

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

BEFORE SHRI ANIKESH BANERJEE, JUDICIAL MEMBER AND
MISS. PADMAVATHY.S, ACCOUNTANT MEMBER

ITA 4275/Mum/2023
(Assessment year 2013-14)

Mahendra Kapadia 220, Vijay Gally, M J C Market, Mumbai-400 002 PAN : AAEPD1237E	vs	ITO 18(2)(3), Mumbai
APPELLANT		RESPONDENT

Assessee by : Shri Viraj Mehta
Respondent by : Shri R.R. Makwana, JCIT

Date of hearing : 25/04/2024
Date of pronouncement : 29/ 04/2024

ORDER

PER ANIKESH BANERJEE, J.M:

Instant appeal of the assessee is filed against the order of the National Faceless Appeal Centre, Delhi (NFAC)[for brevity, 'Ld.CIT(A)'] passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act') for Assessment Year 2013-14 dated 12/10/2023.The impugned order was emanated from the order of the Ld.Income-tax Officer, Ward-18(2)(3), Mumbai (in short, 'the A.O.') passed under section 143(3) of the Act date of order 31/03/2016.

2. The assessee has taken the following grounds of appeal: -

“1. On facts and circumstances, Ld. CIT(A) has erred in confirming the addition made by Ld AO in taxing the Long Term Capital Gains on sale of inherited agricultural lands as Business Income of Rs. 31,88,713/-on the plea that the Appellant sells the land in a phase manner and it was the motive to earn economic benefit from frequent sales over a period of ten years without appreciating the fact that appellants stand is confirmed by the its own decisions. Such addition is bad in law and erroneous in facts and liable to be deleted.

2. On facts and circumstances, Ld. CIT(A) has erred in confirming the action of Ld. AO in recommending the value of land to be substituted as on 01.04.1981 at Rs 85/- per sq. mtrs which was estimated by DVO for AY 2007-08 u/s 55A thereby rejecting the value estimated by the Registered Valuer at Rs 110/- without appreciating the fact the Ld AO has no jurisdiction to refer the matter to DVO u/s 55A. Such addition is bad in law and erroneous in facts and liable to be deleted.

3. On facts and circumstances, Ld. CIT(A) has erred in confirming the order without appreciating the fact that The Hon JCIT Range 18(2) erred disposing off the application filed u/s 144A without giving any opportunity to the Appellant of being heard, thereby the order framed u/s 143(3) is bad in law.

4. On facts and circumstances, Ld. CIT(A) has erred in confirming the addition without providing proper opportunity of hearing which is against the principle of natural justice. Such addition is bad in law and erroneous in facts and liable to be deleted as the same is confirmed without providing proper opportunity of hearing.”

3. The brief facts of the case are that the assessee, in individual capacity filed the return of income. The assessee claimed long term capital gain amounting to

Rs.30,09,826/- related to the transaction for F.Y. 2012-13, through sale of land. The assessment was framed and order was passed under section 143(3) by treating the long term capital gain of the assessee as business income. The Ld.AO considered this transaction as frequent transaction, so the sale of land is treated as business income and the assessee's share @12.5% on the income amounting to Rs.2,55,09,700/- which works out to Rs.31,88,713/- which was added back with the total income of the assessee. The assessee has taken the valuation for LTCG @110/- sq mt. Applying section 55A the Departmental Officer valued the land @Rs.85/- per sq.mtr which is accepted by the Ld.AO. In case of assessee the same issue was raised and the Id. CIT(A) for A.Ys. 2005-06, 2009-10 and 2010-11 allowed the appeal of the assessee and accepted the transaction as LTCG. Aggrieved, assessee filed an appeal before the Ld.CIT(A). The Ld.CIT(A) passed an *ex parte* order by considering the grounds and the assessment order. The grounds of the assessee are rejected by the Id. CIT(A). Being aggrieved, the assessee filed an appeal before us by challenging the appellate order.

4. The Ld.AR argued and invited our attention in assessee's co-owner's case in the case of **Estate of Krishnakumar J Khata vs ITO 16(3)(4) in ITA No.4223/Mum/2014; date of pronouncement 01/12/2014** where the Bench considered the sale as a long term capital gain and not as a business income. The Ld.AR prayed for setting aside the matter to the file of Ld.CIT(A) for further adjudication of appeal.

5 The Ld.DR argued and relied on the orders of Revenue Authorities.

6. We heard the rival submissions, considered the documents available on the record. On perusal of the appellate order, the relevant paragraphs of which are reproduced as under:-

“Decision:

All the information available on record in this case along with the impugned assessment order and the grounds of appeal has been perused. Various judicial pronouncements relied upon by the AO during the assessment proceedings have also been considered. The issues raised in these grounds of this appeal are discussed below.

7.1 Ground no. 1

In this ground of the appeal, the appellant has assailed the AO's decision to consider the profits earned on sale of inherited agricultural lands as Business Income. The appellant has submitted in support of his claim that similar additions were made in his case for A.Y. 2005-06, 2009-10 & 2011-12, which were deleted by the CIT (A). Further, the appellant has stated that the decision delivered by Hon IT AT Mumbai in case of 2 co-owners in the same transactions for AY 2005-06 in favor of the said co-owners, but he has not submitted the copy of the order. The appellant's argument is that the impugned order has been framed the order u/s 143(3) on the same basis, as it was framed in AY 2009-10, 2005-06 (u/s 147), 2010-11, 2011-12 & 2012-13 by his predecessor AO, which without any basis and without appreciating the facts that the land sold during the year by Appellant & co-owners is on as is where is basis, without any activity and or development and said land was acquired under Will duly probated and not purchased.

7.1.1 *The appellant has cited the Hon'ble ITAT Mumbai order in case of 2 co-owners in the same transactions for AY 2005-06 as in their favor, without furnishing the details of the case or copy order. It has been gathered from the official website of the Income Tax Appellate Tribunal that the Hon'ble ITAT, Mumbai has dismissed the Dept. of Revenue's appeal in the case of M/s Devidas Soonderdas and Co. for A.Y. 2005-06 in ITA no.1382/MUM/2011. The Hon'ble ITAT, Mumbai has held that "At the time of hearing, Id. counsel for the assesses submitted that the tax effect in both the appeals is less than Rs.3 lakhs and hence by I.T.A. No.1382 & 1379/Mum/2011 2 virtue of CBDT Instruction No.3 of 2011 dated 9.2.2011, the Revenue is precluded from filing the present appeals.*

3. The Id. AR also submitted that the issue contested in these appeals does not fall in any of the exceptions provided in the circular referred above. Accordingly, he submitted that both these appeals are liable to be dismissed in limine.

4. The Id. DR did not object to the factual aspect presented by the Id. AR.

5. Having regard to the submissions made by the Id.AR and also the circular of CBDT referred above, we are of the view that both these appeals are liable to be dismissed in-limine, as unadmitted as they are contrary fo the binding circular issued by the CBDT. Accordingly we dismiss both the appeals filed by the revenue."

7.1.2 *On perusal of the above, it is found that the Hon'ble ITAT, Mumbai has dismissed the Dept. of Revenue's appeal on the basis of guidelines circulated vide CBDT Instruction No. 3/2011 dated 9.2.201, as the tax effect in the case was below Rs. 3 Lakhs. Clearly, the Hon'ble ITAT, Mumbai has not decided the case in favor o the co-owner of the appellant's inherited land on merits. Considering this fact, it i; presumed that the appellant has deliberately submitted half-truth at the time of filin< this appeal to hide the true and complete facts of the case.*

7.1.3 *Further, the AO has remarked in the impugned assessment order that the appellant had sold part of the inherited land situated at Village Mire, Mahajanwadi, Taluka and District Thane to builders/developers in every financial year starting from F.Y.2002-03 except FY.2005-06 in phased mannerwith a view to earning profit.The AO has enlisted the year wise details of the sale of land undertaken by appellant to*

highlight that it has been a regular and organized activity of the appellant year after year along with the co-owners of the property to maximize the profit. The appellant's claim of sale of land without any development was rejected in absence of any evidence in this regard during the assessment proceedings. It is seen that the AO has noted that the total consideration of Rs. 2,57,00,000/- on sale of part of the land during the financial year under consideration and the appellant has declared Long Term Capital Gain of Rs. 30,09,826/- as his share. The AO has considered the transaction as business transaction in view of the frequency of transaction in preceding years, nature and motive behind it. The AO has relied upon various judicial pronouncements to support the rejection of appellant's claim of Long Term Capital Gain and has concluded in the assessment order as following:

".....it /s clear that assessee has frequently sold parts of land over the years in such a manner which will maximize its profits. For instance, the assessee has sold survey no, 110 over the period of two years (mentioned at Sr. no. 10 and 11 in the aforesaid chart) in order to maximize its profits. Thus, considering the frequency of transactions along with profit motive of assessee, the profits from sale of land has to be taxed as business income."

7.1.4 The AO has denied the appellant's claim of Long Term Capital gain and has treated it on the basis of frequency and number of the sale transaction and motive behind it. It is observed that the assessee has sold the part of the land in every financial year from F.Y. 2002- 03 to F.Y. 2012-13 except F.Y. 2005-06. In this regard, the case laws relied upon by the AO to reach on conclusion in this proceeding have been considered in light of the facts of this case. It is clearly established in these judicial pronouncements that the magnitude and frequency along with the motive of profit maximization behind these transaction are among the important factors in deciding the nature of that transaction. Further, the appellant has failed to produce any evidence with regard to the claim that the land was sold without any development and on 'as is where is basis' either during assessment or appellate proceeding. In absence of any explanation or documentary evidence in this regard, there is no reason to interfere with finding of the AO in this case. Therefore, the consideration of long term capital gain of Rs.30,09,826/- as claimed by the appellant as business income for A.Y. 2013-14 by the AO in this impugned order dated 31.03.2016 is confirmed. Accordingly, this ground of appeal is dismissed."

We find that the *ex parte* order was passed by the Ld.CIT(A) but, on the other hand, Ld.CIT(A) had proper information about the order of the co-owner of the assessee, in the case of **Devidas Soonderdas and Co. in ITA No.1382/Mum/2011, ITAT, Mumbai Bench**. But without considering the same, the assessment order was upheld. The assessee for justice agitated the issue related to conversion of capital gain into business income. But on perusal of appeal order, we find that the assessee has not appeared on several dates before the Ld.CIT(A). But the impugned issue is required for adjudication. So, we remit back the matter to the file of the Ld.CIT(A) for further adjudication. Both the revenue and the counsel of the assessee had not made any objection for remanding back the issue before the

ld. CIT(A). We are not expressing any views on the merits of the case so as to limit the appellate procedure before the ld. CIT(A). Needless to say, the assessee should get a reasonable opportunity of hearing for setting aside proceedings. The assessee should be diligent and careful in set aside appeal proceeding.

7. In the result, appeal in **ITA No.4275/Mum/2023** is allowed for statistical purpose.

Order pronounced in the open court on 29th day of April, 2024.

Sd/-

(PADMAVATHY. S)
ACCOUNTANT MEMBER
Mumbai, दिनांक/Dated: 29/04/2024
Pavanan

sd/-

(ANIKESH BANERJEE)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्डफाइल/Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar), ITAT, Mumbai