

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE "B" BENCH : PUNE

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

I.T.A.No.553/PUN./2018
Assessment Years 2013-2014

Shri Vasant Haribhau Gaikwad, Unit No.76, Sr.No.13-14, Hills and Dales, Undri, Pune PIN - 411 060 PAN ABCPBG7344L Maharashtra.	vs.	The Income Tax Officer, Ward-13(5), Pune. Maharashtra.
(Appellant)		(Respondent)

For Assessee :	Shri Kishor Phadke
For Revenue :	Shri M.G. Jasnani

Date of Hearing :	10.10.2023
Date of Pronouncement :	13.10.2023

ORDER

PER SATBEER SINGH GODARA, J.M. :

This assessee's appeal for assessment year 2013-14, arises against the CIT(A), Pune-5, Pune's Order in case no. PN/CIT(A)-5/ITO Wd13(5), Pune/153/2016-17, dated 22.12.2017, involving proceedings u/s. 143(3) of the Income Tax Act, 1961 (in short "the Act").

Heard both the parties. Case file perused.

2. The assessee pleads the following substantive grounds in the instant appeal :

1. *“The learned CIT(A) erred in confirming the asst, of total income made by the A.O. at Rs.2,27,22,984/- as against the returned income of, Rs.1,00,50,984/-.*
2. *The learned CIT(A) erred in confirming the profit on sale of lands, S. No.132, H.No.2, Mouje Jambe, Mulshi and land at S. No.20/2, Mouje Nere Dattawadi, Pune at Rs.77,22,000/- by confirming the addition of Rs.25,72,000/-.*
3. *In confirming the above addition, the learned CIT(A) erred in –*
 - a. *Not allowing the MI deduction of stamp duty, registration charges and legal fees incurred by the assessee of Rs.4,24,040/-.*
 - b. *Disallowing the additional purchase price paid by the appellant of Rs.23,46,360/-.*
4. *The learned CIT(A) erred in taxing business income of Rs.1,01,00,000/- on account of the agreement to sale the land, S. No.129/2/2, Mouje Jambe, Mulshi, Pune on the ground that the land was transferred during the year.*
 - 4.1. *The learned CIT(A) failed to appreciate that –*
 - a. *The appellant had entered into only an agreement for sale for this land and had not handed over the possession of the land to the transferee and thus, the profit on this land did not accrue in this year.*

- b. Simply because, the buyer was given, a right to mortgage the land, did not mean that the transfer of the land was completed during the year.*
- c. The possession, of the land was transferred to the transferee only at the time of sale deed on 31.08.2015 and therefore, the question of taxing profit in this year did not arise.*
- 5. The learned CIT(A) erred in not giving the deduction of the entire cost of land of Rs.95 lakhs and stamp duty of Rs.5,05,640/- while computing the income from this transaction.*
- 5.1. The learned CIT(A) erred in not giving the deduction of the cost of settlement of Rs.1 Cr. incurred by the appellant in the above transaction.*
- 6. The learned CIT(A) was not justified in holding that the profit on sale of land was taxable as income from business' and not under the head 'capital gains'.*
- 7. The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal.”*
3. It emerges during the course of hearing from a perusal of the assessment order herein dated 31.03.2016 that the Assessing Officer appears to have reduced the assessee's cost of acquisition regarding the former capital asset sold in this year i.e., land in Sy.No.132, H.No.2, Mouje Jambe, Mulshi on 03.01.2013 and further held regarding the latter parcel of

land i.e., Sy.No.129/2, Mouje Nere Dattawadi, Pune. There is hardly any issue that this taxpayer had been indeed sold/transferred the above former asset in the relevant previous year on 05.01.2013. It is in this factual backdrop that the Assessing Officer went on to disallow/add the assessee's cost of acquisition of the instant former asset to the tune of Rs.25,72,000/- and assessed the sale consideration of the latter asset as short term capital gains to the tune of Rs.1,01,00,000, respectively.

