

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

**ITA No.5188/M/2018
Assessment Year: 2014-15**

Shri Venkatesh Gopalkrishna Kamath, 1202-B, Princeton Hiranandani Estates, Thane (W), Patlipada, Thane-400 607 PAN: AHAPK8647G	Vs.	Income Tax Officer, Ward 3(4), 6 th Floor, Ashar IT Park, Road Number 16Z, Nehru Nagar, Wagle Industrial Estate, Thane West, Thane - 400 604
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Girish Dave, A.R. &
Shri Tanzil Padvekar, A.R.

Revenue by : Shri Vijay Kumar, D.R.

Date of Hearing : 06.11.2020

Date of Pronouncement : 08.01.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 10.07.2018 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2014-15.

2. The grounds raised by the assessee are as under:

"The Ld. AO has erred in not considering the submissions made by the appellant during the course of assessment, where the appellant has stated the actual reasons for the lower valuation of the property sold @ Rs.1,85,00,000/- and not Rs.5,13,19,000/-"

The assessee has also raised the following additional grounds of appeal:

"1. On the facts and in the circumstances of the case and in law, the property in question being land is a long term capital asset within the meaning of Section 2(29A) and hence, capital gain on the transfer of the sale of land is a long term capital gain within the meaning of Section 48 of the Income Tax Act.

2. On the facts and in the circumstances of the case and in law, the capital gain on the sale of Land/Property is to be treated as long term capital gain and benefit of Index Cost of Acquisition needs to be given under Sect. 48 of the Income Tax Act."

3. The only issue raised in the sole ground of appeal by the assessee is against the order of Ld. CIT(A) affirming the order of AO in which the AO calculated the short term capital gain by taking market value of the plot as per section 50C at Rs.5,13,19,000/- as against the sale consideration as per agreement dated 24.10.2013 at Rs.1,85,00,000/- thereby computing the short term capital gain at Rs.2,06,61,480/- by allowing the deduction of cost of acquisition of Rs.1,45,73,520/-.

4. First we would like to adjudicate the additional grounds of appeal as raised by the assessee before us. The ld. A.R. vehemently submitted before us that the issue whether the capital gain arising from the sale of property is a short term capital gain or long term capital gain is a legal issue, the facts qua which are available on record and no new facts need to be brought on the record nor any further verification of facts is required. The Ld. A.R. therefore, prayed that the ground raised by the assessee may kindly be admitted in the interest of justice and fairplay and accordingly adjudicated as it has important and significant bearing on the income of the assessee. In defence of his argument the Ld. A.R. relied on the decisions of National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383/157 CTR 249 (SC). The Ld. D.R., on the other hand, strongly opposed the argument of the Ld. A.R. on the admission of additional ground

by submitting that these were never raised before the authorities below and may kindly be dismissed.

5. After hearing the rival parties and perusing the material on record we find that the issue raised in the additional ground is purely a legal issue whether the conveyance dates back to the agreement to sell or from the date of registration of conveyance deed in favour of the assessee. In our view the issue is squarely covered in favour of the assessee by the decisions of National Thermal Power Co. Ltd. v. CIT (supra). We, therefore, respectfully following the decision of the Hon'ble Apex Court admit the additional ground raised by the assessee.

6. Now we are adjudicating all the grounds including the additional grounds together in the following paras. The facts in brief are that the assessee filed return of income on 02.02.2015 showing a total income of Rs.2,15,870/- which was processed under section 143(1) of the Act. Thereafter, the case of the assessee was selected for scrutiny under CASS and statutory notices were duly issued and served upon the assessee. The assessee is engaged in the business of retailing in stocks and PAN etc. Besides the assessee is having income from salary from Manjiri Gas & Co. and also partner in a firm. The case of the assessee was selected under CASS in order to verify the sale consideration of the property as disclosed in ITR which is less than the sale consideration of the property as returned in AIR. The AO upon perusal of AIR data observed that during financial year 2013-14 the assessee has sold immovable property bearing old survey No.279, new survey No.76, hissa No.1/A, village-Navghar, Taluk-Bhayendar, District- Thane admeasuring in

aggregate 9680 sqr. yard equivalent to 8093.71 sqr. mtr. The agreement was registered on 24.10.2013 as per which the sale consideration was Rs.1,85,00,000/- whereas the market value as per stamp valuation authority was Rs.5,13,19,000/-. Accordingly, the assessee was asked by the AO to furnish the documentary evidences in support of the sale of property and along with working of capital gain. On the basis of evidences filed the AO observed that assessee has sold the property vide deed of conveyance dated 24.10.2013 in favour of M/s. A.A. Corp. for a total consideration of Rs.1,85,00,000/-. The AO observed, on the basis of capital gain computed by the assessee, that sale consideration was taken at Rs.1,85,00,000/- instead of Rs.5,13,19,000/- which is in violation of provisions of section 50C of the Act. Accordingly, a show cause notice dated 03.11.2016 and 13.12.2016 were issued to the assessee calling upon as to why the market value should not be adopted as per the provisions of section 50C of the Act. The assessee replied as under:

"4.1 In response to the same, the assessee's AR vide letter dated Nil filed during the course of assessment proceedings dated 22.12.2016 made the following submissions:-

"It is true that your assessee has sold the property which was purchased in the earlier years. Valuation of registrar is not acceptable to my client as he has done valuation at very high rate. Hence we have taken valuation report of government approved valuer.

I here with enclose the valuation report of government approved valuer for the above same property sold. The property i.e. Land shown under residential zone in DC rule applicable by MBA & is affected by CRZ-III where only School/college can be built upon, the said land is situated in low lying area of excessive soil filling (Appox. Upto extent of 3 to 4 meters) is essential, as on today the said property is locked property with marshy land, mangrows, & irregularities & high tension line (electric wire lines) passing through the said property. The plot is highly floods in monsoon. The location of the said land is surrounded by slums, m middle class & approach is

restricted. The movement of vehicles is insufficient & the nearest railway station is 5 km away i.e. Mira Road, Hence valuation of land is made on the basis of CRZ-HI for the land sold period because CRZ-HI was levied by MBMC department after the sale of land. Because of such above reasons the said property is in litigation & for the same court case is also going to till today. I herewith enclose all the documents for the above said property such as Valuation report, court filed documents, etc for your reference".

Further, valuation report accompanied with the letter submitted during the course of assessment proceedings dated 22.12.2016, it is seen that the valuation has been done by Shri Jawahar P Thakar, government registered valuer of the said plot of land bearing old survey No. 279, New Survey No. 76, Hissa No. 1/A, Village- Navghar, Taluka- Bhayander, Dist- Thane area admeasuring 8100 sq. mtrs, adopting the rate per sq. mtrs is Rs.4350 of 8100 sq. mtrs. Thus, the FMV during FY 2013-14 relevant to AY 2014-15 of the said plot valued at Rs.3,52,35,000/- as per valuer report. The explanation submitted by the assessee is not backed up by any concrete evidence. As the submission has been made on 22.12.2016 in which the assessee has objected to the value adopted by stamp valuation authority, a reference is made to the departmental valuation officer for valuation of the property transferred."

7. The assessee submitted a valuation report from the approved valuer during the course of assessment proceedings valuing the market value of the plot at Rs.3,52,35,000/-. The AO also made reference to the departmental valuation officer on 23.12.2016 as per the provisions of section 50C(ii) and 55A of the Act. However, due to time limitation and time barring nature of assessment the market value adopted by the valuer in the valuation report dated 09.11.2016 as submitted by the assessee was adopted for computing the short term capital gain/profit on sale of property with the remarks that same will be revised when the valuation report will be received from the departmental valuer.

8. Similarly, the AO determined the cost of acquisition as under:

"4.3 Cost of acquisition

Further, the alleged property bearing old survey No.279, New Survey No.76, Hissa No.1/A, Village-Navghar, Taluka-Bhayander, Dist-Thane was purchased from (i) Mrs. Kamal Shreekrishna Joshi (married daughter of Shri Vasudeo Damodar Kashalikar), (ii) Mrs. Jayshree Suresh Nakhare Alias Mrs. Jaya Suresh Nakhare (married daughter of Shri Vasudeo Damodar Kashalikar), (iii) Shri Ramesh Vasudeo Kashalikar (son of Shri Vasudeo Damodar Kashalikar) and (iv) Shri Damodar Vasudeo Kashalikar (son of Shri Vasudeo Damodar Kashalikar) for a total consideration of Rs.44,00,000/-. The agreement was registered on 22.02.2011. The assessee paid stamp duty of Rs.34,42,000/-, Registration charges of Rs.31,520/- and Rs.71,00,000/- paid to M/s. The Estate Investment Company Private Limited as per Release Deed dated 15.09.2011. Thus total cost of the said plot totaling to Rs.1,45,73,520/-."

9. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee by observing and holding as under:

"7. I have carefully considered the facts of the case and the contention of the appellant. On perusal of the same it has been noticed that the Departmental Valuation Officer has forwarded proposed valuation to the appellant and the appellant has also filed his objections to the DVO. The DVO has valued the property at Rs 3,53,48,000/- after considering the objections raised by the appellant. The DVO is expert in the field of valuation and his report is to be followed. Further, there is no much difference between the value of the property as per Valuation of Government Approved Valuer filed by the appellant and the Valuation Report of the DVO. The objections raised by the appellant are dismissed. The AO has mentioned in the assessment order that after receipt of valuation report, the computation of capital gain shall be revised. The AO is directed to consider the fair market value of the property at Rs.3,53,48,000/- as against Rs.3,52,35,000/- adopted by him for computing capital gain."

10. After hearing both the parties and perusing the material on record, we observe that in this case the assessee has sold immovable property for a consideration of Rs.1,85,00,000/- measuring 8100 sqr. mtr. the stamp value whereof as per the Sub Registrar Office, Thane was Rs.5,13,19,000/-. The AO computed the capital gain by taking market value as per the approved registered valuer report submitted by the assessee which calculated the fair market value as Rs.3,52,35,000/- and after allowing the cost of acquisition of Rs.1,45,73,520/- a short term capital gain was added to the income of the assessee of Rs.2,06,61,480/-. The AO adopted the fair market value as per

registered valuer report as the DVO report was not received and framed the assessment due to time barring provisions of the Act. In the appellate proceedings, the Ld. CIT(A) directed the AO to adopt the DVO report as per which the valuation was calculated at Rs.3,53,48,000/- instead of Rs.3,52,35,000/- for computing capital gain. The first contention of the Ld. A.R. was that the agreement to sell conferring a right and interest in favour of the assessee in the said plot was executed on 7th August 2000 a copy of which is attached at page No.1-17 of the paper book. We find that the assessee has purchased the plot for a consideration of Rs.44,00,000/-. We also note that on page 10 para (I) it was stated that the assessee has paid Rs.4,00,000/- and in clause (II) it was further stated that Rs.40,00,000/- was to be paid at the time of execution of deed of conveyance and registration/execution of irrevocable power of attorney in favour of the assessee . The deed of conveyance was executed in favour of the assessee on 22.02.2011 a copy of which is filed at page no.18 – 95. We have also perused the deed of release between the Estate Investment Co. Pvt. Ltd. the releasor and Venkatesh Gopalkrishna Kamath the releasee. A perusal of the said release deed revealed that the assessee paid Rs.71,00,000/- to the releasor vide cheque No.180407 dated 11.08.2011 drawn on Oriental Bank of Commerce, Vile Parle, Mumbai. We note that the right and interest vested in favour of the Estate Investment Co. Pvt. Ltd. was assigned by deed of assignment by the assigner M/s. Govindram Brothers Ltd. Thus we find that there was encumbrance on the said property and on page No.4 of the said release deed there was reference to agreement of sale dated 7th August 2000 and also mentioned that pursuant to the said

agreement the owner executed irrevocable general power of attorney dated 22.02.2011 in favour of the releasee the assessee and also deed of conveyance was also executed on the same date in favour of the releasee. All these facts show that right and interest of ownership was created in the said property in favour of the assessee from the date of agreement to sell dated 07.08.2000 and not from the deed of conveyance dated 22.02.2011. Considering all these facts we are inclined to hold that the date of conveyance shall relate back to the date of agreement dated 07.08.2000 and not from the date of registration of conveyance deed dated 21.10.2013. The case of the assessee is supported by the decision of Hon'ble Supreme Court in the case of Sanjeev Lal vs. CIT (2014) 365 ITR 389 (SC). Therefore, the date of purchase of property by the assessee would be 07.08.2000 and not 13.10.2013 which is the date of registration of conveyance deed. On the issue of the sale consideration being less than the stamp valuation as per Sub Registrar Office and also lesser than the valuation as per registered valuer, we find that in the said valuation report and also in the value as per stamp authority the fact of encumbrance in favour of Estate Investment Co. Pvt. Ltd. was not taken into account and therefore we do not find any merit in the direction of Ld. CIT(A) to substitute the value as per DVO which was not available at the time of passing the assessment order to compute the capital gain. We also hold that the sale consideration has to be taken as per the agreement to sell dated 21.10.2013 of Rs.1,85,00,000/- for the purpose of calculating of long term capital gain. Accordingly, the appeal of the assessee is allowed.

11. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 08.01.2021.

Sd/-
(Ram Lal Negi)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 08.01.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.