



IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, ACCOUNTANT MEMBER

ITA no.362/Mum./2013
(Assessment Year : 2004-05)

Income Tax Officer
Ward-11(3)(2), Aayakar Bhawan
101, M.K. Road, Mumbai 400 020

..... Appellant

v/s

Late R.C. Sampat
(Thru L/H Smt. Kaushalya Sampat)
Flat no.1-A, Hill Top Society
Palli Hill, Bandra (West)
Mumbai 400 050 PAN – AABPR3658L

..... Respondent

Revenue by : Shri Purshottam Kumar
Assessee by : Shri K. Gopal

Date of Hearing – 14.12.2016

Date of Order – 21.12.2016

ORDER

PER SAKTIJIT DEY, J.M.

Captioned appeal at the instance of the Department is directed against the order dated 30th November 2012, passed by the learned Commissioner (Appeals)-2, Mumbai, for assessment year 2004-05.

2. Grounds raised by the Department are as under:-

"1. On the facts and in the circumstances of the case and in law, whether the learned Commissioner (Appeals) was justified in accepting additional evidences with regard to purchase cost of immovable property sold during the year.

2. On the facts and in the circumstances of the case and in law, whether the learned Commissioner (Appeals) was justified in directing the Assessing Officer to compute long term capital gain by taking the indexed cost of acquisition of the immovable property at ₹ 10,35,658.

3. On the facts and in the circumstances of the case and in law, whether the learned Commissioner (Appeals) was justified in directing to assess the income from sale of the immovable property as long term capital gain and not under section 68 as assessed by the Assessing Officer.”

2.

3. Brief facts are, the deceased assessee, an individual, filed his return of income on 29th October 2004, declaring total income of ₹ 2,75,100. Subsequently, on the basis of a survey conducted under section 133A of the Act on 12th September 2007, in the case of Deccan Enterprises, it came to the notice of the Department that the assessee and his wife being co-owners of a property have sold the same to Deccan Enterprises in the relevant previous year and assessee's share in the sale consideration is ₹ 1,08,75,000. On the basis of such information, the Assessing Officer re-opened the assessment under section 147 of the Act. In the course of assessment proceedings, when the assessee was called upon to explain details of the transaction through summons issued under section 131 of the Act, it was stated by the assessee that he along with his wife were owners of a property at Defence Colony, Indira Nagar, Bangalore, each having 50% share and the property was sold for a sale consideration of ₹ 2 crore. However, it is alleged by the Assessing Officer, the assessee did not

produce the sale agreement. On the basis of the impounded sale agreement and other documentary evidences found during survey, it was noticed that the assessee had received sale consideration of ₹ 1,08,75,000 towards sale of the property. Since the said amount was not offered to tax by the assessee, the Assessing Officer treated it as unexplained cash credit under section 68 of the Act and added back to the income of the assessee. Being aggrieved, assessee preferred appeal before the first appellate authority.

4. In the course of proceedings before the first appellate authority, the assessee submitted, he along with his wife were owner of the property each having 50% shares and assessee's share in sale proceeds is ₹ 1,08,75,000. The assessee also produced certain details as per which the cost of acquisition of the property was claimed to be ₹ 10,35,658. After considering the submissions of the assessee and examining the material placed before him, the learned Commissioner (Appeals) directed the Assessing Officer to compute capital gain on the sale consideration of ₹ 1,08,75,000 after adopting indexed cost of acquisition shown at ₹ 10,35,658. Being aggrieved of the aforesaid decision of the learned Commissioner (Appeals), Department is in appeal before us.

5. Learned Departmental Representative submitted, the learned Commissioner (Appeals) was wholly unjustified in directing the Assessing Officer to compute long term capital gain by taking indexed cost of acquisition of the property at ₹ 10,35,658. Learned Departmental Representative submitted, in the course of assessment proceedings, the assessee did not submit any evidence at all in relation to cost of acquisition or computation of capital gain which were produced for the first time before the learned Commissioner (Appeals). Therefore, without giving an opportunity to the Assessing Officer, to examine the additional evidences, learned Commissioner (Appeals) was not justified in directing the Assessing Officer to compute the long term capital gain by adopting indexed cost of acquisition at ₹ 10,35,658.

6. Learned Authorised Representative strongly relying upon the observations of the learned Commissioner (Appeals) submitted, when the amount received by the assessee relates to sale of a capital asset, the learned Commissioner (Appeals) was justified in directing the Assessing Officer to compute the long term capital gain. As far as cost of acquisition of the property is concerned, the learned Commissioner (Appeals) having found on the basis of material on record, the property was purchased for a consideration of ₹ 10,55,658 had directed the Assessing Officer to compute long term capital gain by

adopting such cost of acquisition. He submitted, in case of assessee's wife who was the co-owner of the property, the learned Commissioner (Appeals) had issued similar direction to the Assessing Officer to compute long term capital gain and such order of the learned Commissioner (Appeals) in case of assessee's wife has been accepted by the Department. He, therefore, submitted, there is no reason to interfere with the order of the learned Commissioner (Appeals).

7. We have considered the submissions of the parties and perused the material available on record. As could be seen from the observations of the Assessing Officer in the assessment order, during the survey operation conducted in the business premises of, Deccan Enterprises, the Department impounded copy of sale agreement showing sale of property by the assessee in which assessee's share in sale consideration is ₹ 1,08,75,000. Undisputedly, these documents were available before the Assessing Officer at the time of re-assessment proceedings. That being the case, we fail to understand how he could have added the amount of ₹ 1,08,75,000 as unexplained cash credit under section 68 of the Act. When the Assessing Officer is having documentary evidence before him to demonstrate that the amount in question was received by the assessee against sale of a capital asset the only head under which he could have assessed the gain derived from transfer / sale of such capital asset is long term

capital gain. Therefore, we do not find any reason to interfere with the direction of the learned Commissioner (Appeals) to compute the income derived from sale consideration under the head "*long term capital gain*". However, as far as adoption of indexed cost of acquisition is concerned, it is evident, in the course of assessment proceedings, the assessee had not furnished any evidence as far as the cost of purchase of property is concerned. Only before the learned Commissioner (Appeals), assessee has furnished certain details relating to cost of acquisition by way of additional evidence. Admittedly, the learned Commissioner (Appeals) in terms of rule 46A, has not given an opportunity to the Assessing Officer to have a say on such evidences submitted by the assessee. Thus, to that extent, there is violation of rule 46A. In the aforesaid view of the matter, we are inclined to restore the matter back to the file of the Assessing Officer for the limited purpose of ascertaining indexed cost of acquisition of the property for computation of long term capital gain after examining the evidences submitted by the assessee. At this stage, it is pertinent to observe, in case of assessee's wife who was the co-owner of the property, the learned Commissioner (Appeals) vide order dated 19th February 2013, has directed the Assessing Officer to compute long term capital gain on her 50% share of sale consideration at ₹ 1,08,75,000 by adopting the indexed cost of acquisition at ₹

10,35,658. In case, the aforesaid order of the learned Commissioner (Appeals) in assessee's wife's case has been accepted by the Department, by not preferring any further appeal before the Tribunal, then, in all fairness, the Department should adopt the same approach in assessee's case also for computing long term capital gain. Needless to mention, the Assessing Officer must afford reasonable opportunity of being heard to the assessee.

8. In the result, Department's appeal is partly allowed for statistical purposes.

Order pronounced in the open Court on 21.12.2016

Sd/-
N.K. PRADHAN
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 21.12.2016

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