

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC": NEW DELHI**

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No. 2134/DEL/2023
Assessment Year: 2014-15

Mahesh Kumar, H. No. 352, Near Shiv Mandir, Tilpat, Amar Nagar, Faridabad. PAN- AZHPK1325Q	<u>Vs</u>	Income-tax Officer, Faridabad.
APPELLANT		RESPONDENT
Appellant by	Sh. Vineet Gupta, CA & Sh. Apurv Sharma, CA	
Respondent by	Shri Om Parkash, Sr. DR	
Date of hearing	19.12.2023	
Date of pronouncement	22.12.2023	

ORDER

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi, dated 30.05.2023, pertaining to the assessment year 2014-15. The concise ground of appeal raised by the assessee is as under:

"The Ld. A.O. erred in treating partial advance received against agreement to sell of an ancestral joint agricultural land as sale consideration without transfer of possession of land in the year under consideration."

2. Facts, in brief, are that case was reopened for assessment on the basis that the assessee had deposited cash amounting to Rs. 37,70,000/- in his bank account maintained with Syndicate Bank during F.Y. 2013-14 relevant to A.Y. 2014-15. Before the assessing authority it was stated that the assessee had received sale proceedings of land amounting to Rs. 37,70,000/-. The AO added back the amount and thus assessed income at Rs. 39,66,360/-. Aggrieved against this the assessee preferred appeal before the learned CIT(Appeals), who dismissed the appeal. Aggrieved the assessee is in appeal before this Tribunal.

3. The only effective ground in this appeal is against the treatment of advance received by the assessee in respect of sale of agricultural land jointly executed with co-owner.

4. Learned counsel for the assessee reiterated the submissions as made in the written submissions. He contended that the assessee had received advance on two different dates and after lapse of six years a settlement was arrived at with the purchaser and the land in question was finally transferred and possession was given in the year 2020, however, the agreement to sell was executed in 2013. He contended that under the facts of the present case the authorities below have grossly erred in making the impugned addition. For the sake of clarity the written submissions of the assessee are reproduced as under:

"Submissions supporting the claim of the Appellant:

1. The Ld. Assessing Officer has erred and misdirected himself in making additions of Rs. 37,70,000/- as Long Term Capital Gain by converting the nature of transaction from Advance to Sale Consideration without considering cogent evidences, explanations submitted by the appellant during assessment proceedings, without bring any adverse material on record, on the basis of his own presumptions, surmises, conjectures and wrong interpretation of Section 2(47) of the Income Tax Act with respect to the present case and thus is inconsistent to the legal position, provisions and therefore such addition is without the authority of the law.

2. Ld. The Commissioner of Income Tax (Appeals) was appraised of the definition of the term "transfer" of section 2(47) of the Income Tax Act in detail along with detailed provisions of Section 53A of the Transfer of Property Act which governs Sale/Transfer of Immovable Property. Various case laws were also cited. However, LD. The Commissioner of Income Tax (Appeals) did not record anything for not considering applicability of such cases and the provisions of the Two Act, as stated above, which categorically explains that the subject transaction was merely a transaction of advance and not a transaction of sale/transfer of immovable property, in his order and thus misdirected himself in confirming the

addition made and is therefore is inconsistent to the legal position, provisions and without the authority of the law.

It is not the ipse dixit of the Ld. Assessing Office to compute the income by changing the definitions as provided in the law nor the computation and determination of income can be at the whims and fancies of the Ld. Assessing Office or the Id. The Commissioner of Income Tax (Appeals) as held by Hon'ble Income Tax Appellate Tribunal Delhi 'F' Bench in Assistant CIT Circle, Bulandshahr V/s. M/s Rama Dairy Products Ltd. (ITA No.5185/Del/2010)

Neither Ld. Assessing Office nor Ld. The Commissioner of Income Tax (Appeals) brought on records that the land was transferred to said prospective buyer in the year under consideration.

Neither Ld. Assessing Office nor Ld. The Commissioner of Income Tax (Appeals) brought on records that the how "Agreement to Sell" converted to "Contract of Sale" in the year under consideration or how partial advance

received can be considered as sale/transfer of Immovable property under provisions of Income Tax Act without transfer of possession.

The Ld. Assessing Office has referred to a case Sunmati Dayal Vs CIT 214-ITR-101 where in Hon'ble Supreme Court held that Income Tax Authorities can apply test of human probabilities to see whether the transaction could be considered as genuine or not. Ld. Assessing Office also referred to CIT Vs. Durga Parshad More,

82-ITR-540 wherein it was held that taxing authorities were entitled to look to surrounding circumstances to find out the reality or otherwise of transaction.

However, Ld. Assessing Office totally failed to apply test of human probabilities and check the surrounding circumstances in considering ENTIRE ADVANCE RECEIVED IN THE CURRENT YEAR against "AGREEMENT TO SELL" as Taxable Capital Gain.

Ld. Assessing Office as well as Ld. The Commissioner of Income Tax (Appeals) failed to appreciate that it is beyond human probabilities in general for anyone to transfer possession of land against receipt of only about 42% value of the price fixed for the land to the buyer. No man of even ordinary prudence will transfer possession without fully getting the full consideration unless it is done under an undue threat or coercion, which if so, would render such agreement null and void. Moreover, nothing has been brought on records by the Ld. Assessing Office whether the land stands transferred to the Prospective Buyer during the year under consideration.

Further, no reasons had been recorded by Ld. Assessing Office as to why the value of the ancestral land had been considered as ZERO as full amount has been considered as Long Term Capital Gain. The Ld. The Commissioner of Income Tax (Appeals) has also accepted the view of Ld. Assessing Office as it is, without

recording reasons for his decision to consider the value of land as ZERO.

Further Ld. The Commissioner of Income Tax (Appeals) in his order at page 17 in 2 ^ (nd) para under the heading "Decision" line number 4 to 5 has mentioned

..."The appellant has also accepted that Rs. 37,70,000/- is out of sale of urban agricultural land.".

However, the Appellant or his representative(s) never used the words " OUT OF SALE OF" in their submissions to refer to the amount received as advance against agreement to sell. Therefore, none of them accepted that the sale of land took place in Financial Year 2013-2014 when the Ld. Assessing Office considered the Advance as Sale Consideration for the Financial Year 2013-2014 and made additions to the income of the Appellant.

As also held in CIT Vs Sethia Plastic Industries [2006] 206 CTR DEL 484. the AO, even while making a best judgment assessment is obliged to take into account all the relevant material as are brought before him and he has gathered, and are not in dispute. Whereas, in the present case, Ld. Assessing Office proceeded to make additions without gathering any adverse material on records.

That the Ld. Assessing Officer simply on the basis of suspicions, surmises and conjectures can not change the nature of transactions to suit the Income Tax Department to unnecessarily create demand of tax and is against the spirit of the law as also held in Madnani Construction.. Vs. CIT [2008] 296 ITR 45 Guwahati. Mere suspicion or thought of the Ld. Assessing Officer cannot be given more credence than the documentary evidence filed by the assessee considering the provision of section 91 of the Evidence Act. As also held by ITAT Mumbai in Shri Rajeev G. Kalathil Vs. DCIT (ITAT Mumbai), ITA No.6727/Mum/2012 that Suspicion of highest degree cannot take place of evidence.

As also held in New Plaza Restaurant Vs Income Tax Officer [2009] 309 ITR 259 (HP) that the Ld. Assessing Officer has to make honest estimates on the basis of available material and circumstances of the case. On the other hand, the Appellant during assessment proceedings provided the requisite evidence. The Appellant had also provided detailed explanation as to the nature of the transaction in question along with new corroborative evidences during first appellate proceedings. Thus, the entire onus was discharged by the assessee.

The UNILATERAL DECISION based on assumption, surmises and conjunctures and is illegal, unjustified and against principle of NATURAL JUSTICE and the legal provisions."

