

आयकर अपीलिय अधिकरण, 'ए' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI

श्री महावीर सिंह, माननीय उपाध्यक्ष, एवं
श्री जी. मंजूनाथा, माननीय लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ITA Nos.719/Chny/2019
निर्धारण वर्ष /Assessment Year: 2013-14

Mrs.P. Sulochana,
C/o. S.Ramachandran, B.Com., FCA,
Chartered Accountant,
"Sethuram",
No.15, Sundaresa Iyer Layout,
Trichy Road, Coimbatore.

v. The Asst. Commissioner of
Income Tax,
NCC-I,
Income Tax Dept.,
Race Course, Coimbatore.

[**PAN:** ADIPP 1379 A]
(अपीलार्थी/**Appellant**)

(प्रत्यर्थी/**Respondent**)

आयकर अपील सं./ITA Nos.720 & 721/Chny/2019
निर्धारण वर्ष /Assessment Years: 2013-14 & 2014-15

Mr.M.Paramasivam,
C/o. S.Ramachandran, B.Com., FCA,
Chartered Accountant,
"Sethuram",
No.15, Sundaresa Iyer Layout,
Trichy Road, Coimbatore.

v. The Asst. Commissioner of
Income Tax,
NCC-I,
Income Tax Dept.,
Race Course, Coimbatore.

[**PAN:** ADIPP 1366 K]
(अपीलार्थी/**Appellant**)

(प्रत्यर्थी/**Respondent**)

अपीलार्थी की ओर से/ Appellant by : Mr.B.Ramachandran, CA

प्रत्यर्थी की ओर से /Respondent by : Mr. AR.V.Sreenivasan,
Addl.CIT

सुनवाई की तारीख/Date of Hearing : 07.12.2021

घोषणा की तारीख /Date of Pronouncement : 23.02.2022

:: 2 ::

आदेश / ORDER**PER G. MANJUNATHA, ACCOUNTANT MEMBER:**

These three appeals filed by two different assessees are directed against separate but identical orders of the Commissioner of Income Tax (Appeals)-2, Coimbatore, dated 22.02.2019 and pertains to assessment years 2013-14 & 2014-15. Since, the facts are identical and issues are common, for the sake of convenient, these appeals are heard together and are being disposed off, by this consolidated order.

2. The additional grounds raised by the assessee in ITA No.719/Chny/2019 for the AY 2013-14 are as under:

Furtherance to the original Grounds of Appeal filed before Hon'ble ITAT, it is humbly prayed that the following Additional Grounds of Appeal may also be taken on record and considered:

I. Bad debts:

1) The Ld.CIT(A), having observed in para (4) of his order that the Assessee has become the Creditor in the books of the Companies, on settlement of the Loans availed by the Companies from the Bank, ought to have allowed the entire loan amount written off in the books of account of the Assessee as Bad-debts as under:

a. MPS Steel Castings P. Ltd.	Rs. 71,85,000/-
b. SMM Steel Rolling Mills P. Ltd.	Rs. 97,15,000/-

Totaling to	Rs. 1,69,00,000/-

2) The Ld. CIT(A) ought to appreciate that the purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an Assessee in accordance with law, as was held by the H'ble Apex Court in [1998] 229 ITR 383 (SC) National Thermal Power Co. Ltd., and allowed the claim, if not under Capital Gains as claimed by the Assessee, but under the head "Business" as Bad debts.

3) The Ld. CIT(A) ought to have followed the Circular No. 14(XL-35) dated 11-04-1955 which reads:

"Officers of the department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the officers should take the

:: 3 ::

initiative in guiding a tax payer where proceedings or other particulars before them indicate that some refund or relief is due to him.... "

II. Summons u/s 131 is Void ab-initio:

The Ld. CIT(A) ought to have noticed from the Assessment Order that the summons u/s 131 was issued on 06-05-2016 and at that point of time

there was no proceedings pending under the Income-tax Act and hence the subject summons was bad in law and without jurisdiction and the subsequent proceedings u/s 147 and issue of notice u/s 148 stemming up from the said void summons automatically fails.

Reliance is placed on the following case laws on Sec. 131:

- a. [1986] 27 Taxman 157 (Bom) Jamnadas Madhavji & Co v. ITO*
- b. [1993] 204 ITR 454 (CAL) ITO v. James Joseph O'gorman*
- c. [1998] 235 ITR 2019 (PAT) Smt. Rina Sen v. CIT*
- d. [2000] 108 Taxman 547 (Bom) G.M. Breweries Ltd. v. Uol*

III. The above grounds are independent and without prejudice to each other.

IV. The Appellant craves leave to add, alter, supplement, amend, vary, withdraw or otherwise modify the grounds mentioned hereinabove at or before the time of hearing."

2.1 At the outset, the counsel for the assessee, referring to petition filed for filing additional grounds, submitted that the assessee had taken additional grounds challenging the findings of the Ld.CIT(A) and additional grounds taken by the assessee is purely on legal ground, which can be filed at any stage of the proceedings including proceedings before the Tribunal. Therefore, submitted that additional grounds of appeal filed by the assessee may be admitted.

2.2 The Ld.DR, on the other hand, strongly opposed additional grounds filed by the assessee and argued that the additional grounds taken by the assessee is not purely on legal ground, but it is a mixed ground of question of fact and question of law, which can be entertained, if the facts relating

:: 4 ::

to said issue was already on record before the AO. Since, additional grounds taken by the assessee needs to be examined in light of various facts and further, those facts were not already on record before the AO at the time of appellate proceedings and hence, the additional grounds filed by the assessee cannot be admitted.

2.3 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The petition filed by the assessee taking additional grounds of appeal in light of observations of the Ld.CIT(A) in Para No.4 of his order, though, purely not a legal ground, but facts relating to said issue was already on record before the AO at the time of appellate proceedings and further, there is no need for the AO to go into new evidences to ascertain the facts with regard to claim of the assessee by way of additional grounds. Therefore, we are of the considered view that additional grounds filed by the assessee deserve to be admitted and hence, we admit additional grounds filed by the assessee for adjudication.

3. The assessee has, more or less raised the common grounds of appeal, therefore, for the sake of brevity, grounds of appeal filed for the assessment year 2013-14 are re-produced as under:

1. The order of the Ld. CIT(A) is against the principles of law, justice and equity.

2. The Ld. CIT(A) failed to appreciate that to attract Sec.45 r.w.s.48 of the Income-tax Act, 1961 there should be some gain for the assessee.

a. Here in this case, the Assessee did NOT receive a Single Paisa on the transfer. The Assessee as a result of the transfer only LOST his valuable asset.

:: 5 ::

b. The Ld. AO has clearly mentioned in her Assessment Order that the entire sale consideration was appropriated by the Banks towards their loans to the Companies.

c. The Assessee, who stood as a Guarantor for the loans availed by the Companies, was compelled by the banks to sell the Mortgaged properties and pay-off the loan over dues.

3. The Ld. CIT (A) has erred in stating in page 5 of his order that "the decision of the Kerala High Court in the case of Smt. Thressiamma Abraham (1997) 227 ITR 802 (Kerala) relied upon by the appellant was no longer good law after the judgments of the Supreme Court in the case of V.S.M.R.Jagadish Chandran Vs. CIT (1997) 227 ITR 240"

a. The said judgment of the H'ble SC is distinguishable in so far as that, in the said case, the Assessee created Mortgage of the Property for his own benefit; whereas here in this case the assessee only stood as Guarantor for the loans availed by the Company and did not get derive benefit and only LOST his property.

4. The Ld. CIT(A) has assumed that the Appellant becomes a Creditor in the Company's accounts and the Company will pay back the Creditor when the financial health of the Company improves.

a. When the Company could not pay a Secured Bank Loan much could not be made of by their becoming debtors of the Assessee.

b. On the Sale of the property of the Assessee no amount became recoverable by the Assessee from the Company.

c. The Assessee only Lost valuable assets for no consideration or benefit at all.

5. For these and other grounds that may be adduced at the time of hearing it is humbly prayed that the addition of Capital Gains in the Assessment Order be deleted.

4. The brief facts of the case are that assessee did not file his return of income for the assessment years 2013-14 & 2014-15. As per the information obtained from the Annual Information Return (AIR) and CIB information, the assessee had immovable property transaction as well as huge cash transaction during the financial year relevant to the assessment year 2013-14. Based on the AIR information, summons u/s.131 of the Act was issued to the assessee and in response, a sworn statement was recorded on 06.05.2016. In the said statement, the assessee stated that the bankers have recovered the dues payable by three companies by attaching the collateral properties and they had executed all the Sale Deeds on behalf of the assessee and appropriated sale consideration against loans

:: 6 ::

payable by the borrowers. The assessment has been subsequently re-opened on the basis of information available, as per which, income chargeable to tax had been escaped assessment within the meaning of Sec.147 of the Act and thus, notice u/s.148 of the Act dated 06.09.2016 was issued and served on the assessee. In response to the notice, the assessee had filed return of income on 12.09.2016 declaring total income of Rs.9,51,140/-.

5. The case was taken up for scrutiny and during the course of assessment proceedings, it was noticed that the assessee stood as a guarantor for loans availed by three companies viz., M/s.Paragon Steels Pvt. Ltd., M/s.MPS Steel Castings Pvt. Ltd. and M/s.SMM Steel Re-rolling Mills Pvt. Ltd, from City Union Bank and State Bank of India. The Borrower has defaulted in repayment of loans availed from banks and thus, the banks have insisted on the assessee as a guarantor and has mortgaged the property for repayment of loans. The assessee has sold the properties and paid the entire sale consideration towards bank loans availed by the said companies. Therefore, contended that since, he did not receive any benefit, no capital gains arises in his hands. During the course of assessment proceedings, the AO collected certain details from bank, as per which, the properties that were sold by the assessee during the relevant previous year were originally mortgaged towards the loans availed by banks, in which, the assessee was a Director and Guarantor to the banks. The banks have appropriated sale consideration towards loans payable by

:: 7 ::

the companies. However, it is noticed from the details received from the bank that, the banks have released the mortgaged documents in favour of the assessee on payment of loans and the Sale Deed has been subsequently executed by the assessee in favour of the purchaser. Therefore, the AO opined that it is the assessee who had transferred the property and thus, as per sec.45 of the Act, the assessee is liable to be assessed for the capital gains that arises on the sale of the property. Therefore, computed long term capital gains derived from sale of property and added back a sum of Rs.2,69,55,625/- under the head 'income from capital gains'.

6. Being aggrieved by the Assessment Order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee submitted that the properties mortgaged to the banks as a guarantor, was sold by the banks and consideration has been appropriated against loans payable by the borrowers. Therefore, in the absence of any benefit derived from transfer of property, no capital gains can be computed in the hands of the assessee. In this regard, relied upon the decision of the Hon'ble Kerala High Court in the case of CIT v. Smt.Thressiamma Abraham reported in [1997] 227 ITR 802 (Ker). The Ld.CIT(A) after considering relevant facts and also taken note of certain judicial precedents, including the decision of the Hon'ble Kerala High Court in the case of CIT v. Smt.Thressiamma Abraham (supra) and also the decision of the Hon'ble Supreme Court in the case of V.S.M.R.Jagadishchandran v. CIT reported in [1997] 93 Taxman 389 (SC) held that the AO was right in computing capital gains derived from transfer

:: 8 ::

of property in the hands of the assessee, even though, consideration paid to the bank. Being aggrieved by the Ld.CIT(A), the assessee is in appeal before us.

7. The Ld.AR for the assessee submitted that the Ld.CIT(A) has erred in not appreciating the fact that to attract provisions of Sec.45 r.w.s.48 of the Act, there should be some gain for the assessee to compute capital gains, whereas, in the present case, the assessee did not receive a penny from the sale of assets, because the assets mortgaged to the bank, have been sold by the banks and the sale consideration has been appropriated towards loans payable by the borrowers. The Ld.AR further referring to the decision of the Hon'ble Kerala High Court in the case of CIT v. Smt.Thressiamma Abraham (supra) and also the decision of the Hon'ble Supreme Court in the case of V.S.M.R.Jagadishchandran v. CIT (supra) submitted that the facts of the present case are squarely covered by the decision of the Hon'ble Kerala High Court in the case of CIT v. Smt.Thressiamma Abraham (supra) but distinguishable from the facts of the case before the Hon'ble Supreme Court in the case of V.S.M.R.Jagadishchandran v. CIT (supra), wherein, the assessee himself mortgaged the properties to banks towards loan borrowed in his name and when re-payment was not made, the banks have sold the property and appropriated sale consideration towards loans. Under those facts, the Hon'ble Supreme Court came to conclusion that in a case, where property was not mortgaged by previous owner, but by assessee himself, then amount paid to discharge mortgage debts, could not be considered as

:: 9 ::

cost of acquisition, to allow same as deduction. In the present case, the assessee stood as a guarantor against loans borrowed by companies and thus, the facts of the present case, cannot be equated with the facts of the case before the Hon'ble Supreme Court. He, further submitted that the facts of the present case was squarely covered by the decision of the Hon'ble Kerala High Court in the case of CIT v. Smt.Thressiamma Abraham(supra), wherein, it was clearly held that when the assessee stood as a guarantor for the loans availed by third party and consideration received for transfer of property was appropriated against the loans payable by the borrower and thus, the assessee has not received any consideration for transfer of property, capital gains cannot be computed in the hands of the assessee.

8. The Ld.AR for the assessee further referring to additional grounds of appeal filed, submitted that alternatively the Ld.CIT(A) having observed in his order that the assessee has become the creditor in the books of the companies on settlement of the loans availed by the companies from the banks he ought to have allowed the entire amount written off in the books of accounts of the assessee as bad debts.

9. The Ld.DR, on the other hand, supporting the order of the Ld.CIT(A), submitted that there is no error in the reasons given by the AO as well as the Ld.CIT(A) to make additions towards capital gains derived from transfer of property, because the facts of the present case are distinguishable from the facts of the case considered by the Hon'ble Kerala High Court in the

:: 10 ::

case of CIT v. Smt.Thressiamma Abraham (supra), because in the present case, as per facts brought out by the AO, the assessee himself has sold the property and paid loans to bank on behalf of the companies and get discharged mortgaged properties. Therefore, from the facts it is very clear that the assessee has sold the property, received the consideration and discharged the debt. Therefore, the assessee is liable to pay capital gains tax as per the provisions of Sec.45 r.w.s.48 of the Act.

10. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The factual matrix of the impugned dispute is that the assessee being one of the directors of three companies viz., M/s.Paragon Steels Pvt. Ltd., M/s.MPS Steel Castings Pvt. Ltd. and M/s.SMM Steel Re-rolling Mills Pvt. Ltd, stood as a guarantor to the banks and mortgaged his properties against loan availed by the three companies from City Union Bank and State Bank of India. Further, when the three companies failed to repay the loans availed from banks, the banks have insisted upon the guarantor to sale his properties and repay the loan. The assessee had sold the properties and discharged the debts of three companies and also released the mortgaged property before executing the Sale Deed in favour of the buyer. The assessee claims that since, the banks have sold the property and appropriated the consideration towards loans repayable by three companies, he has not liable to compute capital gains and pay taxes, because he did not receive any consideration for transfer of

:: 11 ::

property. In this regard, he relied upon the decision of the Hon'ble Kerala High Court in the case of CIT v. Smt.Thressiamma Abraham (supra).

11. We have given our thoughtful consideration to the facts of the present case in light of facts brought out by the AO and arguments advanced by the assessee. We find that the assessee claims that the mortgaged properties had been sold by the banks on their own and appropriated sale consideration towards loans repayable by the companies. On the other hand, the AO had recorded categorical findings that the assessee himself had sold the property, discharged the loan repayable by the three companies and executed the Sale Deed in favour of the buyers after discharging mortgage from the banks. Facts are contradicting. In case the claim of the assessee is correct that the banks have sold the property mortgaged by the assessee and appropriated sale consideration against loan payable by the three companies, then the case of the assessee is squarely covered by the decision of the Hon'ble Kerala High Court in the case of CIT v. Smt.Thressiamma Abraham (supra), wherein, it was clearly held that when the purchaser of the property paid entire sale consideration directly to the lender and it was only thereafter mortgaged property was released, then, it can be said that sale consideration was diverted to the lender by overriding title and in such circumstances, no capital gains accrued to the assessee. In case, the claim of the AO is correct that the assessee himself has sold the property and received sale consideration from the purchaser and thereafter discharged the debt payable by three