4. The assessee preferred an appeal before the Commissioner. We find from a perusal of the CIT(A)'s lower appellate discussion that not only he has confirmed the Assessing Officer's action on the foregoing twin issues but also exercised his statutory jurisdiction to hold that the assessee's income derived from the foregoing twin land transactions deserves to be treated as "business" income than under the head "capital gains". It is in this factual backdrop that the assessee has filed his instant appeal before the tribunal raising the foregoing substantive grounds. Learned counsel made it clear at the outset itself that assessee does not wish to press for his pleadings against the CIT(A)'s action assessing him under the 'business income' head.

5. Now comes the assessee's grievance regarding cost of acquisition of the former asset i.e., Sy.No.132, H.No.2,

Mouje Jambe, Mulshi which was admittedly sold/transferred in the relevant previous year. Mr. Phadke invited our attention to the assessment discussion making the impugned disallowance of Rs.25,72,000/- as under :

3. The assessee is an individual. For A.Y. 2013-14, the assessee has shown income received from salary, house property, short term capital gain and income from other sources. During the course of assessment proceedings, details were called for. After taking into account the facts of the case, the details submitted as well as the explanation offered, the assessment is completed as under :

(i) Short-reporting of capital gain

It is found in the ITS details the assessee has entered into sale transaction for Rs. 2.98 crores on 4/1/2013 in respect of property at S. NO. 132 H. No. 2 Mauje Jambe, Mulshi on 3.1.2013. His share is stated as Rs. 1 crore in his computation of income. He had purchase the same vide deed dated 29.7.2011 for Rs. 53,34,000/-. Thus, his share, being 1/3rd in the purchase, works out to Rs. 17,78,000/-. He has submitted copy of additional purchase deed in respect of the same property dated 30/11/2010 as per which, amount of Rs. 15,00,000/- was paid to the vendors of the plot. The assessee's share being 1/3, Rs. 5,00,000/- is attributable to him. Thus, the cost of the plot under consideration works out to Rs.22,78,000/-. The profit on sale of the property works out to Rs.77,22,000/-. The assessee has shown Rs. income of Rs. 51,50,000/- as short-term capital gain. Show-cause dated 25/2/2016 was issued to the assessee to explain his contention. The assessee replied that he has paid towards payment made to Shri Balu Kedari Rs. 17,00,000, towards stamp duty and registration Rs. 2,62,990/- advocate fees Rs. 1,50,000/- and other expenses. However, the following are the observations made :

1. The agreement is registered and the registered agreement states that the assessee has paid only Rs. 53,34,000/- and Rs. 15,00,000/- towards the purchase of the plot by the assessee during the year 2011.
2. The agreement does not mention any other payment made by the assessee
3. The assessee states that he has made payment to Shri Balu Kedari Rs. 17,00,000, towards stamp-duty and registration Rs. 2,62,990/- advocate fees Rs. 1,50,000/- and other expenses. However, the schedule in the agreement does not mention the amount paid.
4. The assessee has stated that he has paid for the stamp-duty and registration but as he is only 1/3rd holder and he is entitled for 1/3rd of the expenses.
5. The assessee has stated that he has paid amounts as per tabulated below :

Date	Cheque	Amount
2.10.10	786770	500000
30/11/2010	786771	232010
30/11/2010	786772	21500
7/12/2010	786773	325000 ✓
7/12/2010	786774	325000 ✓
7/12/2010	786775	250000 ✓
8/12/2010	786776	250000 ✓
8/12/2010	786777	50000
7/12/2010	786778	250000
15/12/2010	786779	50000
22/1/2011	831832	300000
6/1/2012	63275	100000
	Details not found	2,00,000
POA, stamp duty, registration fees	Paid in cash	R. 10,530/-

The assessee has also stated to have made further payments in respect of purchase of the property. On perusal of the tabulated details, it is noticed that the assessee has claimed to have paid the amounts before the date of purchase agreement. But the purchase deed is silent on the payment amount. Therefore, the contention of the assessee is not accepted and the same is disallowed as cost of acquisition and the difference in the cost of acquisition [Rs. 77,22,000/- (assessee's share) (-) Rs. 51,50,000 (shown by the assessee)] i.e. Rs. 25,72,000/- is added back to the total income of the assessee. Initiate penalty proceedings U/s. 274 r.w.s. 271(1)(c) of the Income-tax Act, 1961 for furnishing of inaccurate particulars of income.