5. On the other hand, learned DR opposed the submissions and supported the orders of lower authorities. He contended that there is a lapse of more than six years between agreement to sell and execution of sale-deed. Learned DR contended that the lower authorities have rightly treated the amount as a sale consideration.

6. I have heard rival submissions and perused the material available on record. It is not the case of the assessee that the agreement to sell executed qua the land in question does not fall in the category of capital asset, being agricultural land. The only argument of the assessee is that the land in question was only advance and it could not be treated as sale consideration. He submitted that since no possession of land was given, therefore, there was no transfer.

6.1. Before adverting to the rival submissions, for the sake of clarity, it would be appropriate to reproduce the relevant provision of law i.e. section 2(47) of the Act, as under:

"(47) transfer, in relation to a capital asset, includes,-

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein"; or

(iii) the compulsory acquisition thereof under any law; or

(iv) in a case where the asset is converted by the owner thereof into or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment;] [or]

(iva) the maturity or redemption of a zero coupon bond; or]

(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); or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

6.2 The contention of the assessee is that amount in question was received as advance in respect of sale of agricultural land. The Assessing Officer did not accept the contention and made addition by observing as under:-

"5. On perusal of the bank account statements furnished by the assessee, it is found that the assessee has deposited cash of Rs. 20 Lakh in his bank account on 01.03.2013 and as the assessee has claimed that Rs. 1.00 Crore was received by the all co-owners as advance on 27.02.2013. Hence it appears that the assessee has deposited his 1/5 share of Rs. 20 Lakh i.e 1/5 of 1.00 crore in his bank account on 01.03.2013. Since this transaction falls in the financial year 2012-13, it is being considered separately.

6. Since, no clear explanation was filed by the assessee the AO is bound to see the surrounding circumstances as supported by the following judicial pronouncements:-

- 1) It is also trite law that the Income Tax Authorities can apply the test of human probabilities to see whether the transactions could be considered as genuine or not. Reliance in this regard is placed on the judgment of Hon'ble Supreme Court in the case of Sumati Dayal V / s CIT 214-ITR-101. Their lordships of the Supreme Court in the case of CIT V / s Durga Parshad More,*

82-ITR-540, have held that taxing authorities were entitled to look to surrounding circumstances to find out the reality or otherwise of transaction.

*7. The above case law is clearly applicable to the instant case as the assessee failed to explain the computation of Capital Gain and any exemption/deduction from sale proceed of land of Rs. 3770000/- Therefore, receipt of Rs.3770000/- in hand of the assessee are charged to tax treating the same as sale proceed of urban agriculture land which is taxable in the hands of the assessee as the urban agriculture land is not exempt u/s 2(14) of the Act. because the assessee has not filed any computation of capital gain thus whole of the amount of Rs. 3870520/- i.e 1/5 of the instalment of Rs. 19352600 / (- i) * s added back to the return income of the assessee. Accordingly, an addition of Rs 3770000/- is hereby made to the returned income of the assessee. I am satisfied that concealing the true particulars of his income to the extent of Rs.3770000/- the assessee has committed a default within the meaning of section 271(1)(c) of the Act. Accordingly, penalty proceedings u/s 271(1)(c) of the Act are initiated and penalty notice is being separately issued to the assessee."*

6.3 From the above finding it is clear that the AO did not discard completely the contention regarding source of deposit being advance/sale consideration. However, he made addition on the basis that no capital gain was offered by the assessee. I find merit into the contention of learned counsel for the assessee that the amount was merely advance payment and the transfer was completed in the year 2020. My attention was drawn towards sale deed and settlement agreement executed. As per these documents the possession was handed over on 15.02.2020. Therefore, I hereby direct the AO to delete the impugned addition. The AO would be at liberty

for taxing the capital gain arising out of sale of capital asset in the relevant year in accordance with law, Grounds of appeal are allowed.

7. Assessee's appeal stands allowed accordingly.

Order pronounced in open court on 22nd December, 2023.

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

MP

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI