

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F': NEW DELHI**

**BEFORE,
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SHRI SUDHIR PAREEK, JUDICIAL MEMBER**

**ITA No.1690/Del/2017
(ASSESSMENT YEAR 2011-12)**

Rishi Goyal C/o MNRS & Associates Chartered Accountants I-Block, 35B, 1 st Floor Lajpat Nagar-2 New Delhi-110024 PAN:AALPG 5610P (Appellant)	Vs.	DCIT Circle-46(1) New Delhi (Respondent)
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Assessee by	Shri Sandeep Khandelwal, CA
Respondent by	Shri Vivek Vardhan, Sr. DR

Date of Hearing	21/05/2024
Date of Pronouncement	26/06/2024

ORDER

PER S.RIFAUR RAHMAN, AM:

1. This appeal has been filed by the Assessee against the order of Learned Commissioner of Income Tax (Appeals)-21, New Delhi ["Ld. CIT(A)", for short], dated 06/12/2016 for Assessment Year 2011-12.

2. The brief facts of the case are, the assessee filed his return of income on 30/07/2011 declaring an income of Rs.47,84,580/-. The case was processed u/s 143(1) of the Income Tax Act, 1961 ('the Act' for short). The case was selected for scrutiny through CASS on the basis of AIR information. The statutory notices u/s 143(2) and 143(1) were issued and served on the assessee. In response, the Ld. AR of the assessee attended and submitted the relevant information as called for.

3. The assessee derives his income by way of salary from Mobile Store Ltd. and also declared capital gains as well as the income from other sources. As per the AIR information, assessee has sold immovable property at the total consideration of Rs.82,50,000/- situated in Maharashtra. During the assessment proceedings, the assessee was asked to furnish the details of immovable property along with the computation of capital gain. The assessee filed copy of sale deed of the above property and furnished the computation of capital gain arising from the transfer of property. The assessee has brought on record details of the property and the computation of income which is reproduced by the Assessing Officer at para 7 of

the order. From the above submissions, the Assessing Officer observed that the assessee has claimed Cost of improvement expenses of Rs.61,12,345/-, payment of brokerage of Rs.82,500/- at the time of sale, Pre-closure charges of Rs.1,09,242/- and payment of brokerage of Rs.58,570/- at the time of purchase. In order to verify the same, the assessee was asked to submit the details of the above claim of expenditure. After considering the submissions of the assessee, the Assessing Officer observed that the bill of Galaxy Home Studio for a total of Rs.12,95,000/- was submitted and the Assessing Officer observed that there is mode of payment mentioned, there is no TAN No. and no service tax is mentioned in the bill, therefore, the genuineness of the bill is remained unverified. Accordingly, he disallowed 50% of the above expenditure, the assessee being joint owner. With regard to brokerage payment, since assessee has not filed any documentary evidence for such payment, the same were disallowed. With regard to Pre-closure charges of Rs.1,09,242/-, the Assessing Officer observed that the assessee was using the impugned property as a self occupied property, the Pre-closure charges being a personal

liability of the assessee and it has no connection with the transfer of the property. Accordingly, the same was disallowed and, accordingly, the Assessing Officer revoked the Short Term Capital Gain at Rs.17,46,982/-.

4. Further, the Assessing Officer noticed that the assessee had claimed carry forward of Short Term Capital Loss of Rs.8,60,931/- relating to Assessment Year 2008-09 and the same was set off against the current year Short Term Capital Gain. The assessee filed the details of Short Term Capital Loss relating to Assessment Year 2008-09 and after going through the details submitted by the assessee, AO noticed that the loss was arisen after making the sale and purchase of mutual funds of Rs.11.83 Crs. and 11.91 Crs. respectively. The huge transactions made by the assessee during the Financial Year 2008-09. By referring to CBDT Circular No.4/2007 dated 15/06/2007 and certain decisions of the Hon'ble Supreme Court, he treated the income earned by the assessee in dealing with the share and mutual funds as business transactions and such loss cannot be set-off with the Short Term Capital Gain.

Accordingly, the claim of adjustment of carry forward loss from Assessment Year 2009-10 is disallowed.

5. Aggrieved with the above order, the assessee preferred the appeal before the Ld. CIT(A) and filed a detailed submissions. After considering the detailed submissions of the assessee, the Ld. CIT(A) sustained the findings of the Assessing Officer.

6. Aggrieved with the above order, the assessee is in appeal before us raising the following grounds of appeal:-

“1. On the facts and in the circumstance of the case and in law the Id. AO DCIT Cir 46(1) and the CIT(A)-21 erred in disallowing the claim of assessee as to the cost of improvement evidenced by the bill of the contractor without verifying the same. Neither of them even endeavored to enquire from the counsel of the assessee about the mode of payment or confirmation from the contractor. They presumed that since mode of payment is not mentioned on the bill and Service tax no. or TAN was not mentioned on the bill the expenditure incurred by the assessee is ingenuine. Had either of them tried to cross examine the transaction w.r.t. property documents and associated expenditure claimed by the assessee, they could have very well satisfied themselves about the genuineness of the cost incurred. They completely ignored the condition of the property, which was at the time of purchase and which was at the time of sale after renovation. Consequent upon such modification the assessee was able to fetch good amount despite slow-down in property market.

2. The Id. AO and CIT(A) erred in disallowing assessee's claim as to payment of brokerage on their presumption of no such payment. Neither of them asked for the bill of the broker nor made any endeavor to verify the claim made by the assessee. Even in nowhere during the course of assessment proceedings the AO or the CIT(A) questioned the genuineness of payment made to broker or had asked to produce any documentary evidence in support of the claim made by the assessee. They even appear to be unaware of prevailing practice of property brokerage business and brokerage charged by dealers for materializing property sale and purchase

transactions. The learned AO probably presumed that assessee himself found seller and buyer of the subject property.

3. Both the Id. AO and CIT(A) erred in disallowing assessee's claim as to pre-closure charges paid to ING Vysya bank. The assessee was forced to pre-close subject loan to provide clear title to the buyer of property, free from all encumbrances and mortgages. In this view, it can be clearly apprehended that such expenditure falls under "expenditure incurred wholly and exclusively in connection with such transfer" and had such expenditure not incurred, the subject transaction of sale of subject property could not have taken place and consequently no question of capital gain subject to capital gain tax.

The similar position has been upheld by the judgment of the High court of Mumbai (1991) 190 ITR 56(Bom) between CIT VS Shakuntala Kantilal: The sale transaction with Messr Cosmas Co-operative Housing Society Ltd, under the agreement dated March 30, 1967, would not, rather would not, have materialized. If this transaction had not materialized, there would perhaps have been no question of capital gains. The sale would have then taken place at the rate of Rs 29 per sq yard as against Rs 51 per sq yard. One way of looking at the problem could be to say that the full value of the consideration in this case was not the apparent consideration, i.e, Rs 2,58,672 but Rs.2,23,168 (if, Rs. 2,58,672 minus Rs.35,504).

4. Both the Id. AO and the CIT(A) also erred in disallowing set off of carried forward short term capital loss from A.Y. 2009-10 against the short term capital loss arisen during the year in contravention of provisions of Section 74 of the Income Tax Act, 1961. They erred in treating 6 meagre transactions of sale/ purchase of mutual fund units as business transaction involving a total sale value of Rs. 13.09 lacs to sale and purchase of Rs. 11.83 crores by artificially interpreting transaction as huge and treating the same as business transaction, which in itself is incorrect and unjust. They are also not justified in invoking CBDT circular no. 4/2007 dated 15.06.2007 and judgments of H'ble Supreme Court, which have no relevance with the present case.

Consequent upon wrong interpretation, they are also not justified in rejecting set off of carry forward losses duly reported by the assessee during the relevant assessment year and justifiably adjusting against income during the assessment year under scrutiny. They also exceeded their power in changing the nature of income/loss duly reported and claimed by the assessee in preceding previous year (A.Y. 2009-10).

The AO is also not justified in disregarding and encroaching upon stated provisions of explanation (b) to Section 143(1) which clearly states that "the

acknowledgement of the return shall be deemed to be the intimation in a case where no sum is payable by, or refundable to, the assessee under clause (c), and where no adjustment has been made under clause (a)." Further he neither asked nor expected to ask for documentary evidence relating to determination of loss as claimed by the assessee in view of no such assessment made for the relevant assessment year.

In view of this the AO is not justified in disallowing set off of carried forward loss claim of Rs. 8,60,931/-on account of short term capital loss.

5. The CIT(A)-21 had decided appeal in a casual manner without paying due attention to the facts and supporting evidence produced by the counsel of the assessee. This is evident from the fact that even the ground not raised in appeal has also been decided (Refer para 2 to the appellate order).

6. That the appellant craves leave to add to, alter, amend, modify, substitute, delete, and/or rescind all or any of the GROUNDS OF APPEAL on or before the final hearing, if necessity so arises."

7. At the time of hearing, the Ld. AR submitted that assessee has claimed carry forward of Short Term Capital Gain from Assessment Year 2009-10. The Assessing Officer has denied the claim of carry forward of loss from earlier Assessment Year by reassessing the issue of Short Term Capital Loss incurred by the assessee in Assessment Year 2009-10 in the proceedings for Assessment Year 2011-12. He submitted that there is no jurisdiction of the Assessing Officer to revisit the concluded assessment of Assessment Year 2009-10. In this regard, he brought to our notice page-15 of the Paper Book wherein he brought to our notice return of income filed by the assessee for Assessment Year 2009-10 in

which the assessee has declared Short Term Capital Loss of Rs.8,60,931/- and it is properly declared as carry forward loss from Assessment Year 2009-10.

8. With the regard to calculation of capital loss, he submitted that the Assessing Officer has disallowed the Cost of improvement claimed by the assessee along with brokerage and Pre-closure charges. In this regard, he submitted that assessee has purchased the Flat on 24/11/2008 and incurred Costs of improvement in subsequent assessment year, details are being submitted before the Assessing Officer which is also reproduced in assessment order. He submitted that assessee has incurred Cost of improvement from Galaxy Home Studio for a total value of Rs.12.95,000/- and the relevant bill was submitted before the Assessing Officer. The Assessing Officer has denied the claim of Cost of improvement for the reason that there is no mode of settlement mentioned in the bill, no TAN No. is mentioned and also no service tax were mentioned in the bill. He submitted that it is not denied that assessee has incurred the above said expenditure and there is in fact, assessee has incurred certain expenditure for

improvement. Further, he submitted that the subject matter of Capital Gain was jointly owned by the assessee Mr. Rishi Goyal with his mother Smt. Kshama Goyal, whose case was also under scrutiny assessment and assessment order dated 18/03/2014 was passed u/s 143(3) by ld. AO ITO Ward 23(2), New Delhi. It may kindly be noted that during the course of assessment proceedings the documentary evidence relating to cost of improvement amounting to Rs. 12,75,000/- has been submitted to the Id. AO, who had duly considered and allowed the same while passing her assessment order. As the same has already been considered, the corresponding claim made in the hands of the assessee amounting to Rs.637500/- (being 50% of the cost of improvement amounting to Rs. 12,75,000/- incurred on jointly owned property) be allowed to the assessee in line with what has been allowed by the aforesaid Ld. Assessing Officer.

9. He submitted that the above mentioned documents were submitted to Ld. Assessing Officer, ITO Ward 23(2), New Delhi during the course of assessment proceedings in the case of Smt. Kshama Goyal could not be retrieved/made available and hence

request your good self to allow the same in line with what has been allowed by the Ld. Assessing Officer. Assessment Order passed by Ld. Assessing Officer as together with Computation of Income in the matter of joint owner Smt. Kshama Goyal is being enclosed for your ready reference (The copy of the same has already been submitted together with Additional Paper Book (page No. 19-23) submitted during the course of appellate proceedings before your good-self.

10. Further, he submitted that assessee has incurred certain brokerage expenditure while purchasing and selling of the property and also assessee has incurred Pre-closure charges. In this regard, he submitted that all the above expenditure are relating to transfer of the property and it cannot be denied.

11. On the other hand, Ld. DR relied on the orders of the lower authorities.

12. Considering rival submissions and material placed on record, with regard to Cost of improvement claimed by the assessee, we observed that assessee has submitted a bill from Galaxy Home

Studio for a total amount of Rs.12,95,000/- and the bill does not seem to have any details of payment, tax deduction nor contain service tax charges. Apparently, the bill seems to be taken from an unregistered dealer. It is also brought to our notice that in the case of Joint Owner i.e., Smt. Kshama Goyal in which the relevant Assessing Officer has allowed the same for which assessee has brought on record the relevant assessment order which is placed on record, in which the Assessing Officer has disallowed only the Pre-closure charges. After careful consideration of the same, we observed that in the case of Smt. Kshama Goyal, the Assessing Officer never verified the Cost of improvement, just because the relevant officer has not verified the same, we cannot blindly allow the same when we noticed that the present Assessing Officer took pain to verify the bill submitted by the assessee which apparently seems to be a bill taken from an unregistered dealer. When assessee is not able to submit any document for settlement of the above expenditure, therefore, we are also not inclined to allow the above claim. Accordingly, ground No.1 is dismissed.

13. With regard to brokerage charges, it is the normal practice in the market while the property purchased or sold, certain commission has to be paid to the brokers, therefore, the commission incurred by the assessee while purchasing and selling are allowed. Accordingly, ground No.2 is allowed.

14. With regard to Pre-closure charges, the assessee has claimed Pre-closure charges expenditure incurred for acquisition of the property. We observed that assessee has option to claim the foreclosure charges or prepayment charges u/s 24(b) of the Act, this charges cannot be allowed as expenditure under the head of capital gains. Therefore, we have no doubt to disallow the above expenditure in computation of capital gains. Further, we direct the Assessing Officer to allow the same as an expenditure u/s 24(b) of the Act, if the assessee declared any income under the head “income from house property”. Accordingly, ground No.3 is allowed for statistical purposes.

15. With regard to ground No.4 relating to disallowance of set off of carry forward loss claimed by the assessee which is carry

forward from Assessment Year 2009-10, we observed that the Assessing Officer denied the set-off of carry forward Short Term Capital Loss incurred by the assessee in Assessment Year 2009-10 and reassessed or verified the Short Term Loss claimed by the assessee in the proceedings initiated for Assessment Year 2011-12. Therefore, in our considered view, the return of income for Assessment Year 2009-10 cannot be reassessed in the current Assessment Year and the assessee has clearly declared the same while filing the return of income for Assessment Year 2009-10 and the Assessment Year 2009-10 was not selected for scrutiny, (at least does not brought to our notice) and, therefore, it reached finality as far as Assessment Year 2011-12 are concern, therefore, the Assessing Officer is directed to allow the claim of set off carry forward of Short Term Capital Loss of Assessment Year 2009-10. Accordingly, ground No.4 is allowed.

16. Ground Nos.5 7 6 are general in nature, do not require adjudication.

17. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced on 26th June, 2024.

Sd/-

(SUDHIR PAREEK)
JUDICIAL MEMBER

Dated: 26/06/2024

Pk/sps

Copy forwarded to:

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

Sd/-

(S.RIFAUR RAHMAN)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT, NEW DELHI