

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER
VIRTUAL HEARING

ITA No.209/Ind/2020
Assessment Year: 2010-11

Shri Sunil Sharma,
Bhopal
PAN:AMJPS9677A : Appellant

V/s
ITO 3(2)
Bhopal : Respondent

Appellant by	Shri Manoj Fadnis AR
Revenue by	Shri Amit Soni, Sr. DR
Date of Hearing	07.10.2021
Date of Pronouncement	30.11.2021

ORDER

PER MANISH BORAD, A.M.:

The above captioned appeal filed at the instance of the Assessee for Assessment Year 2010-11 is directed against the order of Ld. Commissioner of Income Tax(Appeals) (in short 'Ld. CIT]-2 Bhopal dated 05.03.2020 which is arising out of the order u/s

143(3) of the Income Tax Act 1961(In short the 'Act') dated 25.03.2015 framed by ITO-3(2), Bhopal.

2. Brief facts of the case as culled out from the records are that the assessee is an individual and engaged in the business of Civil Construction. Return of income for A.Y. 2010-11 filed on 12.01.2011 declaring income of Rs.1,82,950/-. Subsequently, proceedings u/s 147 of the Act were initiated after issuing a valid notice u/s 148 of the Act and supplying the reason for reopening to the assessee. Assessee stated that regular return of income may be treated as return filed. In response to notice u/s 148 of the Act assessee also filed objections to the reason recorded for reopening and the same were duly dealt by the ld. AO. Necessary notice u/s 142(1) of the Act was also served upon the assessee. During the course of assessment proceedings *qua* the reason for which the assessee's case was reopened. Ld. AO observed that there was a transaction of sale of immovable property wherein four co-owners relinquished their rights in the immovable property without receiving any sale consideration. Ld. AO observed that market value of this property as per Stamp Valuation Authority is Rs.61,72,500/-. Ld. AO asked the assessee as to why not the

provisions of capital gain should be attracted on the sale of property to which the assessee replied that the alleged transactions is in the nature of gift and the same is not treated as transfer for the purpose of computing capital gain as provided in section 47(iii) of the Act. However, Ld. AO was not satisfied and in view of the provisions of section 2(47) of the Act came to conclusion that the alleged transaction is a transfer and the assessee is liable to pay tax on the capital gain and accordingly worked out Short Term Capital Gain at Rs.6,63,525/- and added it the income of assessee. Addition of Rs. 1,00,000/- was also made for making incorrect claim u/s 80C of the Act. Income assessed at Rs.9,46,480/-.

3. Aggrieved assessee preferred an appeal before the Ld. CIT(A) and partly succeeded.

4. Now assessee is in appeal before this Tribunal raised following grounds of appeal:

- 1. That the Ld.AO has erred in law and on facts by initiating proceedings u/s 147 without jurisdiction.*
- 2. That the Ld. CIT(A) had erred in facts in confirming the demand u/s 50C by ignoring the fact no consideration was received by the appellant.*
- 3. That the ld. CIT(A) ignored the fact that, the Ld. Assessing Officer has failed to dispose the objection of appellant against proceeding u/s 147 on the issue which was specifically objected to therefore whole proceeding is liable to be set aside.*

4. That the ld. CIT(A) ignored the fact that the order passed by the ld. Assessing Officer without making any additions on the issue which is a subject matter of reasons recorded is illegal and liable to be quashed.
5. That the ld. CIT(A) and Ld. Assessing Officer ignored the fact that, section 2(47)(i) is nothing but the definition of the word "transfer". Consequently, this cannot become a charging section to create any taxable incomes in the hands of appellant, in a situation where the appellant has transferred the property without any consideration.
6. That the appellant reserves the right to add, alter or amend the grounds of appeal before the appeal is decided.

5. At the outset, ld. counsel for the assessee requested for not pressing ground no.1 & 3 raised for challenging initiation of proceeding u/s 147 of the Act. No objection raised by the ld. DR. We accordingly dismiss ground no.1 & 3 as not pressed.

6. Apropos to remaining grounds Ld. counsel for the assessee apart from referring to the paper book dated 01.10.2021 containing 19 pages and another paper book dated 04.10.2021 containing 5 pages vehemently argued referring to the following written submissions:

1. That the appellant along with four other co-owner relinquished his share in the land situated at Berkheda Nathu, Patwari Halka No. 33, Vikas Khand Fanda, Tehsil Huzur, District Bhopal vide relinquish deed dated 27th September, 2009 without any consideration (Copy filed at page No.5 to 11 of the paper book).
2. That at the time of assessment proceedings the ld. AO was informed vide written submissions dated 23rd March, 2015 that the relinquishment amounts to gift which is exempt U/S 47(iii) of the Income Tax Act (Copy filed at page no. 15 to 16 of the paper book). The relevant para 4 of written submission dated 23rd March, 2015 appearing at page no.16 of paper book is reproduced as under ..

"4. We have been asked to show cause why Relinquishment of Rights share of property be treated as Short Term Capital Gain considering the Relinquishment of Rights as transferred within meaning of section 2(47)(i) of the Income Tax Act.

In this regard we draw your kind attention to our objections raised to the proceeding u/s 147 which were filed before you on 14 March, 2015 vide a separate letter. In this regard we submitted that for the whole proceeding u/s 147, the cause of action arisen because AD as invoked section 50C, in a case where transfer was made without any consideration. Your Show Cause Notice referred to section 2(47)(i), under which relinquishment of rights is a transfer, we have no reservation on the issue, but section 2(47)(i) is nothing, but a definition of "Transfer" and definition section does become a charging section. Consequently, even if any transaction is a transfer this will not be taxable unless the law provides the same to be taxable under any of the head of income. There is nothing in the law to tax gifts or transfers without consideration to be capital gains. Your kind attention is draw to section 47(iii) where it has been expressly provided that the gift is not a transfer. Therefore, the said amount does not attract any capital gain and cannot be taxed under Income Tax Act as transfer without consideration is nothing but gift."

3. That the Learned Assessing Officer in paragraph 3.5 of his order has dealt with the definition of 'Transfer' U/S 2 (47) (i) of the Income Tax Act (the Act) which include relinquishment of the asset and has then applied the provisions of section 50 C. However, he has not examined the provisions of Section 47 (iii) of the Act which were specifically brought to his notice.

4. That it was also brought to the notice of Learned CIT (A) vide written submissions dated 13th March, 2019 that gift is covered as transactions not regarded as transfer U/S 47 (iii) of the Act (Copy filed at page No.1 to 4 of the paper book). The relevant submissions are at page No.3 of the paper book.

5. That Learned CIT(A) vide his order at paragraph 4.2, 5, 5.1 and 5.2 has erred in law in holding that the provisions of the section 47 (iii) is totally irrelevant in the case of the appellant.

6. That the Learned CIT(A) failed to consider that the relinquishment of the right in the land amounted to a gift given by an appellant to the beneficiary.

7. That in the assessment of Shri Gaurav Pachori vide assessment order dated 20th March, 2015, the relinquishment in his favour has been considered as Gift. As the relinquishment deed was executed on 27th September, 2009, the provisions of section 56(2)(vii) of the Act which became applicable from 1st October, 2009 were held to be not applicable and therefore such relinquishment of the plot situated at Berkheda Nathu, Patwari Halka No. 33, Vikas Khand Fanda, Tehsil Huzur, District Bhopal, without consideration have been held to be non-taxable.

8. That the Learned Assessing Officer and Learned CIT(A) have failed to

considered that section SOC is special provision whereby the value adopted or assessed or assessable by any authority of state government shall be deemed to be the full value of consideration received or accruing for the purposes of section 48. Section 48 deals with the Mode of computation of the Income chargeable under the head income tax under the head capital gains for which section 45 is the charging section. Section 47 deals with Transaction not regarded as transfer and states that nothing contained in the section 45 shall apply to transfers stated thereunder. Clause (iii) of section 47 reads as under

"Transaction not regarded as transfer

47. Nothing contained in section 45 shall apply to the following transfers:-

(i)

(ii)

(iii) any transfer of a capital asset under a gift or will or an irrevocable trust:

Provided that this clause shall not apply to transfer under a gift or an irrevocable trust of a capital asset being shares, debentures or warrants allotted by a company directly or indirectly to its employees under any Employees' Stock Option Plan or Scheme of the company offered to such employees in accordance with the guidelines issued by the Central Government in this behalf; "

9. That in the assessment of Shri Gaurav Pachori it has been held by his Assessing Officer, Deputy Commissioner of Income Tax 5(1), Bhopal, that section 56(2)(vii) is not applicable to the relinquishment deed dated 27th September, 2009. The said sub-section read as under:

"56(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources ", namely :-

(vii) Where an individual and Hindu undivided family receives, in any previous year, from any person or persons on or after the day of October, 2009 [but before the 1st day April, 2017]-

(a)

[(b) any immovable property-

(i) without consideration, the stamp value of which exceeds fifty thousand rupees the stamp duty value of such property;

(ii) for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration: "

Provided that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not same, the stamp duty value on the date of agreement may be taken for the purpose of this sub-clause:

Provided further the said proviso shall apply only in the case where the amount of consideration referred to therein, or a part thereof, has been paid by any mode other than cash on or before the date of agreement for the transfer of such immovable property.]

10. That from the above, it is evident that his Assessing Officer, Deputy Commissioner of Income Tax 5(1), Bhopal, has held that the relinquishment was without consideration. In other words it is a gift by the appellant Shri Sunil Sharma to Shri Gaurav Pachori.

11. That the term 'Gift' is defined as U/S 122 of the Transfer of Property Act, 1882 as under:

"Section 122 in The Transfer of Property Act, 1882

122. "Gift" defined.-"Gift" is the transfer of certain existing moveable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Acceptance when to be made.-Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void. "

12. That in view of the above, the order if the ld. AO is bad in law and additions made may please be deleted.

7. Further Ld. counsel for the assessee also stated that the alleged transaction of transfer of immovable property is merely gift and the same is out of the purview of the computation of the capital gain and also provision of section 50C of the Act are not applicable. It was also submitted that the person in whose favour in which the property has been gifted has also been assessed by Ld. DCIT-5(1),

Bhopal order dated 20.03.2015 placed at pages 22 to 25 of the paper book.

8. Per contra ld. Departmental Representative (DR) supported the order of both lower authorities.

9. We have heard rival contentions and perused the records placed before us. Through ground no.2 & 4 assessee has challenged the finding of ld. CIT(A) confirming the addition for Short Term Capital Gain of Rs.6,63,525/- made by the Ld. AO.

10. We observe that the assessee along with three other persons purchased 4.238 hectare agricultural land at village-Barkheda Nathu, Distt-Bhopal on 05.12.2007 for a consideration of Rs.40,20,000/-. Further an amount of Rs.3,78,000/- was spent. Assessee's share of investment in land was Rs.8,79,600/-. Subsequently, during the year under appeal assessee along with other three co-owners relinquished their respective rights in the 4.238 hectares agricultural land in favour of Mr. Gaurav Pachauri vide relinquishment deed dated 27.09.2009 which was registered on 21.01.2010. The genuineness of the relinquishment deed is not in dispute before us nor the fact that all the 4 co-owners have not received any consideration against relinquishment of their rights in

the said agricultural land. It is contended before us by ld. counsel for the assessee that this relinquishment of rights is in the nature of gift given by all four co-owners to Mr. Gaurav Pachauri.

11. We note that Ld. AO while examining this transaction was of the view that this is a valid transfer as per provision of section 2(47)(i) of the Act and provision of section 50C of the Act are applicable as the consideration received is less than the value adopted by the Stamp Valuation Authorities. On the other hand, it has been contended by Ld. counsel for the assessee that section 47(iii) of the Act clearly provides that “nothing contained in section 45 shall apply to transfer of a capital asset under a gift or will or an irrecoverable trust”. Therefore, the provisions to section 50C of the Act are not applicable.

12. We have given our thoughtful consideration and observe that relinquishment of rights are referred to as the surrender of ownership rights and claims in a property in favour of another person. In other words through a relinquishment deed one person releases or transfers his legal right in the property to the other person, while a gift deed is a deed by which one person gifts his legal right in a property to any person. Relinquishment may or may

not be for consideration but a gift does not require any consideration. In the instant case also all 4 co-owners have relinquished their rights in the said property without receiving any consideration. Therefore, in our view the said relinquishment of rights in the said property are in the nature of gift only as no consideration have been received and genuineness of the relinquishment deed has not been disputed by the authorities below.

13. Now the question arises whether in case of transfer of property by way of gift, the provision of section 50C can be invoked?

14. From perusal of section 47 as reproduced above in the preceding paras, it contemplates that nothing contained in section 45 shall apply to any transfer of capital asset under a gift or in irrecoverable trust. In the instant case addition has been made in the hands of assessee towards Short Term Capital Gain. Mechanism for Computation of income from capital gain is provided in chapter IV, (sub head E) of the Income Tax Act and relevant sections are section 45 to section 55A of the Act. Condition which needs to be fulfilled before commencing to compute a capital

gain is that whether there is a transfer of a capital asset. Section 47 provides for the transactions which are not regarded as transfer. If the case of a person does not fall u/s 47 of the Act then only all the remaining provisions of section 45 to 55A come into operation, which also includes substantial provision for full consideration in certain cases i.e. section 50C of the Act.

15. As far as, the case in hand is concerned as we have held above that the alleged transaction is in the nature of gift/relinquishment of rights. There is no doubt that there is a transfer of the immovable property as provided in section 2(47)(i) of the Act but this being a definition of 'transfer' is applicable to whole of the income tax wherever the word 'transfer' is mentioned. However for the purpose of computing capital gain the hurdle of section 47 needs to be cleared before computing capital gain. Section 47(iii) states that nothing contained in section 45 shall apply to any transfer of a capital asset under a gift or will or an irrevocable trust. Assessee's case is covered in section 47(iii) of the Act as the transfer/relinquishment of rights/gift is out of the purview of the provisions of section 45 of the Act. It is also judicially settled that section 50C of the Act is part of the chapter (IV)(E) of the Act and

can be applied only if the case of assessee primarily falls u/s 45 of the Act. Since in the case of assessee transaction is not falling in section 45 of the Act, there is no room available for the revenue authorities to invoke the provisions of section 50C of the Act which in itself requires that firstly consideration should be received and secondly consideration so received is less than valuation adopted or assessed or assessable by the Stamp Valuation Authority but in case of assessee NIL consideration is received.

16. We, therefore, under the given facts and circumstances of the case, are of the considered view that the relinquishment of rights in the said property made by the assessee is in the nature of gift along with other co-owners for which no consideration was received and since this transaction of gift, it is out of the purview of section 45 of the Act and also provisions of section 50C are not applicable on the transaction referred in the instant appeal. We, therefore, set aside the finding of Ld. CIT(A) and delete the impugned addition of Rs.6,63,525/- and allow ground no.2 & 4 raised by the assessee.

17. Ground No.5 is general in nature which needs no adjudication.

18. In the result, Assessee's appeal ITANo.209/Ind/2020 is partly allowed.

The order pronounced as per Rule 34 of ITAT Rules, 1963 on 30.11.2021.

Sd/-

(MAHAVIR PRASAD)
JUDICIAL MEMBER

Sd/-

(MANISH BORAD)
ACCOUNTANT MEMBER

दिनांक /Dated : 30.11.2021

Patel/PS

Copy to: The Appellant/Respondent/CIT concerned/CIT(A) concerned/
DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore