IN THE INCOME TAX APPELLATE TRIBUNAL

(DELHI BENCH 'H' : NEW DELHI)

BEFORE SH. N.K.BILLAIYA, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 803/Del/2022, A.Y. 2012-13

Shri Vishal Aggarwal, S/o. Shri Ram Dayal Aggarwal, B-463, Delhi Apartment Plot No. 15C, Sector-22, Dwarka, Delhi PAN : AGGPA8402I	Vs.	Pr. Commissioner of Income Tax Office, A-2D, Sector-24, (Gautam Budh Nagar), Noida – 201307. Uttar Pradesh

Assessee by	Sh. Ankit Gupta, Adv.
Revenue by	Ms. Sapna Bhatia, CIT-DR

Date of hearing:	14.03.2023
Date of Pronouncement:	20.03.2023

ORDER

Per Anubhav Sharma, JM :

The appeal has been filed by the Assessee against order dated 27.03.2022 passed for assessment year 2012-13, by the Pr. Commissioner of Income Tax, Noida (hereinafter referred to as the First Appellate Authority or in short 'Ld. F.A.A.') in regard to the appeal before it arising out of assessment order dated 25.11.2019 u/s 147/143(3) of I.T. Act, 1961 (hereinafter referred to as 'the Act') passed by ITO, Ward 5(2)(5), G Budh Nagar (hereinafter referred as Ld. Assessing officer or in short Ld. AO).

2. The assessee is an individual and filed return of income declaring income of Rs. 11,14,480/- on 27.02.2013 and subsequently the case was re-opened vide notice u/s 147 r.w.s. 148 dated 25.03.2019. In response to said notice the assessee filed return on 09.09.2019 disclosing income of 11,14,480/-. After inquiries the Assessing Officer accepted the return income, by assessment order u/s 143(3) r.w.s. 147 dated 27.12.2019. However, Ld. PCIT considered Assessment order to be erroneous and prejudicial to the interest of revenue, accordingly a notice u/s 263 dated 09.03.2022 was issued upon the assessee on following grounds :-

> First, that the cost of acquisition of the property was Rs.42,12,550/- as per the sale deed whereas the assessee has claimed the cost of acquisition of Rs. 62,40,000/-.
>
> Secondly, that the Assessing officer did not verify the source of repayment of loan of Rs. 40 lakhs avail from IDBI.

2.1 The assessee responded to the aforesaid issue no. 1 by submitting that the property was purchased from Mrs. Sangita Gupta who was original allottee of the property from M/s. Supertech Construction Private Limited. The sales consideration Rs. 62,40,000/- was paid to Smt. Sangita Gupta through banking channels. Further that the Sangita Gupta had a certificate from the M/s. Supertech Construction Pvt. Ltd. that she has paid the price of the property to the builders. It was submitted that sale deed was executed directly by the builder M/s. Supertech Construction P. ltd. in favour of the assessee and his wife as the property was under construction. It was submitted that these aspects were duly inquired by the Ld. AO.

2.2 As with regard to aforesaid issue no. 2, Ld. PCIT was informed about thet the source of income of Smt. Cheenu Goel and that the housing loan was repaid by the assessee alone and there was no contribution of his wife Cheenu Goel.

3. Ld. PCIT, however, was not impressed and had set aside the assessment order being erroneous and prejudicial to the interest of revenue and directed Ld. AO that the purchase price mentioned in the sale deed be taken into consideration to re-compute the short term capital gain. The relevant observations of Ld. PCIT are reproduced below for convenience :-

> *"As can be seen from the discussion above that the transfer of the impugned property has not taken place at all, between the alleged vendor Smt. Sangita Gupta and the vendee, i.e. the assessee, hence, the question of the alleged purchase by the assessee on 05.08.2009 cannot be ascertained with reasonable amount of certainty. Therefore, clause (v) is also not applicable to the facts of the case. Furthermore, the possession has also not been proved to be delivered on 05.08.2009 to the assessee, as is evident from the sale deed that the same was given by M/s Supertech Ltd (second party). The twin conditions of execution of written agreement and handing over of the possession have to be cumulatively satisfied in order to bring the case within the ambit of section 2(47)(v), read with section 53A of the 1882 Act. Only one of the conditions is satisfied in the instant case - only written agreement has found to have been executed but the possession of the impugned property has not been proved to be delivered to the vendee, by the vendor.*
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> *Therefore, is unambiguously held that the impugned property has not been transferred on 05.08.2009 to the assessee, by Smt. Sangita Gupta, consequently, the sale consideration (Rs. 60,00,000/-) allegedly agreed upon by this unregistered Agreement to sell cannot be relied upon.*
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> *In the instant case, the very Agreement to self dated 05.08.2009 is admittedly neither registered under section 17(1 A) of the Registration Act, 1908 nor given possession which is the condition precedent to give effect to the provision of section 53A of the Transfer of Property Act.*
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> *Reliance is placed on the principle enunciated by **the Hon'ble Supreme Court** in the case of CIT v, Balbir Singh WSaini /2Q17 86 taxmann.com 94 /251 Taxman 202/ 398 ITR 531 SC) wherein, the Hon'ble **Supreme** Court held that in the case of immovable property, after the year 2001, the delivery of possession of the immovable property in terms of an agreement cannot be treated as a transfer in terms of section 2/47)(v) of the IT Act, unless the very agreement is registered with the Registration authorities because from the year*

2001 on account of the amendment made under the Registration Act, 1908, every agreement contemplated u/s 53A of the Transfer of Property Act is required to be mandatorilv registered. In the absence of registration, the agreement shall have no effect in law for the purposes of section 53A of the Transfer of Property Act, 1882. Therefore, in view of the above facts and the law as laid down by the Hon'ble Supreme Court, the provisions of section 2(47)(v) are not applicable to the said transaction of Rs. 60,00,000/, as embodied in the so-called Agreement to sell dated 05.08.2009.

4.3 Even otherwise, the unregistered Agreement to sell dated 05.08.2009 cannot be accepted at its face value, due to the following reasons:

(i) *That mode of payment, as mentioned in the said agreement i.e. Cheque No. 156992 ABN Amro Bank dated 01.07.2009 for Rs. 5,00,000/- got bounced due to the signature mismatch of the drawer (Copy of bank statement no. 1448149 maintained by Smt. Cheenu Goel be referred to). Thereafter, the payment of Rs. 5,00,000/- appears to be paid to Smt. Sangeeta Gupta vide RTGS dated 07.07.2009 (Ch. No. 156996). The said unregistered Agreement to sell was allegedly executed on 05.08.2009 (subsequent to the payment through RTGS on 07.07.2009) but in this agreement the reference of Cheque No. 156992 ABN Amro Bank dated 01.07.2009 for Rs. 5,00,000/- is there which has already bounced and this makes the agreement void, being made without transfer of money.*

(ii) *That as per terms/clause no. 3 of the agreement,* the balance amount of Rs. 55,00,000/- *(Rupees Fifty Five Lacs Only) to be paid by the Vendee to the Vendor at the time of the execution of final Transfer Deed i.e. on or before 45 (forty five) days. The unregistered Agreement to sell was executed on 05.08.2009, thus the Final Transfer Deed was required to be executed till 19.09.2009, however, as is seen from the record that final Transfer Deed i.e. sale deed was executed on 12.03.2010 (after 225 days). This goes to show that this agreement lost its validity after the 45 days, therefore, the same is non-est, in the eye of law.*

Since, there is breach of contract, as the parties failed to do any act in furtherance of the contract, hence, the transaction of Rs. 60,00,000/- cannot be treated as sale consideration under Part Performance, as envisaged in section 53 A of the Transfer of Property Act, consequently, the same is void, in the eye of law.

In view of the factual as well as legal discussion above, the cost of purchase to be taken Rs. 42,32,555/- instead of Rs. 62,40,000/-.

4.4. *Further, though, the assessee declared his share in the impugned property at 50% in the return of the income however, it can be concluded from the followings that his wife Smt. Cheenu Goel is merely a name-sake co-owner. :*

1. *Smt. Cheenu Goei (wife of the assessee), allegedly made total investment of Rs. 14,50,000/- through banking channels (Rs. 5.0 lacs paid vide Cheque No. 156996 dt 07.07.2009 and Rs. 9.30 lacs paid vide Cheque No. 156995 dt. 03.10.2009 from the bank (A/c No. 1448149 with Royal Bank of Scotland), however, it is revealed from the said bank statement that she had no regular source of income, the desired fund received from some credit entries, prior to the payment. The evidence with regard to identity, creditworthiness of the lender and genuineness of the transactions has not been filed during the proceedings. Moreover the said payment has been made to Smt. Sangeeta Verma which has been not acceptable as a part of purchase consideration as it is not known for what purpose this money has been transferred to her account. Secondly, during the course of revisionary proceedings, (Vide order sheet entry dated 16.03.2022 & 21.03.2022) the Ld. Counsel of the assessee was requested to produce any evidence (In the Form of PAN, Return of Income, Bank Statement) to substantiate the claim that Rs. 20,00,000/- was transferred to Smt. Sangeeta Verma for the purchase of the said flat. However no compliance has been made regarding this.*

2. *Out of total payment of Rs. 63,00,000/- received as sale consideration of the impugned property, payment of Rs. 40,00,000/- found credited (Rs. 35.0 lacs on 10.09.2011 and Rs. 5.0 lacs on 29.09.2011) in the bank a/c (No. 1474187 with Royal Bank of Scotland) of the assessee. No payment was found credited in the bank a/e of Smt Cheenu Goel, wife of the assessee. Further, the remaining payment of Rs. 23,00,000/- received vide PO No. 506872 dt. 07.10.2011 has not been found credited either in the bank of the assessee or his wife.*

3. *Housing Loan of Rs. 40,00,000/- was avaiied from IDBS Bank in July, 2009 for acquisition of the impugned property and the same was repaid by the assessee by issuing a Ch. No. 191675100016302 dt. 15.09.2011 for* ***Rs.*** *39,48,884/-. Smt. Cheenu Goel, wife of the assessee did not make any contribution towards the repayment of the housing loan.*

   In view of the foregoing discussion, the entire capital gain is to be taxed, in the hands of the assessee.

4.5. *On the facts of the present case, it is evident that the AO accepted the version of the assessee without making any inquiry or verification. Thus, by accepting the unsubstantiated, varying and disjointed claims of*

the assessee, failing to conduct detailed and legitimate inquiries, the AO utterly failed to conduct meaning full investigations essential to determine the total income of the assessee. Hence, when the AO has failed to take notice of all the relevant facts and has failed to examine the correctness or otherwise of the claims and assertions by the assessee, it Is evident that he has failed to apply his mind and discharge his duty as an assessing officer during the course of the assessment proceedings. Consequently, the assessment order, passed by the AO is rendered erroneous in so, far as it is prejudicial to the interest of the revenue.

4.6. *In view of above facts and circumstances, I find that the assessment order dated 04.07.2019 by the AO, Circle-1, Noida is erroneous in so far as the same is prejudicial to the interests of the revenue."*

4. The assessee is in appeal here in Tribunal raising following grounds;

"1. That the notice issued under section 263 of the Income Tax Act, 1961, and the order passed under said section are illegal, bad in law and without jurisdiction.

2. That the notice by the Pr. CIT under Section 263 does not show that the Assessing Officer committed any error in passing the assessment order under Section 147/143(3). Therefore, the jurisdiction assumed by the CIT under Section 263 is illegal and without jurisdiction and is liable to be quashed.

3. That the Pr. CIT has erred in not appreciating the fact, that the assessing officer has wrongly assumed the jurisdiction u/s 147 of the ACIT, on the basis of the incorrect reason to believe, which is illegal bad in law and without jurisdiction.

4. That, the Pr. CIT has failed to appreciate, that, the assessing officer has completed the re-assessment proceedings without providing the copy of reason recorded, even after specific request was made, therefore, the re-assessment proceedings and order passed is illegal, bad in law and without jurisdiction.

5. That, the Pr. CIT has erred in initiating the proceedings u/s 263 on the basis of the re-assessment proceedings and order passed, which are void-ab-initio, illegal, bad in law and without jurisdiction.

6. That the order passed under section 147/143 (3) by the Assessing Officer is neither erroneous nor prejudicial to the interest of Revenue and as such the order passed by the pr. CIT

order under section 263 in cancelling the assessment is illegal and bad in law.

7. That the Pr.CIT has failed to appreciate that all the issues referred in his order under Section 263 have been duly considered and the view taken by the Assessing Officer is a possible view. Thus, the notice issued and the impugned order are beyond the preview of Section 263 and hence, die order passed under Section 263 is liable to be quashed.

8. That the Pr.CIT has failed to appreciate that the assessee has purchased, the alleged immovable property in resale and the payment was made through banking channels, which has been verified by the assessing officer and accepted the cost of acquisition of property, hence, the CIT has erred in law and on facts in setting aside the assessment to be redone afresh.

9. That, the Pr.CIT has failed to appreciate, that, the assessee has duly complied with all die queries filed during the assessment proceedings and also verified the books of accounts and make die appropriate Ad-hoc addition to cover the possible leakages. Therefore, the view taken by the assessing officer cannot be held as erroneous and prejudicial to the interest of the revenue, hence, the assumption of jurisdiction U/s 263 is illegal, bad in law and without jurisdiction.

10. That the observations of the Pr.CIT are based on surmises and conjectures and on the basis of the different view taken by the Assessing officer after framing the Assessment Order Section 147/143(3) and do not afford any legal justification to the findings given.

11. That the proceeding under Section 263 are initiated at the instance of Assessing officer and the order passed by the Pr.CIT is dearly without application of mind as it refer to many irrelevant issues hence the order under section 263 is liable to be quashed.

12. That the Pr.CIT has erred in not providing proper and adequate opportunity to Appellant to place the material on record and the impugned order passed is against the principle of natural of justice.

13. That all the facts and circumstances of the case and the material available on record have not been properly considered by the Pr.CIT while passing the order under Section 263. The impugned order is illegal, arbitrary and bad in law.

14. The appellant craves leaven to add, amend, alter and or

modify the grounds of appeal of the said appeal."

5. Heard and perused the record.

6. Ld. AR made submissions primarily on facts of the case as reproduced above. The primary contention was that the notice u/s 142(1) dated 11.09.2019 had raised the issue for which a detailed reply was given available on page no. 3 of the paper book and thus in the light of reply and relevant document being examined by the Ld. AO, there is no question of any lack of inquiry. It was submitted that if assessing officer has taken one of the possible views. The assessment order cannot be interfered u/s 263 of the Act.

7. Ld. DR however supported the orders of Ld. PCIT submitting that the premium received was not proved to the given to Mrs. Sangita Gupta on account of the sale as the sale deed was executed directly by the builder.

8. Giving thoughtful consideration to the matter on record, it can be observed that there is no dispute to the fact that the an amount of Rs. 62,40,000/- was paid by banking channels to Smt. Sangita Gupta. There is available on record the material which shows that the builder M/s. Supertech Construction Pvt. Ltd., who executed the sale deed of purchase of the demised property in favour of assessee, had issued a certificate mentioning no dues from Smt. Sangita Gupta qua this property. There are receipts which show Mrs Sangita Gupta had made payments to builder through cheques over period starting from 24/2/2005. Assessee along with his wife purchased the property from Mrs. Sangita Gupta from availing a loan of Rs. 40 lakhs from IDBI bank and this amount was credited by the bank to Mrs. Sangita Gupta as part of consideration for purchase of property. However still the Ld PCIT has doubted the transaction having involvement of Mrs. Sangita Gupta and agreement executed by her in favour of assessee and his wife. It seems Ld. PCIT has gone more with the recitals of the Sale deed instead of giving glance to the

transaction as a whole and then determine what should be the cost of acquisition of the asset. If only sale deed was relevant or even the subsidiary transactions too were to be acknowledged to find what was the actual cost of acquisition of the asset for the purpose of Section 48(ii) of the Act.

9. Relevant at the outset here will be to reproduce the relevant part of bare provision of Section 48 of the Act, as follows;

> *"48. 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 asset and the cost of any improvement thereto:"*

10. The bench is of considered opinion that for determining cost of acquisition for the purpose of Section 48, it has to be understood that the term that *"cost of acquisition of the asset'* in fact is a wider term as compared to words *"consideration paid for transfer of capital asset".* The distinction arises from the fact that transfer of capital asset is concluded by way of transfer of title through execution of sale deed. Which may be preceded by an agreement to sell or any other transaction where by, a person agrees to transfer an enforceable interest in property to the prospective buyer. Thus, under sale deed the title is transferred from the seller to the buyer while in the case of agreement to sell the transfer of title has to take place at a future time and subject to some condition thereafter to be fulfilled. Such agreement may even be oral or implied but sale deed is concluded by registration and the stamp duty value in a sale deed only means value adopted by registration authority for the purpose of payment of stamp duty for the transfer of title in the immovable property. Same is higher of either the actual sale consideration paid by the purchaser or the circle rates

determined by the Government. It may not be the 'cost of acquisition of the asset'.

11. The 'cost of acquisition of the asset' thus not only includes the sales consideration incorporated in sale deed or value of asset taken by registration authority for the purpose of stamp duty but also any amount paid to any intermediary under the preceding agreement to sell or any enforceable liability Provided intermediary had a enforceable and transfarable interest or an interest in the form of an encumbrance upon the asset and sale deed can be executed only on redemption of that interest.

12. Mumbai Bench in **Dy. Commissioner Of Income Tax vs Shri Uday S. Kotak, Kotak Mahindra decided on 28 June, 2004, (2005) 96 TTJ Mum 1018** was considering a question if payments made to tenants are cost of acquisition of residential house, therefore, it qualifies for exemption Under Section 54F of the Act and made certain observations which are relevant to present lis and support the aforesaid opinion of this Bench. The Mumbai bench held;

> *"11. An asset (particularly immovable asset) can be sold by a person , who has legal title over the asset. Without having legal title, one cannot effect sale the immovable property. The legal title in the present case, undisputedly, was vested in the brother of assessee Shri Suresh A. Kotak, who had sold his 1/2 share in the residential house to the assessee on "as is where is" basis. Erstwhile tenants of the residential house did not have the ownership right in the residential house. Thus, any payment made to them after the completion of sale does not tantamount to purchase money paid for "purchase" of a residential house. Such payment may be cost of acquisition within the meaning of Section 48 which is relevant only for computing capital gain.*
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> *12. The term that "cost of acquisition or cost of improvement are wider terms" as compared to word "purchased". While computing*

income under the head "long-term capital gain", it is not only equitable but also necessary to give deduction as cost of the amount spent by assessee with regard to the asset on sale of which, the net capital gain is computed. Similar is the case with cost of improvement. Unless, these are allowed, one cannot arrive at net capital gain taxable under the Income-tax Act. Therefore, these terms find place in Section 48 which section is relevant for computing income under the head "capital gain".

13. As we have already pointed out that the controversy in the present case is limited to the word "purchased" and "cost of acquisition" as well as "cost of improvement" has no relevance for deciding the present case, the cases relied upon by CIT(A) have no application on the facts of present case. 14. Looking the matter from this aspect and having regard to the plain language of Section 54F, we find that there is no scope of extending the meaning of word "purchase" to "cost of acquisition". The specific word "purchased" is used by legislature in Section 54F. If the intention of the legislature would have been to allow exemption with regard to "cost of acquisition" and "cost of improvement", these terms could have been used in this section as well as the same have been used in Section 48. Thus, the word "purchased" found place in Section 54F cannot be interpreted in a manner to include within its ambit the term "cost of acquisition and cost of improvement."

13. Thus in present case in hand Mrs Sangita Gupta was the intermediary being original allottee from builder. The builder was under an obligation to transfer title to her only or to anyone to whom she assigns her right to have title in that property from the builder. Builder could not have transferred a title free of encumbrances over and above the interest she held in the property being allottee and having paid part consideration to builder. She certainly was in her right to add her profit or margin over and above to what she paid to the builder. The amount of consideration agreed in the agreement to sell between her and the assessee thus forms part of the cost of acquisition of asset. The valuation of the property for the purpose of stamp duty is thus not relevant in the case in

hand as there is no dispute to the fact of paying of Rs. 62,40,000/- to Smt. Sangita Gupta by banking channel under the agreement to sell executed by her and Ld. PCIT has not appreciated the facts in a wholesome manner on the basis of evidence available on record which exhibit that the transaction involved three parties and amount received by Smt. Sangita Gupta included not only the amount paid by her as allottee from M/s. Supertech construction P. ltd. but also premium she earned. Thus conclusion of Ld. PCIT that Ld. AO committed error in considering the agreement to sell between Mrs. Sangita Gupta and assessee to determine cost of acquisition for purpose of section 48 of the Act, is not sustainable. Ld. AO had made relevant and sufficient enquiries on the issue and was justified to take into consideration the agreement to sell. In fact Ld. PCIT has committed further error in expanding the scope of inquiry by questioning the source of payment to Smt. Sangita Goel by the wife of assessee. While the reasons to believe for purpose of Section 148(2) of the Act was merely alleged escapement of income under the head of capital gain arising from transfer of immovable property for Rs. 63,00,000/- Thus, the order of Ld. PCIT u/s 263 the Act cannot be sustained. Grounds raised are allowed and the impugned order is set aside. **Consequently, the appeal of assessee is allowed**.

Order pronounced in the open court on 20th March, 2023.

Sd/-	**Sd/-**
(N.K.BILLAIYA)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:-20.03.2023
Binita, SR.P.S
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI