आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.99/Ind/2020
(Assessment Year:2010-11)

Late Bhuwan Bali through Legal heir Shri Chhotelal Balai, Shri Santosh Balai and Shri Subhash Balai 204 Niranjanpur, Vijaynagar Dewas Naka Indore	Vs.	ITO (4) Indore
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: BMUPB 9091 H		

Assessee by	None
Revenue by	Shri Ashish Porwal, Sr. DR
Date of Hearing	17.04.2023
Date of Pronouncement	20.04.2023

O R D E R

Per Vijay Pal Rao, JM:

This appeal by the assessee is directed against the order dated 06.12.2019 of Ld. Commissioner of Income Tax (Appeals)(in short Ld. CIT(A),-1, Indore, for Assessment Year 2009-10.

2. None has appeared on behalf of the assessee despite the repeated notices issued to the legal heir of the deceased assessee through RPAD as well as e-mail on the e-mail ID given in the form no.36. One of the notices issued through RPAD has been received back as it was not received by the legal heir who has filed the present appeal. Accordingly, this bench

proposes to hear and disposed of this appeal ex-parte. The assesse has raised following grounds:

Ground-I: No transfer of capital asset during the year

On the facts and circumstances of the case and in law the learned CIT(A) erred in not holding that no capital gains arose during the year since the registered agreement to transfer the impugned property was executed before the registrar and possession was handed over in the earlier year and mere registration on later date by registrar cannot result in transfer in the year of registration.

Accordingly the Appellant prays that no transfer had arisen in the year under consideration therefore the addition is prayed to be deleted.

Ground-II: Not Admitting Additional Evidences

On the facts and circumstances of the case and in law the learned CIT(A) erred in not admitting the additional evidences submitted before him without appreciating that the additional evidences went to the root of the matter and ought to have been admitted in the interest of justice.

The Appellant prays that the matter be set aside to CIT(A) to consider and admit the said additional evidences.

Ground-III: Deemed Sale consideration

On the facts and circumstances of the case and in law the learned CIT(A) erred in confirming the action of AO of not considering the sale consideration prevailing at execution of agreement and upholding the action of AO in considering the stamp duty guideline value as on actual registration of sale deed.

He failed to appreciate and ought to have held that there were payment through account payee cheque made at the time of executing sale agreement and therefore the value on such date should be considered For Section 50C of the Act.

The Appellant prays that the stamp duty value as on date of agreement be considered as Sale consideration.

Ground-IV: Legal Expenses

On the facts and circumstances of the case and in law the learned CIT(A) erred in confirming the action of AO in not allowing Legal Expenses in Full incurred on the registration on Purchase of such property.

The Appellant prays that the said deduction be directed to be allowed

3. Ground No.1 & 2 are regarding transfer of capital asset being land during the year under consideration or in the preceding year.

4. We have heard the Ld. DR and carefully perused the impugned orders of the authorities below. The assessee has sold the land in question vide sale deed registered on 22.02.2010. The assessee claimed before the AO that the lands were transferred in the financial year 2008-09, as the parties signed sale deed on 18.06.2008. Therefore, the assessee claimed that there was no transfer of the land in question during the year under consideration.

5. The AO did not accept this contention and found that the sale deed may be written on 18.06.2008 but the same was registered with the Sub-registrar on 22.02.2010. Accordingly, the Ld. AO assessed the capital gain arising from the transfer of the land in question for the year under consideration. The assessee challenged the action of AO before the Ld. CIT(A), filed written submission which are reproduced before Ld. CIT(A)in para 2 as under:

> *"This Appeal is filed before your honour on behalf of Late Shri Bhuwan Bali, PAN og BMUP9091H Through his Legal Heirs Chhotelal Balai, Santosh Balai, Subhash Balai all sons of Late Shri Bhuwan Balai Against the order u/s 144 r.w. section 147 of the learned Assessing officer dated 24th, December 2017 for the Assessment year 2010- 11. For filing of online appeal, the appeal was filed through Shri Chhotelal balai as representative of all legal heirs. The Facts of the case are: The assessee Late Shri Bhuvan Balai had died on 20/09/2017. After his death his sons Shri Chhotelal Balai Shri Santosh Balai, Shri Subhash Balai were issued a notice dated 5.12.2017 requiring submissions of certain querries as the Legal heirs of Late Shri Bhuwan Balai the said notice the Legal Heirs of late assessee came to know that he had been subject to assessment proceedings for AY 2010-11. The assessee was totally dependent financially on his sons and did not have any income of his own or had any property in his name at the time of his death. The case of the Deceased assessee was based on the Annual Information Report received by the learned Assessing Officer regarding capital gains in AY 2010-11 for sale of agricultural land. The land was used as such by assessee before transfer. The legal heirs had truly stated that their father late Shri Bhuvan Balai had not sold any land in the*

Financial Year 2009-10 and had no income during the said financial year pertaining to Assessment Year 2010-11. He did not have any taxable income for AY 2010-11 therefore he did not file any income tax Return and no Return was filed after his death. During the course of proceedings the learned assessing officer in his notice had stated that the Late Shri Bhuwan Balai had sold Ancestral Agricultural Land in Niranjanpur, District Indore. According to the notice it is mentioned that the same was Registered on 22.02.2010 having market value Rs. 1,32,16,000. However the legal heirs have contented that Assessee had neither sold the said Ancestral agricultural land was sold by the Deceased assessee Late Shri Bhuwan Balai, in the year 2008, ie, on 18.06.2008 and sale Deed was presented for adjudication and registeration on 18.06.2008.The sale was completed and full consideration received in June 2008 in respect of the said land by the deceased assessee. Complete consideration of Rs. 32 lakhs was received by the assessee which is verified by copy of bank statement submitted with cheques deposited in the bank being cheque number 492651 and 492652 of Bank of Rajasthan of Rs.15 lakhs each and Rs. 2 lakhs in Cash being Rs. 32 lakhs in Total. Possession and complete control handed over to the Buyer on 18.06.2008. The stamps to register the Sale Deed were purchased on 16th June 2008 and Documents for registration were submitted to the office of Deputy Registrar, Indore duly signed by both the parties. Sale Deed signed on all pages through thumb impression by the Seller Late Shri Bhuwan Balai and signed by Buyer Shri Atul Surana on behalf of Modern Infra and Real Estate Private Limited on 18.06.2008 in the presence of witnesses Shri Satish son of Shri Shankarlalji and Shri Sunil Son of Shri Asharamji The last page of the Sale Deed very clearly mentions the Date of signing of Sale Deed as 18.06.2008 and thumb impression of Seller and sign of Buyer and signatures of witnesses. On the same date, i.e. date of registration 18.06.2008, the possession of the Agricultural Land was handed over to the Buyer, Hence it was submitted by the legal heirs of the assessee that the full transaction regarding sale was completed in the year financial year 2008-09, which is relevant to assessment year 2009-10.The sale deed presented for registration was presented with Stamp duty paid on the Sale Value of Rs. 32,00,000/- which was the contracted sale price. The Registration of Immovable property is done on Guideline value and Stamp Duty has to be paid on this Guideline value. The sale deed also mentions that the Complete Possession of the Agricultural Land was given to Buyer to his complete satisfaction on 18.06.2008 as per the Copy of sale deed. Proved by point number 6 on Page 4 and duly signed by Both Buyer and Seller. The contention of the Learned Assessing Officer in point 3.4 of the Assessment Order dated 27.12.2017 that the Purchaser Shri Atul Surana, Director of Modern Infra and Real Estate Private Limited had signed on 16.02.2010 is incorrect as per the Copy of Sale Deed he had signed on all the pages on 18.06.2008 including the last page in front of witnesses Shri Satish son of Shri Shankarlalji and

Shri Sunil Son of Shri Asharamji. It is clear from all the pages of the Sale Deed that the Purchaser has in fact signed the sale deed on 18.06.2008. The Purchaser Shri Atul Surana, Director of Modern Infra and Real Estate Private Limited had signed on the sale agreement/deed on all pages including Page 6, But due to some reason he could not sign in the presence of sub registrar when the sale deed was presented. Shri Atul Surana signed in presence of sub registrar on 22.02.2010, and when the guideline value was higher, he paid the additional duty In para 3.5 of the assessment order, the learned AO had set the meaning of the term Executed. To do all that is required to make the document legally binding. When a person executes a document, he or she signs it with proper formalities. It is clear from the copy of Sale Deed that Both the parties had signed the deed on 18.06.2008 in front of witnesses And the Execution of Sale Deed was completed. The Sale was complete on 18.06.2008 with the purchaser taking the Possession of the immovable property. The assessee late Shri Bhuwan Balai had presented the Executed Sale Deed for Registration on 18.06.2008 duly signed by him and signed by the Purchaser and witnesses. The Sale deed could not be completely registered at sub registrar's office because the Purchaser was not present. The Purchaser presented himself before the sub registrar for signing in his presence and paid the required Additional Stamp duty on 22.02.2010 for financial year 2009-10 for the Sale deed executed on 18.06.2008. The Complete consideration of Rs. 32,00,000 was received by seller and possession as taken over by the Purchaser in June 2008 and hence the contract was completed the year 2008.As the Deed was signed by both parties on 18.06.2008 the deed is red to be executed in Financial year 2009-10 relevant to assessment year 2009-10. Transfer, in relation to a capital asset, includes, (v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); In order to attract section 53A of the transfer of property Act the following conditions need to be fulfilled

1. There should be contract for consideration.
2. It should be in writing.
3. It should be signed by the transferor.
4. It should pertain to the transfer of immovable property.
5. The transferee should have taken possession of property.

6. Lastly transferee should be ready and willing to perform the contract. All these conditions are fulfilled in this case. Hence transfer for the purpose of Income tax Act was complete in the financial year 2009-10 pertaining to assessment year 2009-10. In the point of the assessment order the learned assessing officer has taken the value of purchase as per the purchase deed. And not the market value as on registration date of Rs. 2800,000 which should have been taken

as the cost of purchase. The assessing officer has also not allowed the legal expenses of s. 300000. And has allowed only Rs. 50000. It is herewith submitted that as the assessee Shri Bhuwan Singh Balai has died and his legal heirs had found it difficult to furnish details of old papers more than decade old. The assessing officer vide his order dated 27.12.2017 has computed Long term capital gains for the assessment year 2010-11 and made demand of Rs. 1,16,63,709 which is not correct as per above facts. The legal heirs to the assessee maintains that no tax was payable and no income to be assessed in the Assessment year 2010-11.The learned Assessing officer had proposed to initiate penalty under section 271(1)(b) and under section 271(1)(C), for inaccurate particulars of income. The deceased assessee Late Shri Bhuwan balai was just an Illiterate farmer with Little Knowledge of technicalities and rules of Income tax act. In his ignorance he could not understand the importance of Income tax notices and thus could not comply. He had no intention to not cooperate with the Income tax Department. Written submission dated 19/12/2018:

With respect to the above appeal and further 10 our earlier submissions we herewith submit the following:-

1. *In the case of assessee, For the purpose of calculation of Capital gains in the Income tax Act, 1961, the transfer is said to be complete as per the provisions of section 2(47) as submitted earlier. We once again submit that the sale deed fully signed by both the seller and buyer was presented before sub registrar on 18.06.2008 and stamp duty applicable on the date was paid. As far as late assessee was concerned, after he had presented and signed on the sale deed before the office of Sub Registrar the sale of property was complete and all the required legal formalities to be done from his side on ie. date. The assessee had extinguished all his right from the properly and handed over the possession to transferee. It was left on the part of transferee to obtain the documents from the register office. However, for reasons not known to the legal heirs of the late assessee, Buyer paid additional stereo duty as applicable on 22/02/2010 and completed the registration of sale deed. With the facts already submitted by us we submit that the said property was transferred on 18/06/2008 for the purpose of defining Transfer for determining Capital Gains under the Income Tax Act 1961. Therefore the assessment year for charging capital gains should be assessment year 2009-10 and not assessment year 2010-11.Even if the capital gains on said transfer are to be charged in the assessment year 2010-11, since transfer was complete in on 18/06/2008 as per section 2(47), the stamp duty value of the property on the date of execution of the agreement to sale should be adopted instead of value on the date of execution of sale deed which in this case is when the sale deed was first executed by all the parties and presented before the sub registrar for completion of execution and not the date when the additional stamp duty was paid*

by the buyer. Sir we will also draw your attention to the following proviso to Section 50C the Act inserted by the The Finance Act 2016, Provided that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer. Provided further that the first proviso shall apply only in a case where the amount of consideration, or a part thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account, on or before the date of the agreement for transfer. In this case full amount of consideration on and before 18/6/2008, major part of which was by way of account payee cheques as evidenced by the sale deed and copy of bank pass book of sellers already submitted. Possession was also handed over to seller on the same date. The proviso to section 50C of the Act inserted by the Finance Act, 2016 is curative in nature and intended to remove an undue hardship to the assessee and accordingly given retrospective effect from 1st April, 2003 Le. the date effective from which section 50C of the Act was introduced. Accordingly, as per the proviso, the stamp duty value of the property on the date of execution of the agreement to sale should be adapted instead of value on the date of execution of sale deed. In the case of DOIT vs. M/s. Indorie Foot Care Pvt. Ltd. In ITA No.788 /Ind./2016 dated 02.05.2017 it was held that the amendment brought in section 50C of the Income Tax Act by the that the Finance Act 2016 is in nature. 2. the rate prevailing in the market in A.Y. 2008-09 should be considered for the calculation of Capital Gain. Le. the year in which sale was made and not the year in which sale deed was executed. In case of Shri Manoj Yadav vs ITO 3(1) Indore, and Smt Rukamani Yadav vs TO 3(1) Indore, ITAT Indore, has held that the assessee has been successful to demonstrate that there was a valid transfer of the impugned capital asset as per the provision of section 2(47) of the Act on the date 24.03.2007 when the assessee received total sale consideration through account payee cheque and possession was also given to the buyer. It was also held that the lower authorities erred in applying the valuation of the impugned property as per the stamp duty guideline in the year in which sale deed wa registered. Therefore in the present case also applicability of the provisions of section SOC should be looked at only on the date of sale agreement which is 18/06/2008. As on the date of transfer the guideline, stamp duty value of the property sold was Rs. 100,00,000/- per hectare. A certified copy of the Stamp Duty Value for financial Year 2008-09 is herewith submitted. This should be taken as the stamp duty value for the purpose of section 50 C of the Act.

6. The assessee has relied upon the provisions of section 2(47)(v) of the Income Tax Act read with the provision of section 53A of transfer of

property Act. It is pertinent to note that the said definition of transfer provided u/s 2(47)(v) will not help the case of the assessee. At the outset a reference judgment of Hon'ble Supreme Court in the case of *CIT vs. Balbir Singh Maini 398 ITR 531* wherein the Hon'ble Supreme Court had held in para 19 to 22 as under:

> *"19. It is also well-settled by this Court that the protection provided under Section 53A is only a shield, and can only be resorted to as a right of defence. See Rambhau Namdeo Gajre v. Narayan Bapuji Dhgotra (Dead) through LRs. (2004) 8 SCC 614 at 619, para 10. An agreement of sale which fulfilled the ingredients of Section 53A was not required to be executed through a registered instrument. This position was changed by the Registration and Other Related Laws (Amendment) Act, 2001. Amendments were made simultaneously in Section 53A of the Transfer of property Act and Sections 17 and 49 of the Indian Registration Act. By the aforesaid amendment, the words "the contract, though required to be registered, has not been registered, or" in Section 53A of the 1882 Act have been omitted. Simultaneously, Sections 17 and 49 of the 1908 Act have been amended, clarifying that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of Section 53A of 1882 Act) is registered, it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument. Section 17(1A) and Section 49 of the Registration Act, 1908 Act, as amended, read thus:*
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> *"17(1A). The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then they shall have no effect for the purposes of the said Section 53A." "49. Effect of non-registration of documents required to be registered. No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall-*
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> *(a) affect any immovable property comprised therein, or*
>
> *(b) confer any power to adopt, or*
>
> *(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:*

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1887 (1 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument."

20. The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of Section 53A. In short, there is no agreement in the eyes of law which can be enforced under Section 53A of the Transfer of Property Act. This being the case, we are of the view that the High Court was right in stating that in order to qualify as a "transfer" of a capital asset under Section 2(47)(v) of the Act, there must be a "contract" which can be enforced in law under Section 53A of the Transfer of Property Act. A reading of Section 17(1A) and Section 49 of the Registration Act shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in Section 53A. The ITAT was not correct in referring to the expression "of the nature referred to in Section 53A" in Section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was inserted by the Finance Act of 1987 w.e.f. 01.04.1988. All that is meant by this expression is to refer to the ingredients of applicability of Section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in Shrimant Shamrao Suryavanshi (supra), that the Section applies, and this is what is meant by the expression "of the nature referred to in Section 53A". This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression "of the nature referred to in Section 53A" would somehow refer only to the nature of contract mentioned in Section 53A, which would then in turn not require registration. As has been stated above, there is no contract in the eye of law in force under Section 53A after 2001 unless the said contract is registered. This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no "transfer" can be said to have taken place under the aforesaid document. Since we are deciding this case on this legal ground, it is unnecessary for us to go into the other questions decided by the High Court, namely, whether under the JDA possession was or was not taken; whether only a licence was granted to develop the property; and whether the developers were or were not ready and willing to carry out their part of the bargain. Since we are of the view that sub-clause (v) of Section 2(47) of the Act is not attracted on the facts of this case, we need not go into any other factual question.

> *21. However, the High Court has held that Section 2(47)(vi) will not apply for the reason that there was no change in membership of the society, as contemplated. We are afraid that we cannot agree with the High Court on this score. Under Section 2(47)(vi), any transaction which has the effect of transferring or enabling the enjoyment of any immovable property would come within its purview. The High Court has not adverted to the expression "or in any other manner whatsoever" in sub-clause (vi), which would show that it is not necessary that the transaction refers to the membership of a cooperative society. We have, therefore, to see whether the impugned transaction can fall within this provision.*
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> *22. The object of Section 2(47)(vi) appears to be to bring within the tax net a de facto transfer of any immovable property. The expression "enabling the enjoyment of" takes color from the earlier expression "transferring", so that it is clear that any transaction which enables the enjoyment of immovable property must be enjoyment as a purported owner thereof. 1 The idea is to bring within the tax net, transactions, where, though title may not be transferred in law, there is, in substance, a transfer of title in fact.*

7. Therefore, in view of the judgment of Hon'ble Supreme Court transaction of transfer of the immovable property is completed when the title deed is registered as per registration Act, 1908, after amendment in 2001. There is no dispute in the case in hand that the sale deed transferring the title of the land in question was registered on 22.02.2010 and therefore, any draft title deed written on a prior date will not change the event of transfer of title vide registered deed. Hence, we do not find any error or illegality in the impugned order of the Ld. CIT(A).

8. As regards, the additional evidence is sought to be filed by the assessee before the Ld. CIT(A) when the date of registration is not in dispute then nothing will be achieved even by the production of the additional evidences.

9. Ground no.3 is regarding adopting the full value of consideration u/s 50C of the Act. The assessee has objected the adopting of full value consideration u/s 50C of the Income Tax Act being the Stamp Duty Valuation taken at the time of registration of sale deed. Despite the objection of the assessee neither the Ld. AO nor the Ld. CIT(A) has

referred the determination of the fair market value u/s 50C(2) of the Act to the DVO. The assessee has also claimed that sum of the consideration was received by the assessee through account payee cheques at the time of writing of sale documents (draft sale deed) and therefore, the stamp duty valuation as on the said date should be adopted as full value of consideration instead of the stamp duty valuation at the time of registration of sale deed. We find that as per the first and second proviso to section 50C(1) the Stamp Duty valuation on the date of agreement if the amount of consideration or part thereto has been received by way of account payee cheques or other electronics mode may be adopted as full value consideration. Further, once the assessee has disputed the adoption of deemed full value of consideration the the AO is bound to refer the determination of the fair market value of the capital asset to the DVO. Accordingly, in the facts and circumstances of the case the issue of determination of fair market value of the land in question is set aside to the record of the AO for fresh adjudication after consideration the objections of the assessee as well as the determination of fair market value by referring to the DVO.

Ground no.4 is regarding legal expenditure.

10. We have heard the Ld. DR and carefully perused the impugned orders of the authorities below. The assessee has claimed legal expenses of Rs.3 lac as cost of purchase. The AO ask the assessee to furnish the details and evidence in this regard but the assessee did not furnish any detail of expenditure or evidence in support of the claim. The AO recorded the fact that there was some legal dispute with the respect to the purchase of property and purchase deed was registered on the order of the Court. Accordingly, the AO estimated the expenses at Rs.50,000/-. It is manifest from the record that except making a claim of Rs.3 lac as legal expenses regarding the purchase of the property the assessee has not furnished any details of such expenses nor any evidence in support of the said claim. Accordingly, in the facts and circumstances of the case, we find that estimation of Rs.50,000/- made by the AO is reasonable and proper.

Hence, we do not find any substance on merits in the ground no.3 of the assesse's appeal and same is dismissed.

11. In the result, appeal of assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 20.04.2023.

Sd/- **Sd/-**

(B.M. BIYANI) **(VIJAY PAL RAO)**
Accountant Member Judicial Member

Indore, .04.2023

Patel/Sr. PS

Copies to: *(1)* *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore