

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

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.775/Mum./2019
(Assessment Year : 2015-16)

Jt. Commissioner of Income Tax (OSD)
Central Circle-7(1), Mumbai

..... Appellant

v/s

Shri Sujan Azad Parikh
C-701, Beaumonte Tower
Appasaheb Marathe Marg
Prabhadevi, Mumbai 400 025
PAN – AAEP9028R

.....Respondent

Assessee by : Shri Satish Modi
Revenue by : Shri Ajay Singh

Date of Hearing – 05/09/2022

Date of Order – 02/12/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the Revenue challenging the impugned order dated 16/11/2018, passed under section 250, of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals)-49, Mumbai, [*learned CIT(A)*], for the assessment year 2015-16.

2. In its appeal, the Revenue has raised the following grounds:-

"(1) On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to accept long term capital gain shown by the assessee without appreciating the fact that the assessee had failed to furnish

concrete evidence in respect of payment of Rs. 4.25 lakhs towards acquiring the flat at Skylark Society in the year 1992."

(2) On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the addition u/s 68 of the IT Act 1961 as unexplained cash credit, without appreciating the fact that the explanation offered by the assessee in respect of credit of Rs. 7,62,50,000/-, was not satisfactory in the opinion of the AO.

(3) On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to allow the set off long term capital loss claimed by the assessee against the long term capital gains arising from the sale of flat without appreciating the fact that the decision of the Hon'ble ITAT in the case of M/s. Raptakos Brett & Co. Ltd. ITA No. 3317/Mum/2009 & 1692/Mum/2010 for A.Y. 2007-08 has not been accepted by the department and appeal u/s 260A to the High Court has been filed.

The appellant prays that the order of CIT(A)-49, Mumbai on the above grounds be set aside and that of the Assessing Officer be restored.

The appellant craves leave to amend or alter any ground and/or add new grounds which may be necessary."

3. The issue arising in grounds No. 1 and 2, raised in Revenue's appeal, is pertaining to long-term capital gain earned from the sale of a flat.

4. The brief facts of the case as emanating from the record are: The assessee is an individual and during the year under consideration assessee's main source of income consists of salary, income from house property, capital gain, and income from other sources. For the relevant year, the assessee filed its return of income on 17/08/2015, declaring a total income of Rs. 2,81,69,870. The return filed by the assessee was selected for limited scrutiny through CASS. During the assessment proceedings, it was observed that the assessee has claimed to have sold a flat at Skylark Co-operative Housing Society Ltd ('Skylark flat') declaring a long-term capital gain of Rs. 7,25,08,820, against consideration of Rs. 7,62,50,000, (being 50% sale consideration of the flat). The gain so earned by the assessee was set off

against current year losses of Rs. 53,97,182, on account of long-term capital loss on the sale of mutual funds and carried forward term capital loss of Rs. 1,59,75,965, on account of sale of mutual funds during the previous years. The remaining long-term capital gain was reinvested in another flat purchased for Rs. 4,90,35,672, and reinvestment in REC bonds for ₹ 21 lakh. It was further observed that the ownership of Skylark flat was bestowed pursuant to decree order of the Hon'ble Court on Small Causes at Bombay in favour of the mother of the assessee, inter-alia, on condition of payment of Rs. 8.5 lakh to the Plaintiff. It was also noticed that pursuant to the aforementioned decree, the assessee along with his mother made joint representation to the Skylark Co-operative Housing Society Ltd to transfer the shares in their joint names. Pursuant thereto share certificates were transferred to the joint names of the assessee and his mother. Subsequently, in July 2007, the mother of the assessee transferred half share of the Skylark flat to the wife of the assessee. Finally, in July 2014, the Skylark flat was sold to a third-party for a total consideration of Rs. 15,25,00,050, and the assessee and his wife declared 50% of the consideration from the sale of the Skylark flat in their respective income tax returns for the assessment year 2015-16. The Assessing Officer ('AO') vide order dated 30/12/2017, passed under section 143(3) of the Act held that the said flat was decreed in favour of the mother of the assessee, however, without any sanction of law and based on flimsy grounds, the half share of the flat was transferred in the name of the assessee. It was further held that in the eyes of law, the complete share of property continues to be in the name of the mother of the assessee till she sold half share to the wife of the assessee in July 2007. Consequently, thereafter, the mother along with the

wife of the assessee are the real owners of the Skylark flat 50% share each. It was further held that even if the assessee is treated as a joint owner, the same is without any benefit during the lifetime of the real ultimate owner. Even the minutes of the meeting of the society nowhere mention 50% ownership for the assessee. Further, the AO held that the assessee has not furnished any evidence of the bank statement indicating payment of Rs. 4,25,000, by him during 1992 i.e. part of purchase consideration. Accordingly, the AO held that the half consideration received by the assessee amounting to Rs. 7,62,50,000, is taxable in the hands of the actual owner of the half share of the Skylark flat i.e. mother of the assessee. Further, consideration received on the sale of Skylark flat and consequent set off against such considerations/gain cannot be considered in the hands of the assessee. The AO also proceeded to add the aforesaid amount of Rs. 7,62,50,000, as unexplained credit in the hands of the assessee on the basis that the aforesaid amount was received by the assessee without any ownership of any asset.

5. The learned CIT(A) vide impugned order allowed the appeal filed by the assessee on this issue, by observing as under:

"6.6 The assessee's name has been included as a joint owner in the shares issued by the Skylark co-operative housing society. The assessee was able to sell the flat vide a registered sale deed as he was the rightful owner of 50% of the shares. Otherwise, the registration would not have taken place. In fact, the other 50% share of the flat was owned by Mrs. Enakshi Sujan Parikh who is the wife of the assessee. The 50% share of Smt. Avani Azad Parikh has been sold to Enakshi Sujan Parikh, Both Enakshi Sujan Parikh and Sujan Azad Parikh being co-owners, have jointly sold the flat which has been registered on 17.07.2014, Had the assessee not been the owner, he would not have been able to sell the flat as the owner. The facts that the assessee had paid Rs.4.25 Lakhs which is his share of the purchase consideration in 1992, had held and enjoyed the ownership of the flat till its sale in 2014, the transfer of shares of the flat in the joint names of the assessed and his mother, all show that the assessee was the owner of the flat and the sales consideration received is

taxable in his hands. Therefore, the long term capital gains shown by the assessee are acceptable.

6.7 The other contention of the AO is that as the assessee is not eligible for long term capital gains, as he is not the owner of the flat, he had taxed the entire consideration u/s, 68 of the IT Act. However, section 68 cannot come into play here because as per the AO's own admission the amount has been received as 50% sale consideration from Mrs. Gouri Kapoor. The registered sale deed is stark evidence for the sale which has not been disputed by the AO, Section 68 of the Income Tax Act states "where any sum is found credited in the books of account of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source there and or the explanation offered by him to not, in the opinion of the AO, satisfactory, the same so credited may be charged to income tax as the income of the assessee of that previous year". In this case, the assessee has offered an explanation about the nature and source of the credit of Rs.7,62,50,000/- which has not been denied by the AO. The AO himself states that the amount of Rs.7,62.50,000/- is taxable in the hands of the actual owner Smt. Avani Azad Parikh, When the purpose and source of credit has been explained, there is no case for an addition u/s 68 of the Income Tax Act. Therefore, the addition of Rs.7,62,50,000/- made by the AO as unexplained cash credit is deleted. These grounds of appeal are ALLOWED."

Being aggrieved, the Revenue is in appeal before us.

6. During the hearing, the learned Departmental Representative (*'learned DR'*) vehemently relied upon the order passed by the AO.

7. On the contrary, the learned Authorised Representative (*'learned AR'*) submitted that the assessee along with his wife has sold the flats to a third party, and without being the legal owner registration could not have taken place. Further, the assessee also paid part of the purchase consideration in the year 1992 and enjoyed 50% ownership of the said flat till it was sold in the year 2014.

8. We have considered the rival submissions and perused the material available on record. In the present case, the AO has treated the assessee to be not the owner of 50% share in the Skylark flat. As per the AO, the decree

order of the Hon'ble Court on Small Causes at Bombay was in favour of the mother of the assessee, however, without any sanction of law and based on flimsy grounds both the assessee and his mother gave joint representation to the Skylark Co-operative Housing Society Ltd to transfer/mutate the shares on their joint names. Though, the AO has made the above allegations, however, has not produced anything on record to suggest any dispute by any party challenging the name of the assessee as a joint holder of shares certificates along with his mother. Further, it has also not been disputed that the mother of the assessee had sold her share in the Skylark flat to the wife of the assessee in July 2007. Pursuant thereto, in the records of Skylark Co-operative Housing Society Ltd, the name of the assessee and his wife is appearing as the shareholders. The assessee has also furnished a copy of the bank statement of assessee's account in Bombay Mercantile Co-operative Bank, forming part of the paper book on page 28, to substantiate the payment of Rs. 4,25,025 on 23/09/1992 as part of the purchase consideration of the Skylark flat. It has also not been disputed that the said flat was subsequently sold in July 2014 to third-party by the assessee and his wife and as per the registered deed of transfer dated 18/07/2014, forming part of the paper book from page nos. 23-35, the purchaser has agreed to pay the total consideration in equal proportion to the assessee and his wife. Further, nothing has been brought on record that due to the alleged lack of ownership of the assessee, the title in the property has not been legally transferred to the purchaser. Therefore, in view of the above, we are of the considered opinion that the learned CIT(A) has rightly accepted the long-term capital gain in the hands of the assessee.

9. Further as regards the addition made by the AO by treating the part consideration from the sale of Skylark flat as unexplained credit, we find that the registered deed of transfer whereby the said flat was sold to the third party was already available on record before the AO and therefore in the aforesaid circumstances the amount of sale consideration received by the assessee, being the joint owner of the flat, cannot be held to be unexplained credit in the hands of the assessee. Thus, we find no infirmity in the impugned order passed by the learned CIT(A) on this issue. As a result, grounds No. 1 and 2 raised in Revenue's appeal are dismissed.

10. The issue arising in ground No. 3, raised in Revenue's appeal, is pertaining to the set off of long-term capital loss arising from STT paid transactions against long-term capital gain arising from the sale of the flat.

11. The brief facts of the case as emanating from the record are: The long-term capital gain earned from the sale of Skylark flat was set off by the assessee against current year losses of Rs. 53,97,182, on account of long-term capital loss on the sale of mutual funds and carried forward long term capital loss of Rs. 1,59,75,965, on account of sale of mutual funds during the previous years. The AO vide assessment order denied the claim of set off of long-term capital loss against the long-term capital gain from the sale of the flat. In appeal, learned CIT(A) vide impugned order following the decision of the coordinate bench of the Tribunal in M/s Raptakos Breet & Co. Ltd., ITA No. 3317/Mum./2009, decided this issue in favour of the assessee. Being aggrieved, the Revenue is in appeal before us.

12. During the hearing, learned DR submitted that on this issue there are divergent views of the coordinate bench of the Tribunal, however, the Hon'ble Kerala High Court in Appolo Tyres Ltd vs DCIT, (2022) 284 Taxman 229 (Kerala) has decided this issue in favour of the Revenue and held that Long-term capital loss arising out of the sale of shares and units of mutual funds on which STT was paid and covered under section 10(38) could not be set off against long-term capital gain arising out of the sale of land as per section 70(3) of the Act.

13. On the contrary, learned AR placed reliance upon the impugned order passed by the learned CIT(A) on this issue.

14. We have considered the rival submissions and perused the material available on record. It has not been denied by the assessee that the long-term capital loss arose on account of the sale of units of mutual funds on which STT was paid. The said long-term capital loss has been sought to be set off against the long-term capital gain arising on the sale of Skylark flat. We find that in Appolo Tyres Ltd. (supra) following question of law came up for consideration before the Hon'ble Kerala High Court:

"2. Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in disallowing the setting off of long term capital loss on sale of shares and units of mutual funds against long term capital gain on sale of land?"

15. While deciding the aforesaid question of law in favour of the Revenue, the Hon'ble Kerala High Court observed as under:

"7.1 The question of law framed deals with the claim of the assessee to set off the loss suffered by the assessee from the sale of long term capital assets (e.

shares against the income earned from the sale of a long term capital asset. Section 10(38) reads as follows:

"10(38) any income arising from the transfer of a long-term capital asset, being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust where-

(a) the transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No. 2) Act, 2004 comes into force, and

(b) such transaction is chargeable to securities transaction tax under that Chapter:"

Chapter III of the Act deals with incomes that do not form part of total income. Sections 10 to 13 are various incomes that are treated as not forming part of the income of the assessee Chapter IV deals with the computation of total income Section 14 deals with heads of income. Sections 45 to 55 deal with computation of capital gains Chapter VI deals with aggregation of income and set-off or carry forward of loss.

Set-off of loss from one source against income from another source under the same head of income Section 70 reads thus:

"(1) xxxxx

(2) xxxxx

(3) Where the result of the computation made for any assessment year under sections 48 to 55 in respect of any capital asset (other than a short-term capital asset) is a loss, the assessee shall be entitled to have the amount of such loss set-off against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset not being a short-term capital asset."

7.2 There is no quarrel between the assessee and the Revenue that the shares and units of mutual funds sold by the assessee would come under section 10(38) of the Act. Thus had there been income such income is excluded from the computation of income of the assessee Sections 48 to 55 deal with the computation of long term capital gains by the assessee. The principle laid down by the Supreme Court in Harprasad & Co. case is to the effect that income is inclusive of profit and loss re both positive and negative effects of the transaction Hence, it is legal and correct not to introduce the entry of sale of shares in the computation of income under sections 48 to 55. The set-off of loss etc is dealt with by section 70(3) of the Act.

7.3 Let us understand see 70(3) as follows:

Set-off of loss from one source against income from another source, important words are under the same head of income. Next, section 70(3) is applicable or attracted, viz:-

(a) the result of the computation made for the assessment year, important words are viz under sections 48 to 55 in respect of any capital asset, being a short term capital asset, in a loss;

(b) enables the assessee to have the amount of such loss set off against the income if any.

(c) as arrived at under similar computations Le Sections 48 to 55 made for the assessment year for same assessment year in respect of the same capital asset not being a short term capital asset.

Under section 70(3) of the Act, the first requirement is that the result of the computation made for any assessment year under sections 48 to 55 in respect of any capital asset excluding a short term capital asset results in a loss. Then, the assessee shall be entitled to have such loss set-off against the income, if any as arrived at under a similar computation made for the assessment year in respect of any other capital asset not being a short term capital asset. Therefore, to merit an adjustment under section 70(3), the assessee is required to first establish that the loss arrived at by the assessee is on the computation under sections 48 to 55, in respect of a long term capital asset. And the loss can be set off only against the income arrived at under a similar computation e sections 48 to 55 made for the very assessment year. The literal meaning of section 70(3) clearly shows that both for including the loss against set-off and setting of loss against income the computation must have been made under sections 48 to 55 of the Act. The language of section 70(3) is clear and unambiguous In the understanding of this Court, the Parliament intended homogeneous entries to adjust the loss or profit against one another and not introduce heterogeneous elements or entries. Hence, the interpretation adopted by the assessee would give benefits not otherwise intended by the Section.

7.4 The effort of the assessee, in our view, includes an excluded claim, ce a heterogeneous claim under section 70(3) of the Act, by claiming that the homogeneity of long term capital gain is satisfied by the assessee. We are of the view that the application of section 70(3) by the assessee is incorrect und illegal. The Assessing Officer has very clearly appreciated the objection, applied the law to the circumstances of the case, and recorded the findings. As we have noted supra the CIT (Appeals) and the Tribunal have merely adopted the conclusions recorded by the Assessing Officer. After independently examining the implication of each one of the Sections and the principle laid down by the Supreme Court in Harprasad & Co. (P) Ltd case (pra) we are of the view that no exception to the view taken by the Assessing Officer, as confirmed by the CIT (Appeals) and Tribunal could be taken by us as well.

8. The decisions relied on by the assessee are distinguishable on facts. Therefore, we won't burden the judgment by stating how these decisions are distinguishable both in fact and law, We have perused the judgment of the Gujarat High Court in Kishorebhai Virani case and are in agreement with the view taken by the Gujarat High Court. The question of law in the appeal, upon our independent consideration and also by following the principle laid down in Harprasad & Co. (P) Ltd. case (supra) as applied in Kishorebbai Virani case, will be answered in favour of the Revenue, and against the assessee."

16. Thus, respectfully following the aforesaid decision of the Hon'ble Kerala High Court, the claim of the assessee of set off of long-term capital loss arising

from STT paid transactions against long-term capital gain arising from the sale of the flat is rejected. As a result, ground No. 3 raised in Revenue's appeal is allowed.

17. In the result, the appeal by the Revenue is partly allowed.

Order pronounced in the open Court on 02/12/2022

Sd/-
PRASHANT MAHARISHI
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 02/12/2022

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai