2,28,470/- is hereby confirmed."

5.3 We have heard the rival submissions and perused the material on record. The Assessing Officer has worked out the short term capital loss of Rs.13,38,670 and the same has been allowed u/s 50 of the I.T.Act. As a result, the Written Down Value (WDV) for the block of assets consisting of plant and machinery and building became NIL. Therefore, the disallowance of claim of depreciation of this block of assets, whose WDV is NIL is correct and hence the addition of Rs.2,28,470 is confirmed.

6. **Commission expenses of Rs.18,55,605**

6.1 The assessee had claimed Rs.18,55,605.50 as commission paid. In the course of assessment proceedings, it was noticed that the commission sought to be deducted was not paid during the relevant assessment year. Further, the A.O. held that there was no evidence submitted before him for payment of above said commission despite the explanation called for in relation to this aspect. Accordingly, the A.O. disallowed the expenditure claimed as deduction on the cost of transfer of land. On further appeal, the CIT(A) confirmed the view taken by the Assessing Officer. The relevant finding of the CIT(A) reads as follow:-

"12.1 I have considered this issue. The Assessing Officer was not correct in disallowing the commission expenses of Rs.18,55,605/- which was accounted as advances paid since the sales effected only in the subsequent year. The Assessing

Officer has also stated that the appellant did not furnish any evidence for the payment of commission during the previous year 2010-11. In the above circumstances, it is held that the Assessing Officer was correct in disallowing the claim of commission payment. Therefore the addition of Rs.18,58,605/- is confirmed."

6.2 We have heard the rival submissions and perused the material on record. The assessee has not produced any evidence to show that it has incurred any commission expenditure during the relevant assessment year. Hence, we hold that the Assessing Officer has correctly disallowed the claim of commission payment. It is ordered accordingly.

7. In the result, the appeal filed by the assessee is dismissed.

Order pronounced on this 04th day of September, 2019.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 04th September, 2019.
Devdas*

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals)-I, Kochi.
4. The Pr.CIT Kochi.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin