

IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI ASHWANI TANEJA, ACCOUNTANT MEMBER

ITA no.442/Mum./2014
(Assessment Year : 2009-10)

Shri Zahid I. Qureshi
405, Dheeraj Arcade
Above Punjab Seva Samiti
Pali Naka, Bandra (West)
Mumbai 400 050
PAN – AAAPQ0566B

..... Appellant

v/s

Income Tax Officer
Ward-19(3)(3), Mumbai

..... Respondent

Assessee by : None
Revenue by : Shri Nitin Waghmode

Date of Hearing – 19.01.2016

Date of Order – 29.01.2016

ORDER

PER SAKTIJIT DEY, J.M.

Instant appeal by the assessee is directed against the order dated 28th November 2013, passed by the learned Commissioner (Appeals)-18, Mumbai, for the assessment year 2009-10.

2. As could be seen from the order sheet entries dated 21st September 2015 and 23rd November 2015, notice of hearing was issued through RPAD to the assessee. However, when the appeal was

called for hearing, no one appeared on behalf of the assessee. Due to repeated non-appearance of the assessee in spite of notice being issued to the address furnished by the assessee in Column no.36, we proceed to dispose off assessee's appeal ex-parte after hearing the learned Departmental Representative and on the basis of facts and material on record. Following grounds have been raised by the assessee:—

1. *The learned CIT (A) erred in law by sustaining the assessment order of the learned AO without appreciating the facts and circumstances of the case and the provisions of the relevant statutory enactment & laws.*
2. *The learned CIT (A) failed to appreciate the material available on record as the sale of said immovable property is taxed twice, once in the assessment year 2002/03 & second time in the assessment year 2009/10.*
3. *The learned CIT(A) erred in law by invoking the provisions of section 50'C' applying the market rate of immovable property of the assessment year 2009/10 to the property which is already sold in the assessment year 2002/03 and offered for taxation in that assessment year.*
4. *The learned CIT(A) failed to appreciate the fact that as per the provisions of section 53A of the transfer of property Act, 1908 a property is deemed to have been transferred if consideration for the same is paid and physical possession of the property is handed over to the transferee without the agreement for sale being stamped and registered with the registrar.*
5. *The appellant prays before your honor that the addition of Rs.6,01,985/- being long term capital gains on sale of immovable property made to the total income of the appellant is illegal bad in law and contrary to the provisions of the Act and hence it should be deleted and squashed.*

6. *The appellant craves to add amend, alter, or delete any "Grounds of Appeal" at any time on or before the final disposal of the appeal.*

3. Briefly stated the facts are, assessee an individual filed his return of income on 29th March 2010, declaring total income of ₹ 1,55,260. Assessee is engaged in the business of purchase and sale of car. In the course of assessment proceedings, on the basis of information available on record, the Assessing Officer found that though the assessee had sold a property on 2nd April 2008, as per records of Jt. Registrar, Andheri, Mumbai, and purchased a new property but the assessee has not declared / offered any capital gain in the return of income filed. On verifying the sale deed, the Assessing Officer found that the sale consideration shown in the sale deed is less than the valuation made by the registering authority for stamp duty purpose. He, therefore, called upon the assessee to explain why capital gain should not be computed by applying the provisions of section 50C of the Act. As alleged by the Assessing Officer, assessee could not properly comply to the query raised. He, therefore, computed the capital gain by adopting the value determined by the registering authority for stamp duty at ₹ 36,73,860, as per the provisions of section 50C and worked out assessee's 1/4th share from such deemed sale consideration at ₹ 9,93,465 and after allowing indexed cost of acquisition of ₹ 3,91,480, determined net long term capital gain at ₹

6,01,985. Being aggrieved of determination of capital gain as aforesaid, assessee preferred appeal before the learned Commissioner (Appeals).

4. Before the first appellate authority, it was submitted by the assessee that the property in question was actually sold by the assessee on 13th July 2002, though, the document was not registered with Registrar of Documents because the society where the property was situated had not issued no objection certificate for the transfer of property. It was submitted, as far as assessee is concerned, he has treated the property as sold in the year 2002 itself as subsequently it was not reflected either in the balance sheet or capital account. He submitted, even the assessee had offered long term capital gain arising out of the sale of property for taxation in the return of income filed for assessment year 2002-03. The learned Commissioner (Appeals), however, did not find merit in the assessee's submissions. He was of the view that though the assessee might have entered into agreement of sale with the purchaser and received advance but sale of property is not complete until and unless the registration was made in the name of the purchaser and stamp duty paid on the value of property in the name of the purchaser. He opined as the registration of the property was made on 2nd April 2008, falling within the financial

year 2008–09, the Assessing Officer was correct in determining the capital gain by applying provisions of section 50C.

5. Learned Departmental Representative relied upon the reasoning of the learned Commissioner (Appeals) and the Assessing Officer.

6. We have considered the submissions of the learned Departmental Representative and perused the material available on record. As far as the factual aspect is concerned, though there is no dispute that the sale deed was registered before the Jt. Registrar, Andheri, Mumbai, on 2nd April 2008, at a value determined at ₹ 39,73,860, for stamp duty purpose against the recorded sale consideration which was adopted as deemed sale consideration received by the assessee in terms of section 50C but it is the claim of the assessee that the property for all practical purpose stood transferred to the vendee vide agreement of sale dated 13th July 2002. Further, it is seen from the written submission filed before the learned Commissioner (Appeals), which has been reproduced in Para-1.2 of the learned Commissioner (Appeals)'s order, assessee has specifically submitted that long term capital gain arising out of the sale of subject property was offered for taxation in assessment year 2002–03. Departmental Authorities are completely silent on this issue. If the capital gain derived from sale of the property was offered for taxation in assessment year 2002–03 and

the Department has also accepted that, in our view, it cannot be taxed again in the assessment year 2008–09, wherein the sale deed was registered. As the aforesaid specific claim of the assessee has not at all been considered by the learned Commissioner (Appeals) / Assessing Officer, in our view, the same requires re–examination. Moreover, it is seen from the assessment order that the assessee is one of the co–owners of the property. Therefore, assessment of long term capital gain in respect of other co–owners also requires examination. As these facts have not been examined / verified by the Departmental Authorities, we deem it appropriate to set aside the impugned order of the learned Commissioner (Appeals) and restore the matter back to the file of the Assessing Officer for deciding the issue afresh after providing reasonable opportunity of being heard to the assessee.

7. In the result, appeal stands allowed for statistical purposes.

Order pronounced in the open Court on 29.01.2016

Sd/-
ASHWANI TANEJA
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 29.01.2016

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Dy./Asstt. Registrar)
ITAT, Mumbai