6. Mr. Phadke next invited our attention to the assessee's three voluminous paper books as well as a chart filed. We make it clear that there is no dispute even from the Revenue side regarding correctness of all the relevant details atleast in principle. The assessee next threw light on the historical background of this former parcel of land. Learned counsel stated that this land originally belonged to Shri

Mahadev Tulsiram Gaikwad from the year 1990 onwards. The state government thereafter allotted it to Shri Balu Kedare etc. for rehabilitation of Kasarsai dam project ousters'. And that hon'ble jurisdictional high court thereafter stated to have quashed the foregoing dam project notification as illegal/irregular. The Revenue records however continue to be in the name of "Balu Kedare" only even after the hon'ble jurisdictional high court's judgment. And that he thereafter entered into a registered purchase agreement for this former parcel of land with the original owner Shri Mahadev Tulshiram Gaikwad for Rs.58 lakhs along with two other co-vendees. We are informed that this former purchase agreement also involved ancillary expenses under three heads to the tune of Rs.21,500/-; Rs.2,32,010/- by demand drafts representing stamp etc. and cash sum of Rs.30,980/-.

6.1. Learned counsel next submits that once the latter allottees namely "Balu Kedare" continued to be recorded as the land owners as per the Revenue record; Forms-7/12 [page-197]; he entered into a latter registered purchase agreement dated 29.07.2011; this time for Rs.51 lakhs and other similar charges. Both these agreements form part of the case records before us. What we note from a combined perusal thereof is that although the assessee has been the common co-vendee therein; the twin vendors/parties namely Mahadev Tulshiram Gaikwad and Balu Kedare had declared themselves to be the

exclusive owners in possession. And also that the latter registered agreement has nowhere incorporated the relevant information regarding the former one between S/Shri Gaikwads and these three vendees. It is in this factual backdrop that the assessee's case before us is that he is entitled to claim the impugned expenditure regarding both these purchase agreements which culminated in the registered sale deed for Rs.2,98,00,000/- having his share of Rs.1 crore [not in dispute] since we are concerned with the cost of acquisition only. When we confronted all these facts to the assessee, Mr. Phadke submitted that now once the learned CIT(A) has held the assessee to have taken plunge in real estate/land aggregation business; he is very much entitled to claim the impugned expenditure regarding both these registered purchase agreements u/sec.37 of the Act. He sought to buttress the point that the impugned expenditure cannot be "necessarily" but it should be "wholly" and "exclusively" incorporated for the purpose of business only. He further placed strong reliance upon the relevant Revenue record i.e., Forms 7 and 12 extracts at pages 197 of the paper book that Mr. Kedare had also been declared as the owner in exclusive possession which made the assessee to purchase all of his rights over the land in question.

7. The Revenue has placed strong reliance on the CIT(A)'s action upholding the impugned disallowance.

8. We have given our thoughtful consideration to the foregoing rival stands. Suffice to say, it is very much clear to us from a perusal of the assessment findings extracted in preceding paragraphs as well as the CIT(A)'s discussion that both the said learned lower authorities have not given due consideration to the clinching fact that there were two registered agreements executed by the assessee as a co-vendee. Faced with the situation, learned counsel submitted that we ought to remit the matter back to the Assessing Officer in this factual backdrop. We however note that all these agreements etc. took place in the year 2010 onwards and the assessment year before us is 2013-14; which is sought to be adjudicated upon a decade thereafter i.e., by the end of the year 2023. We therefore, assume this task of determining the correct cost of assessee's acquisition of land in Sy.No.132/2 ourselves only. We further to note that once Shri Mahadev Tulshiram Gaikwad etc. had been treated as the exclusive owner in possession in the former registered agreement and Kedare's rights/title no more continued as per hon'ble jurisdictional high court's decision, we fail to understand as to how the assessee's cost of Rs.51 lakhs + expenses [to the extent of 1/3rd share] regarding the latter parcel is admissible as entering such a second agreement without quoting the former one would be punishable in law under the provisions of Indian Penal Code. We also wish to reiterate here that the

assessee had faced with the very situation regarding the latter parcel of the land i.e., Sy.No.129/2 as well wherein he had duly got the Revenue records corrected from the learned Upper Collector/Deputy Collector Rehabilitation [Land], Pune vide order dated 10.11.2014 [pages 30 onwards in paper book]. All these facts take us to the conclusion that the assessee is only entitled for the cost of acquisition coming to 1/3rd share in Rs.58 lakhs + expenses involving the vendors S/Shri Mahadev Tulshiram Gaikwad etc. (supra) than the latter one u/sec.37(1) of the Act. We order accordingly and direct the Assessing Officer to grant him the impugned deduction to the extent of 1/3rd of Rs.58,00,000/- + Rs.21,500/- + Rs.2,32,010/- + Rs.30,980/- or that actually paid by assessee; whichever is lower, in very terms.

9. Learned counsel at this stage submitted that the assessee would be facing worst position than in Assessing Officer's assessment order dated 31.03.2016 once he has not granted the impugned cost of acquisition regarding both these agreements. We are of the considered opinion that the Assessing Officer had entirely grossed-up the cost of acquisition as reproduced in the preceding paragraphs than deciding the admissibility thereof as per law. The factual position is hardly any different in the CIT(A)'s order. We accordingly reject the assessee's instant technical objection in very terms.

10. Next comes the second substantive issue raised at the assessee's behest regarding taxability of the alleged profits derived from the transfer of the second parcel of the land in Sy.No.129/2 (supra). It has come on record that the assessee had executed the corresponding registered sale deed dated 13.08.2015 regarding a part of this latter parcel of land in favour of S/Shri Chandrakanth Gaikwad etc. followed by his declaration of capital gains arising therefrom in assessment year 2016-17. Learned counsel has also filed the assessee's corresponding details in pages 11 onwards in first paper book.

11. The Revenue on the other hand has drawn strong support from both the learned lower authorities action that his registered sale agreement in favour of very party dated 08.01.2013 for Rs.1.10 crore amounts to "transfer" only giving rise to the taxable income. We find no merit in Revenue's instant arguments as a perusal of the instant case file suggests that the assessee had also executed registered purchase deed dated 06.12.2014 [in assessment year 2015-16] followed by sale deed thereof dated 13.08.2015. All these clinching facts deserve to be considered in light of the CIT(A)'s directions that the assessee has to be assessed under the head "business income" than "capital gains" (supra). That being the case, we hardly see any justification in Revenue's stand once the assessee was neither incorporated as the registered owner in possession in the Revenue record nor he had carried-out

any sale transaction in the impugned assessment year in light of the preceding facts on record. This is more so in light of the fact that the Assessing Officer had assessed the impugned sale consideration of Rs.1.10 crores under the head “capital gains” as upheld in the CIT(A)'s order u/sec.2(47) of the Act which is not applicable once “business head” has come into play as per the CIT(A)'s directions.

12. So far as the Revenue’s instant “accrual” principle is concerned, we quote hon’ble apex court’s land mark decision in Chainrup Sampath Ram vs. CIT [1953] 24 ITR 481 (SC) that an income could be said to have accrued by the principles of reasonable “certainty” only than reasonable “probability” as is applicable in case of anticipation of expenditure/losses. We thus accept the assessee’s arguments regarding the instant second substantive issue that both the learned lower authorities have erred in law and on facts in assessing him for alleged profits from sale of land in Sy.No.129/2 in question. Ordered accordingly.

No other ground or argument has been pressed before us.

13. This assessee’s appeal is partly allowed in above terms.

Order pronounced in the open Court on 13.10.2023.

Sd/-
[DR. DIPAK P. RIPOTE]
ACCOUNTANT MEMBER

Sd/-
[SATBEER SINGH GODARA]
JUDICIAL MEMBER

Pune, Dated 13th October, 2023

VBP/-

Copy to

1.	The applicant
2.	The respondent
3.	The CIT(A), Pune-5, 578/2B, Aayakar Sadan, 5 th Floor, Room Nos.511 & 512, Salisbury Park, Gultekdi, Pune PIN 411 037.
4.	The Pr. CIT, Pune-4, Pune.
5.	D.R. ITAT – 'B' Bench, Pune.
6.	Guard File.

//By Order//

//True Copy //

Assistant Registrar, ITAT, Pune Benches,
Pune.