

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "B", BANGALORE**

Before Shri Chandra Poojari, AM & Smt.Beena Pillai, JM

ITA No.3441/Bang/2018 : Asst.Year 2010-2011

The Income Tax Officer Ward 1 Bidar.	v.	Sri Rajkumar Agarwal H.No.15-1-564 Siddaimber Bazar Hyderabad – 500 012. PAN : AGRP6180A
(Appellant)		(Respondent)

ITA No.3421/Bang/2018 : Asst.Year 2010-2011

Sri Rajkumar Agarwal H.No.15-1-564 Siddaimber Bazar Hyderabad – 500 012.	v.	The Income Tax Officer Ward 1 Bidar.
(Appellant)		(Respondent)

Assessee by : Sri.Rajkumar Hanchnal, CA
Revenue by : Sri.Priyadarshi Mishra, Addl.CIT-DR

Date of Hearing : 07.02.2022	Date of Pronouncement : 07.02.2022
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ORDER

Per Chandra Poojari, AM :

These cross appeals are directed against the order of the CIT(A), Kalaburagi, dated 25.10.2018. The relevant assessment year is 2010-2011.

2. The assessee has raised the following grounds:-

“1. On facts and circumstances of the Appellants case, the orders of the lower authorities are opposed to law, equity, weight or evidence and probabilities.

2. On facts and circumstances of the Appellants case, the appellant denies himself liable to be assessed total income of Rs.1,58,26,780/- as against total income of RS.1,66,589/- as per the return of income filed by the appellant individual capacity.

3. On facts and circumstances of the Appellants case, the learned authority ought not to have assessed the capital gain in the individual capacity of the appellant as the property owned and belongs to appellant HUF which has returned income from capital gains in the return of income filed for A.Y. 2010-11, inspite of filing copies of returns of income and other related evidences of appellant HUF during the course of proceedings.

4. On facts and circumstances of the Appellants case, the learned CIT(A) ought to have appreciated and endorsed that HUF property can never be gifted by co-parceners till partition, even if gifted as per family mutual agreement to settle the rights, the said property still remains the property of HUF, the finding in the order is against the ratio of law in the cases.

5. On facts and circumstances of the Appellants case, the learned authority's erred in making the addition of Rs.1,56,60,189/- by stating that the appellant adopted values being the fair market value as on 01.04.1981, which are extraordinarily higher than the assessed values of SRO and further appellant manage to obtain some abnormal valuation for the property and manipulates with this proviso.

The learned authority's ought to have appreciated SRO value is not fair market value as has been held by Jurisdictional High Court in the case of Assistant Commissioner of Income Tax v. Smt.Krishna Bajaj (2014) 41 Taxman 445 (Kar.)

6. On facts and circumstances of the Appellants case, the learned authority's ought not to have ignored the provisions of section 50C(2) as the appellants claim about the valuation of capital asset to ascertain fair market value as on 01.04.1981 rejected unilaterally without following the procedure prescribed by the applicable provisions.

7. On facts and circumstances of the Appellants case, the order of learned authority's is invalid and bad in law as the conditions for reopening of assessments as contemplated in sec.148 r.w.s. 149 have not been complied as notice under section 147 is anti dated as it was booked on 01.04.2017 but dated 30.03.2017 which is void ab initio, and accordingly assumption of jurisdiction.

8. On facts and circumstances of the Appellants case, notice u/s 147 was issued by ITO Ward 7(3) Hyderabad who recorded the reasons to believe escapement of income, did not exercise jurisdiction over the matter but ITO Ward 1 Bidar

exercised the jurisdiction over the matter, it is only the officer having jurisdiction over the matter who can have the reason to believe escapement of income and none other which is against the ratio of law laid down in the case of ITO v. Jawahar Lal Agarwal (2017) 190 TTJ (Agra) 870.

9. *On facts and circumstances of the Appellant's case, the order of learned authority's is invalid for non-disposal of objections of the appellant by separate speaking order which is against the law declared by the Supreme Court in the case of ITO & Ors. v. GKN Driveshafts (India) Ltd. (2003) 179 CTR (SC) 11 and Assistant Commissioner of Income Tax v. Jayanti Natarajan (2018) 300 CTR (Mad) 225.*

10. *The learned authority's have erred in making the addition purely on the basis of presumption, surmise and conjecture which is wholly impermissible in law and contrary to evidence on record on the facts and circumstances of the case.*

11. *The learned authority's ought to have allowed and considered the cost of improvement of Rs.26,48,007/- towards development of the plot and Rs.387350/- incurred towards selling and other expenses at the time of sale of property.*

12. *The learned authority's is not justified in levying interest u/s 234A, u/s 234B and u/s 234C of the Act on the facts and circumstances of the case and further the quantum, period and rate are not discernible from the assessment order."*

3. The Revenue has raised the following grounds:-

“1. *The order of the learned Commissioner of Income tax (Appeals) is opposed to law and facts of the case.*

2. *In the facts and circumstances of the case, the ld.CIT(A) erred on the issue of accepting the capital gains offered in hands of HUF, without appreciating the fact that property has been acquired through series of wills to the assessee as an individual.*

3. *In the facts and circumstances of the case, ld.CIT(A) erred in accepting the status of "HUF" for the assessee, without bringing the facts on record to show that the will was jointly for the family of the assessee and not in individual capacity and without appreciating the legal position that properties inherited under a will or gift are not ancestral properties, and capital gains of property which never became*

the property of HUF, cannot be declared / assessed in the hands of HUF.

For these and other grounds that may be urged at the time of hearing of appeal by the appellant.”

4. The facts of the case in brief are that the assessee is an individual filed his return of income declaring total income at Rs.1,66,580. The A.O. noticed that the assessee has not declared any capital gains from the sale of property along with his bothers at Gyanbagh Colony, Hyderabad. The A.O. hence issued notice u/s 148 of the Act on 30.03.2017. On receipt of the notice u/s 148 the assessee has requested to transfer the proceedings to ITO Ward-1 Bidar, where he was regularly filing returns. The assessee never questioned the jurisdiction of the issuing officer during the course of assessment proceedings. The files were transferred to ITO Ward-1, Bidar. Before the A.O. it was submitted that the capital gains from Hyderabad property has been reflected in his HUF return with PAN AAHHR3464E which was filed on 31.07.2010. From the details furnished, the AO has noticed that against the sale consideration of Rs.1,69,90,000, the assessee has adopted the cost of acquisition as on 01.04.1981 at Rs.1200 for square yard for land and Rs.130 per sft. for building basing on the valuation report given by one of the approved valuer. However, the values as obtained from the SRO office were found to be Rs.100 per square yard and Rs.21 per sft only. The A.O. rejected the claim of the assessee towards cost of improvement and transfer expenses in the absence of any details and adopted the SRO values for cost of acquisition of land and building and the reopened assessment was

completed on 28.12.2017 by bringing to tax the capital gains of Rs.1,58,26,780.

5. Aggrieved by the order of assessment, the assessee preferred appeal to the first appellate authority. The CIT(A) partly allowed the appeal of the assessee by observing as under:-

“3.0. The facts of the case are that the father of the assessee Sri Ramanadji Agarwal has acquired a property of 3834 square yards at Gyanbagh Colony, Hyderabad during his life time and bequeathed the property to his wife and three sons including the assessee. After the demise of Ramanandji Agarwal on 28/11/1980 and his wife Smt Barfi Bai on 5/2/2002, the above property has been vested with the assessee and his two brothers. The assessee alongwith two brothers has received gift of property admeasuring 1250 square yards at Gyanbagh Colony, Hyderabad from his paternal aunt on 30/4/2069. The assessee alongwith his two brothers has sold the property of 5084 square yards on different dates during the FY 2009-10. The share of the assessee in the above property is 1695 square yards.

3.1. During the appellate proceedings, the appellant has pointed out from Speed Post data that the notice vij s.148 was booked on 1/4/2017 and hence the notice was issued out of time. The notice u/s 148 was despatched and handed over to the speed post person on 31/3/2017 itself. If the speed post was booked after 12PM (mid night) on 31/3/2017 by the postal authorities, it cannot be held that the notice was issued beyond the date. Therefore, the contention of the appellant is not acceptable and hence rejected.

3.2. The other contention of the appellant that the capital gains has been offered in the return of income filed in his HUF capacity for the A Y 2010-11 has some force. As could be seen from para 3.0 above, the property in 3834 square yards has been received from the father of the appellant and hence it constitutes HUF property only. Hence, bringing the capital gains in respect of share of the appellant in such property in his individual capacity is not as per law. However, the same cannot be said about property in 1250 square yards received as gift from maternal aunt. This falls to the individual share of the appellant and cannot be treated as his HUF property.

This is supported by the appellant's own submission on this issue which is reproduced below:-

Another property bearing municipal No. 14-2-1993 admeasuring 1250 sq yards situated at gym bagh colony ghode-ki-khbar, Hyderabad was acquired by Shri. Vinoddilalji Agarwal during his life time. Shri. Vinodilalji Agarwal executed a bill dated 20.05.1994 and expired on 10.10.1994. After the demise of Shri. Vinodilalji Agarwal the will dated 20.05.1994 came into effect and the property ownership came to Smt. Sarala Bai, Wife of late Vinodilalji Agarwal. Whereas, Smt. Saralabai along with her sons Shri. Ravindrakumar S/o Late Vinodilalji Agarwal and Shri. Gopal Krishna S/o late Vinodilalji Agrwal executed a gift deed documents no. 1348 of 2009, dated 30.04.2009 in favour of 1. Shri. Madadev Prasad Agarwal son of late Shri. Ramanandji Agarwal 2. Shri. Rajkumar Agarwal son of late. Shri. Ramanandji Agarwal and, 3. Shri. Sunil kumar son of late Shri. Ramanandji Agarwal.

Whereas the donour Smt. Sarala Bai is the paternal aunt of the donees and donees are husbands brothers son's.

Thereafter, the above mentioned joint owners of the property including Shri. Rajkumar Agarwal sold the said property on different dates in the year of 2009-10.

4.0. I have considered the submissions made by the appellant during appellate proceedings. The calculation of capital gains by the appellant is based on the valuation report by a registered valuer, whereas the AO has based on the values given by the SRO. Apart from the valuation report, the appellant has no other material to substantiate his claim. Transactions in the vicinity of the area registered around 1981 would have been clinching evidence for the .appellant. The appellant has also not furnished any evidence to substantiate his claim towards cost of improvement and transfer expenses. Hence, I uphold the action of the AO in adopting the SRO values as on 1/4/ 1981 for land and building and rejecting the claim towards cost of improvement and transfer expenses.

4.1 However, as mentioned in para 3.2 above, bringing capital gains in respect of 3834 square yards of property in the individual capacity is not tenable as the property pertains to the HUF of the appellant. Hence, I hold that the appellant is liable for capital gains in respect of 417 square yards of property (1/3 of 1250) only. The AO is directed to calculate capital gains proportionately and bring the same to tax in the hands of the appellant in his individual capacity.”

6. Aggrieved by the order of the CIT(A), both the assessee and Revenue are in appeal before the Tribunal. At the time of hearing before us, the learned AR submitted that the assessee has raised issue relating to application of section 50C(2) of the I.T.Act and also the validity of reopening of assessment and not disposing of the objections for reason for reopening of assessment by way of a speaking order, which were not adjudicated by the CIT(A). As such the assessment order deserves to be quashed because of the following reasons:-

(i) On facts and circumstances of the Appellants case, the learned authority's ought not to have ignored the provisions of section 50C(2) as the appellants claim about the valuation of capital asset to ascertain fair market value as on 01.04.1981 rejected unilaterally without following the procedure prescribed by the applicable provisions.

(ii) On facts and circumstances of the Appellants case, the order of learned authority's is invalid and bad in law as the conditions for reopening of assessments as contemplated in sec.148 r.w.s. 149 have not been complied as notice under section 147 is anti dated as it was booked on 01.04.2017 but dated 30.03.2017 which is void ab initio, and accordingly assumption of jurisdiction.

(iii) On facts and circumstances of the Appellants case, notice u/s 147 was issued by ITO Ward 7(3) Hyderabad who recorded the reasons to believe escapement of income, did not exercise jurisdiction over the matter but ITO Ward 1 Bidar exercised the jurisdiction over the matter, it is only the officer having jurisdiction over the matter who can have the reason to believe escapement of income and none other which is against the ratio of law laid down in the case of ITO v. Jawahar Lal Agarwal (2017) 190 TTJ (Agra) 870.

7. The learned Departmental Representative, on the other hand, fairly conceded that these issues were not adjudicated by the CIT(A), as such the issue may be remitted to the CIT(A) for adjudication afresh.

8. We have heard rival submissions and perused the material on record. Admittedly, the issues were raised by the assessee before the CIT(A), by way of grounds 5, 6, 7 and 8, which were not dealt by the CIT(A). Hence, we remit this legal issue raised by the assessee to the files of the CIT(A) for proper adjudication there upon decide the other issues on merits in accordance with law.

9. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

10. Since we have remitted the issue raised by the assessee to the files of the CIT(A), the Revenue's appeal becomes infructuous and dismissed accordingly.

11. In the result, the appeal filed by the assessee is partly allowed for statistical purposed and the Revenue's appeal is dismissed as infructuous.

Order pronounced on this 07th day of February, 2022.

Sd/-
(Beena Pillai)
JUDICIAL MEMBER

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Bangalore; Dated : 07th February, 2022.

Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Kalaburagi
4. The Pr.CIT, Gulbarga.
5. The DR, ITAT, Bengaluru.
6. Guard File.