IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI

BEFORE SHRI G.S. PANNU (HON'BLE PRESIDENT)
AND
SHRI SAKTIJIT DEY (HON'BLE JUDICIAL MEMBER)

I.T.A. No.2553/Mum/2019
(Assessment year 2013-14)

| Shri Mahesh Pratapsingh Asher<br>33A, Sir Pochkhanawala Road<br>Worli Colony PO, Mumbai<br>Pan : AAFPA0850K | vs | ACIT, Circle-21(2), Mumbai |
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| **APPELLANT** | | **RESPONDENT** |

| Appellant by | Ms.Kinjal Bhuta, AR |
|---|---|
| Respondent by | Shri Bharat Andhle[CIT, (DR)] |

| Date of hearing | 21-10-2021 |
|---|---|
| Date of pronouncement | 16-12-2021 |

**O R D E R**

**Per Bench:**

This is an appeal by the assessee against order dated 25-02-2019 of learned Commissioner of Income Tax (Appeals)-48, Mumbai for the assessment year 2013-14.

2. The effective grounds raised by the assessee read as under:-

*"On the basis of facts and circumstances of the case and in law;*
*1. The Ld. Commissioner of Income Tax (Appeals) erred in conforming the actions of AO of not allowing Rs.80,00,000/- claimed u/s. 48 of the Income Tax Act,1961 from the sale proceeds in calculation of Long term Capital Gains without appreciating the fact that that the amount was paid in compliance to the Consent Terms approved by the Bombay High Court.*

*2. The Appellant prays that:*
*i)The expenditure in incurred wholly and exclusive in connection with the transfer of Long Term Capital Asset.*
*ii) That the AO be directed to allow the expenditure incurred u/s. 48 of the Act.*
*iii) Any other relief Your Honours may deem fit."*

3. Briefly the facts are, the assessee is a resident individual. For the assessment year under dispute, assessee filed his return of income on 05-08-2013 declaring total income of Rs.1,57,17,620/-. Subsequently, the assessee also filed a revised return of income. In course of assessment proceedings, the assessing officer noticed, though, in the original return of income the assessee had offered long term capital gain of Rs.1,49,47,078/-; however, in the revised return of income the assessee has reduced the long term capital gain to Rs.81,59,944/-. When called upon to explain the reason for doing so, the assessee submitted that subsequent to sale of property to M/s Colo Colour Pvt Ltd, another party, viz. Amar Builders and Developers Pvt Ltd claimed itself as the owner of the property sold. Therefore, M/s Colo Colour Pvt Ltd filed a suit filed for declaration of title. It was submitted, ultimately, the dispute was settled by virtue of consent terms approved by the Hon'ble Bombay High Court. It was submitted, as per the terms of the consent decree, an amount of Rs.4,00,00,000/- was paid to the buyer M/s Colo Colour Pvt Ltd by the assessee and other co-owners who had sold the property. It was submitted, assessee, being a co-owner having 20% share in the property, contributed an amount of Rs.80 lakhs out of the total amount paid to the buyer. Thus, it was submitted by the assessee, since the amount was paid in connection with the transfer of the capital asset, it is allowable under section 48(i) of the Act.

4. The assessing officer, however, was not convinced with the submissions of the assessee. He observed, the consideration received by the assessee has already been mentioned in the deed of conveyance dated 18-12-2012 and there is no specific direction of the Court to pay further compensation to the buyer. Therefore, he disallowed the deduction claimed of Rs.80 lakhs and computed long term capital gain accordingly. Though, the assessee contested the aforesaid disallowance before learned Commissioner (Appeals), however, the disallowance was sustained.

5. Reiterating the stand taken before the departmental authorities, learned counsel for the assessee submitted, after the assessee along with other co-owners sold the property, another person disputed the sale by claiming ownership over the property. In view of the dispute over the ownership of the property, the buyers filed a suit seeking declaration of title over the property. It was submitted, ultimately, the dispute was settled by virtue of a consent term approved by an order of Hon'ble Bombay High Court on 02-12-2013. She submitted, as per the consent terms, the buyer was required to pay a sum of Rs.7,50,00,000/- to the defendant to perfect its title over the property. Further, the consent term required the other plaintiffs, i.e. the assesse and the other co-owners to pay a sum of Rs.4 crores to the buyer M/s Colo Colour Pvt Ltd. She submitted, since the assessee had 20% share in the property as co-owner, he paid an amount of Rs.80 lakhs. The learned counsel submitted, to perfect the title over the property by removing the encumbrance, the assessee had to pay the amount of Rs.80 lakhs. Otherwise, the sale deed would have become invalid. Therefore, since the payment of compensation of Rs.80 lakhs is in connection with the

transfer of the property, it is an allowable deduction. In support of such contention, she relied upon the following decisions:-

1. CIT vs Abrar Alvi (2001) 117 Taxman 95 (Bom)
2. CIT vs Shakuntala Kantilal (1991) 190 ITR 56 (Bom)
3. V Laxmi Reddy vs ITO (2011) 333 ITR 359 (Bom)

6. The learned departmental representative strongly relied upon the observations of the assessing officer and learned Commissioner (Appeals). Further, drawing our attention to certain observations of learned Commissioner (Appeals), he submitted, crucial agreements / documents were not filed before learned Commissioner (Appeals).

7. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. The factual matrix reveals that the subject property from which the assessee derived long term capital gain was acquired by his father in the year 1937. By way of a registered agreement executed on 27-02-1981, a portion of the property was sold to M/s Amar Builders and Developers. Subsequently, on 18-12-2012, through another registered deed of conveyance , a part of the property was sold to M/s Colo Colour Pvt Ltd for a consideration of Rs.3,00,60,000/-. However, subsequent to such sale, M/s Amar Builders and Developers claimed ownership over the plot sold to M/s Colo Colour Pvt Ltd and further claimed that they have sold that part of the property to another person, viz. Shri Premjibhai Ruparel. In view of the dispute in ownership of the property and for declaration of title, the buyer, M/s Colo Colour Pvt Ltd filed a suit against M/s Amar Builders and Developers and Shri Premjibhai Ruparel, wherein, M/s Colo Colour Pvt Ltd. alongwith the assessee and other co-owners were the plaintiffs and M/s Amar Builders and Developers and others

were arrayed as defendants. The aforesaid suit filed before the Hon'ble Bombay High Court was registered as suit No.881 of 20123.

8. Subsequently, the plaintiffs and defendants decided to settle the dispute amicably and a consent term was drawn up. Ultimately, the suit was decided by the Hon'ble Bombay High Court vide order dated 02-12-2013 in accordance with the consent terms. Perusal of the aforesaid order of the Hon'ble Bombay High Court and the consent terms forming part of the order reveals that the settlement of dispute was on the terms that M/s Colo Colour Pvt Ltd being plaintiff No.1 will pay a sum of Rs.7,50,00,000/- to Shri Premjibhai Ruparel, the defendant No.1 to the suit. Clause 9 of the consent terms also provided that plaintiff nos 2 to 11 (the assessee and other co-owners) would pay plaintiff no.1, M/s Colo Colour Pvt Ltd a sum of Rs.4 crores and which was paid through cheque issued on 28-11-2013. Assessee's share in the property being to the extent of 20%, he contributed a sum of Rs.80 lakhs.

9. Thus, it is a fact on record that as per the consent terms approved by the Hon'ble jurisdictional High Court, assessee paid a sum of Rs.80 lakhs to the buyer M/s Colo Colour Pvt Ltd. Therefore, the payment made by the assessee is established on record and hence, cannot be disputed. In our view, learned Commissioner (Appeals) has completely misconceived the facts and made a fundamental error while observing that assessee's claim cannot be allowed in absence of complete terms and conditions of agreement date 18-11-2002 as mentioned in the consent terms approved by the High Court. Undisputedly, the consent terms along with Hon'ble High Court's order was very much available before learned Commissioner (Appeals). A reading of the consent terms would

make it clear that assessee is one of the plaintiffs in the suit and as per the consent terms, had paid an amount of Rs.80 lakhs to the buyer.

10. Now, the issue which arises for consideration is, whether the payment of Rs.80 lakhs qualifies for deduction under section 48(i) of the Act. It is the contention of the assessee that the payment of Rs.80 lakhs was necessary to clear the encumbrance and perfect the title over the property. Otherwise, the sale deed would have been cancelled. In our view, the aforesaid contention of the assessee has been established through facts and materials on record; hence, acceptable. A reading of section 48(i) of the Act makes it clear that expenditure incurred wholly and exclusively in connection with transfer of the capital asset is allowable as deduction. In case of CIT vs Shakuntala Kantilal (supra), the Hon'ble jurisdictional High Court has held, the expression "in connection with such transfer" appearing in section 48(i) is much wider than the expression "for the transfer". The Hon'ble Court has held, any amount of payment which is absolutely necessary to effect the transfer will be an expenditure covered by section 48(i). In this regard, it will be worthwhile to go through the following observations of the Hon'ble Court:-

> *'6. In order to appreciate Dr. Balasubramanian's submission, it is desirable to refer to the provisions of s. 48 which read as under :*
>
> > *"The income chargeable under the head 'Capital gains' shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely:*
> >
> > *(i) expenditure incurred wholly and exclusively in connection with such transfer,*
> >
> > *(ii) the cost of acquisition of the capital asset and the cost of any improvement thereto."*
>
> *The section broadly contemplates three amounts for the purpose of computing income chargeable under the head "Capital gains". The first is the full value of the consideration for which the capital asset has been transferred. The second is the expenditure incurred wholly and exclusively in connection with such transfer and the third and the last is the cost of acquisition of the capital asset including the cost of any improvement thereto. We have already referred to the facts of the case in detail earlier. It cannot be disputed that, unless the assessee had settled the dispute with Radia and Sons (Pvt.) Ltd., the sale transaction with M/s. Cosmos Cooperative Housing Society Ltd., under the agreement*

*dt. 30th March, 1967, would not, rather could not, have materialised. If this transaction had not materialised, there would perhaps have been no question of capital gains. The sale would then have taken place at the rate of Rs. 29 per sq. yard as against Rs. 61 per sq. yard. One way of looking at the problem could be to say that the full value of the consideration in this case was not the apparent consideration, i.e., Rs. 2,58,672, but Rs.2,23,168 (i.e., 2,68,672 minus Rs.35,504), The Legislature, while using the expression"full value of consideration"; in our view, has contemplated both additions to as well as deductions from the apparent value. What it means is the real and effective consideration. That apart, so far as cl. (i) of s. 48 is concerned, we find that the expression used by the Legislature in its wisdom is wider than the expression"for the transfer". The expression used is"the expenditure incurred wholly and exclusively in connection with such transfer". The expression "in connection with such transfer" is, in our view, certainly wider than the expression "for the transfer". Here again, we are of the view that any amount the payment of which is absolutely necessary to effect the transfer will be an expenditure covered by this clause. In other words, if, without removing any encumbrance including the encumbrance of the type involved in this case, sale or transfer could not be effected, the amount paid for removing that encumbrance will fall under cl. (i). Accordingly, we agree with the Tribunal that the sale consideration requires to be reduced by the amount of compensation. The first question is, therefore, answered in the "affirmative and in favour of the assessee.'*

11. Thus, as per the ratio laid down in the aforesaid decision, any amount paid for removing encumbrance without which the sale or transfer could not be effected, is allowable as deduction under section 48(i) of the Act. Similar is the view expressed by the Hon'ble Madras High Court in case of V Laxmi Reddy vs ITO (supra). In fact, the Hon'ble jurisdictional High Court in case of CIT VS Abrar Alvi (supra) while dealing with similar issue relating to payment by the father to his son to remove the encumbrance, held that the payment made is allowable under section 48(i) of the Act.

12. In the facts of the present case, undisputedly, the payment made by the assessee to M/s Colo Colour Pvt Ltd is certainly for removing encumbrance and perfecting the title over the property sold. Otherwise, the transaction would have failed. Thus, considered in the light of the ratio laid down in the decisions cited before us, we are of the view that the amount paid by the assessee to M/s Colo Colour Pvt Ltd is an expenditure in connection with transfer of a capital asset as per section 48(i) of the Act; hence allowable.

13. As regards the quantum, the facts on record clearly reveal that the assessee had 20% share holding in the property sold. Therefore, the amount paid by the assessee is in terms with Hon'ble High Court's direction. Accordingly, we delete the addition. Grounds are allowed.

14. In the result, appeal is allowed.

Order pronounced on 16/12/2021.

Sd/- Sd/-

| **(G.S. PANNU)** | **(SAKTIJIT DEY)** |
|---|---|
| **PRESIDENT** | **JUDICIAL MEMBER** |

Mumbai, Dt : 16/12/2021
Pavanan
Copy to :

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2. Respondent
3. The CIT concerned
4. The CIT(A)
5. The DR, ITAT, Mumbai
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Asstt. Registrar, ITAT, Mumbai