:: 12 ::

companies to banks and get released the mortgaged property and thereafter executed the Sale Deed in favour of the purchaser, then the case of the assessee is not covered by the decision of the Hon'ble Kerala High Court in the case of CIT v. Smt.Thressiamma Abraham (supra). Since, there are contradicting arguments from both the sides, we are of the considered view that the issue needs to be re-examined by the AO in light of the arguments of the assessee that the bank has took possession of the property under SARFAESI Act, 2002, sold the property directly to the buyers and buyers have directly paid the consideration to the banks against loans repayable by three companies in light of decision of the Hon'ble Kerala High Court in the case of CIT v. Smt.Thressiamma Abraham (supra) to ascertain the correct facts to compute capital gains.

12. Even otherwise, as per the additional grounds filed by the assessee, the Ld.CIT(A) having accepted the fact that once assessee become creditor in the books of accounts of three companies, and the assessee has written off loans and advances given to three companies in his books of accounts as irrecoverable bad debts, the Ld.CIT(A) ought to have examined the claim of the assessee in light of provisions of Sec.36(1)(vii) r.w.s.36(2) of the Act. Because, when the assessee had mortgaged his property in favour of the banks against loans availed by three companies, then loan repaid by the assessee to banks becomes loans and advances given to three companies in the books of accounts of the assessee. If assessee written off those loans and advances given to three companies as irrecoverable bad

:: 13 ::

debts, then the assessee can claim the benefit of deduction towards bad debts, if conditions prescribed u/s.36(1)(vii) r.w.s.36(2) of the Act are satisfied. Since, the assessee has taken arguments for the first time before the Tribunal, we are of the considered view that the issue needs to go back to the file of the AO for verification of the facts on this count also.

13. In this view of the matter and considering the facts and circumstances of the case, we are of the considered view that the appeals filed by the assessee needs to be set aside to the file of the AO for verification of facts in light of various averments made by the assessee. Hence, we set aside the appeals and restore the issue back to the file of the AO and direct the AO to re-examine the issue in light of various arguments made by the assessee and also in light of decision of the Hon'ble Kerala High Court in the case of CIT v. Smt.Thressiamma Abraham (supra) and also the claim of the assessee that he had written off loans and advances as irrecoverable bad debts in his books of accounts.

14. In the result, the appeals filed by the assessee for the assessment year 2013-14 in ITA Nos.719 & 720/Chny/2019 are treated as allowed for statistical purposes.

ITA No.721/Chny/2019 for the assessment year 2014-15:

15. The facts and issues involved in this appeal are identical to the facts and issues which we have considered in ITA Nos.719 & 720/Chny/2019 for the assessment year 2013-14. The reasons given by us in preceding

:: 14 ::

paragraphs shall mutatis mutandis apply to this appeal, as well. Therefore, on similar reasons, we set aside the order passed by the Ld.CIT(A) and restore the issue to the file of the AO and direct the AO to re-consider the issue in light of various arguments advanced by the assessee and also in light of decision of the Hon'ble Kerala High Court in the case of CIT v. Smt.Thressiamma Abraham (supra).

16. In the result, appeals filed by the assesseees for the assessment years 2013-14 and 2014-15 are treated as allowed for statistical purposes.

Order pronounced on the 23rd day of February, 2022, in Chennai.

Sd/-
(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /VICE PRESIDENT

Sd/-
(जी. मंजूनाथा)
(G. MANJUNATHA)
लेखा सदस्य /ACCOUNTANT MEMBER

चेन्नई/Chennai,
दिनांक/Dated: 23rd February, 2022.
TLN, Sr.PS

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF