

आयकर अपीलीय अधिकरण “ए” न्यायपीठ पुणे में।
IN THE INCOME TAX APPELLATE TRIBUNAL “A”
BENCH, PUNE

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

आयकर अपीलसं. / ITA No.1751/PUN/2018
निर्धारणवर्ष / Assessment Year : 2013-14

The Income Tax Officer, Ward-2(3), Solapur,	Vs	Shri Ulhas Mallikarjun Patil, Block No.3, Sunandan Complex, Near Dayanand College, Ravivar Peth, Solapur – 413004. PAN: AKEPP 1943 P
Appellant/ Assessee		Respondent /Revenue

Assessee by	Shri Krishna V Gujarathi – AR
Revenue by	Shri Ramnath P Murkude – DR
Date of hearing	05/09/2022
Date of pronouncement	06/09/2022

आदेश/ ORDER

Per S.S.Godara, JM:

This Revenue’s appeal for Assessment Year 2013-14 is directed against the Commissioner of Income Tax(Appeals)-7, Pune’s order dated 31.08.2018 passed in case no.PN/CIT(A)-7/Wd-2(3)/10434/2016-147, in proceedings u/s.143(3) of the Income Tax Act, 1961 [in short “the Act”].

Heard both the parties. Case file perused.

2. The Revenue’s first and foremost substantive ground challenges correctness of the CIT(A)’s action reversing assessment findings making section 50 short term capital gains addition of Rs.2,11,48,477/- made in the course of assessment dated 31.03.2016.

The formers lower appellate discussion to this effect reads as follows:

“5.3 I have carefully considered the facts of the case and law apparent from records. The assessee has filed original return of income on 06/12/2013 declaring total income of Rs. 2,40,450/- and agricultural income of Rs. 30,25,000/-. The assessee submitted copy of balance sheet in and expenditure account with return of income. The AO had information that the assessee has sold immovable property of Rs. 3,39,00,000/-(stamp valuation). The AO sought details of sale and the assessee submitted that he had purchased property on 06.12.2014 and construction commenced on 06.07.2007. The appellant/ assessee submitted that property is sold on 20.10.2012 to trust and no capital gain received and submitted capital loss of Rs. 2,04,28,946/-.The AO noted that the cost of land is taken at Rs. 1,00,000/- and cost of construction of Rs. 2,51,45,400/- in F.Y. 2006-07. The assessee has also capitalized interest of Rs. 89,65,775/- towards cost of construction. The sale value of the property is Rs. 3i00,00,000/-. The property (building) was given on rent to various schools from 01.06.2008. The assessee has shown income from business in return of income. The AO sought to invoked provisions of section 50 & 50C. The AO observed that the school building was constructed keeping in view needs of school and intention of building was on commercial basis. The AO also observed that assessee has shown business income from A.Y.2008-09 onwards. The assessee has not claimed any depreciation on school building. The AO has mentioned that capitalization of interest till completion of construction i.e. 31.07.2007 found allowable. The cost of construction has been taken at Rs.2,365,47,980/- in F.Y.2007-08 by the AO. The AO considered depreciation @ 10% and computed WDV at Rs. 1,25,67,506/- as on 01.04.2012. The AO computed short term capital gain of Rs. 2,11,38,477/-.

5.4 During appellate proceedings the appellant submitted that the appellant has inadvertently declared the rent received as income from business instead of income from house property. The appellant submitted that income from house property should have been computed at Rs. 4,87,892/- and relied on judicial pronouncement. The appellant submits that interest on borrowed funds is allowed u/s 24(b). The appellant also submits that no adverse evidence brought against the appellant to prove that appellant has carried business. The appellant objected to computation of WDV and invocation of provisions of section 50. The appellant also submits that the property which was let to school belongs to the appellant since F.Y. 2007-08.

5.4.1 The appellant also submits that premises were let out for a long period to a charitable trust and relied on judicial pronouncement that rent received is income from house property.

5.5 Ostensibly, the appellant constructed school building and received rent since A.Y.2008-09. The appellant was showing rent received as business income in return of income. The appellant sold school building for consideration of Rs. 3,00,00,000/- during the year under consideration. The appellant did not claim any depreciation on school building. The AO treated the gain arising from sale of building as short term capital gain by invoking provisions of section 50. The appellant admitted that the correct working of income from house property would be Rs. 4,87,892/- whereas the appellant has shown income from business at Rs. 2,40,450/- as per income & expenditure account. The income & expenditure account depicts that there is receipt of rent, salary and dividend. Apparently, there are no other receipts which would depicts complex nature of letting out to treat rental receipt as business receipt

5.6 The main issue is invocation of provisions of section 50 in respect of school building sold. Admittedly, no depreciation has been claim by the appellant. The provisions of section 50 is very clear that the capital assets sold should be part of block of assets in respect of which depreciation has been allowed. In case of appellant there is no block of assets and no depreciation has been claimed. In case of block of assets where the depreciation Has been claimed which reduces the profit and in turn on sale short term capital gain would arise. Irrespective of holding for longer period. Therefore, in case of appellant provisions of section 50 is not applicable.

5.7 The AO is of opinion that in case of commercial assets the provisions of section 50 would apply even though no depreciation is claimed. The AO has computed depreciation on cost of acquisition of Rs. 2,36,47,980/- from F.Y. 2007-08 to 2012-13. This artificial computation of depreciation would result into change of income in earlier years. Even in case of commercial assets if no depreciation is claimed than provisions of section 50 cannot be applied. It is also clarified that provisions of section 50 would apply if depreciation is claimed in one year and discontinued later on. Therefore, in the given circumstances section 50 does not apply to case of the appellant.

5.8 The appellant relied on decision of the Gujarat High Court CIT Vs. New India Industries Ltd. reported in 201 ITR 208. Apparently, the appellant is not the user of the building and the user was charitable trust who was running a school on rented premises. The Bombay High Court in case of Parekh Traders Vs. CIT reported in 150 ITR 310 has held that income from let out from godown earlier used by assessee would be income from property and not income from business. The intention of the appellant in respect of commercial exploitation of school building should be

discernible from records. It is also not apparent that the same school building has been rented to many schools from time to time. The contention of the appellant has force that no adverse evidence brought against the appellant to prove that appellant has carried business. Therefore, the rental receipts should have been assessed as income from house property instead of business income

*5.9 In view of the above action of the AO in invoking provisions of section 50 cannot be upheld and **ground No.1 of the appeal is allowed.**”*

3. Mr.Murkunde vehemently argued that the Assessing Officer had rightly treated the assessee’s long term capital gain in issue as short term capital gains u/s 50 of the Act since the same had arisen from transfer of depreciable assets in the relevant previous year. The assessee has drawn strong support from the CIT(A)’s foregoing lower appellate discussion.

4. We have given our thoughtful consideration to the foregoing rival submissions and find no merit in Revenue’s arguments. We note first of all in light of assessee’s balance sheet as on 31.03.2013 followed by his income and expenditure account as well as capital gain/loss calculation that he had neither claimed nor debited any depreciation sum; whatsoever, so as to attract section 50 in the given facts and circumstances of the case. We make it clear that the legislature has incorporated the clinching statutory expression “where the capital asset is an asset forming part of a block of assets in respect of which depreciation has been allowed” which is nowhere

the situation before us. The Revenue's pleadings also do not rebut the assessee's stand that he had not claimed any depreciation on the school building or any other asset transferred in the relevant previous year, if any.

5. Faced with the situation, we quote honorable jurisdictional high court's decision in CIT vs. Ace Builders [2005] 281 ITR 210 (Bom) holds that section 50 is a deeming fiction applicable in the specified circumstances only. We further refer to stricter interpretation in light of Commissioner Vs. Dilipkumar and Company [2018] 9 SCC page 1 (SC)(FB) as well as CIT vs VEEPE Enterprises [2010] 325 ITR 414 (Kerala) that transfer of assets forming part of a block of assets specifically held entitled for depreciation, is a condition precedent for invoking the impugned deeming fiction u/s 50 wherein long term capital gains are assessed as short term gains. The Revenue's instant former substantive ground stands rejected therefore.

6. Next comes unexplained cash deposits issue of Rs.35 lakhs added in the course of assessment and reversed in the CIT(A)'s order. Learned counsel could hardly dispute the fact that the assessee had not filed all the relevant details regarding source thereof during the course of assessment as per para 16.1 in Assessing Officer's findings. The assessee appears to have filed its cash

flow/cash book details only before the CIT(A) which were sent to the Assessing Officer in remand. The assessee claimed therein that he had derived agricultural income in cash of Rs.40.50 lakhs and made other payments including corresponding expenses of Rs.25,26,762/-. The Assessing Officer's findings taken into consideration in para 7.5 of the CIT(A)'s order had disputed the assessee's agricultural income which has nowhere been considered in proper perspective prima facie. Faced with this situation, we are of the opinion that the instant latter issue requires the Assessing Officer's afresh factual verification. We order accordingly. This revenue's instant latter substantive ground is allowed for statistical purpose.

7. This Revenue's appeal is partly allowed for statistical purpose in above terms.

Order pronounced in the open Court on 6th September, 2022.

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 6th Sep, 2022/ SGR*

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे/ITAT, Pune.