

IN THE INCOME-TAX APPELLATE TRIBUNAL “D” BENCH MUMBAI
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, ACCOUNTANT MEMBER
ITA No. 2243/Mum/2015 (Assessment Year 2011-12)

Sir Mohd. Yusuf Trust, Nhava House, 1 st Floor, 65, M.K. Road, Mumbai-400002. PAN: AAATS3048L	Vs.	ACIT-18(1) Mumbai.
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Appellant

Respondent

Appellant by : Shri Piyush Chhajed (AR)
Respondent by : Shri Chaitanya Anjaria (DR)
Date of Hearing : 24.12.2018
Date of Pronouncement : 08.03.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee under section 253 of Income-tax Act ('Act') is directed against the order of Id. Commissioner of Income-tax (Appeals)-29, hereinafter referred as Id CIT (A), Mumbai dated 09.01.2015. the appeal before Id CIT(A) arises from the assessment order passed by assessing officer under section 143(3) dated 31/12.2013 for Assessment Year 2011-12. The assessee has raised the following grounds of appeal:

The grounds mentioned hereunder are without prejudice one another:

1. The Commissioner of Income Tax (Appeals) erred in confirming the order of learned assessing office invoking section 50C without appreciating that the price at which the capital asset was sold was the fair market value as per the highest bid received in response to public advertisement in July 2003 and was approved by the Honorable Bombay high court on 1-10-2004 considering the same to be in interest of the beneficiaries of Appellant trust. In the

circumstances the Assessment order passed by the Learned Assessing Officer is liable to be set aside.

2. The Commissioner of Income Tax (Appeals) erred in confirming the addition U/s 50C on the basis of ova report obtained determining fair market value as at date of registration of agreement i.e. 10-8-2010 without appreciating that the Memorandum of intent (Mal) to sale the property was already entered into 18-12-2003 when the transaction price was finalised and for which separate ova report was also obtained to determine fair market value on the date of Mal and therefore addition if any had to be based on the fair market value determined on the date of Mal.

3. The Commissioner of Income Tax (Appeals) erred in confirming the addition U/s 50C on the basis of ova report obtained determining fair market value as at date of registration of agreement i.e. 10-8-2010 without appreciating that the said ova report was based on incorrect facts and presumptions' drawn without any basis.

4. The learned assessing officer erred in imposing capital gains in hands of the appellant trust during the AY 2011-12, without appreciating that the capital asset was transferred during the AY 2010-11 in accordance with the Hon Bombay High Court order and only registration of the same was done in AY 2011-12.

5. The learned assessing officer erred in making addition of capital gains in hand of the appellant trust without appreciating that the trust was non-discretionary trust and the shares of beneficiaries were determinate and therefore the addition if any can be made only in the hands of the beneficiaries.

6. The Commissioner of Income Tax (Appeals) erred in confirming addition of Rs. 4,80,000/- the amount distributed to the beneficiaries of the Appellant trust and who had already offered the same to the tax in their individual returns.

2. Brief facts of the case as gathered from the orders of the lower authority are that the assessee is a Non-discretionary Trust. The income of the assessee is assessed as association of person (AOP). The assessee filed its return of income for Assessment Year 2011-12 on 17.10.2012 declaring total income of Rs. 25,41,756/-. The return was selected for scrutiny. The assessment was completed by Assessing Officer on

31.12.2013 under section 143(3) of the Act. The Assessing Officer while passing the assessment order made addition of Long Term Capital Gain (LTCG) of Rs. 5.88 Crore and addition of Rs. 4,80,000/- under the head Income from 'Other Sources'. The facts leading to the additions of LTCG are that while filing return of income the assessee claimed long term capital loss (LTCL) of Rs. 30,765/- on sale of investment in mutual fund. The assessee assessing officer during the assessment noted that the information was received from the office of Registrar regarding the sale of immovable property by assessee at Rs. 27,93,285/-, however, the market value of the said property was Rs. 11,76,35,500/-. The assessing officer confronted the facts of discrepancy in the sale consideration and the value of the immovable property. The assessee vide its reply dated 18.09.2013 filed revised statement of income declaring LTCG on sale of land of Rs. 13,96,274/- after claiming adjustment of LTCL on mutual fund of Rs.13,65,877/-. The assessee was asked to substantiate as to why the piece of land of 17,300 Sq Meter was sold at Rs. 27,93,285/-, whereas the stamp value of the said land is or Rs. 11.76 Crore. The assessee was also show caused as to why the provisions of section 50 C be not invoked. The assessee filed its reply dated 31.03.2013. in the reply the assessee contended that the stamp valuation authority has value the land at the current rate, however, the property was conveyed at the price agreed in 2003 and the consideration under the sale agreement was

approved by Hon'ble Bombay High Court. The assessee trust was set up vide Wakf deed dated 19.04.1929. And as per clause 14 of the Trust deed the properties owned by the assessee cannot be transferred without the consent of Bombay High Court. The assessee owned several properties in and around Mumbai. The assessee trust entered in Memorandum of Intend for sale of piece of land at Village Tungwa, Kurla which was encroached by slum devellers with M/s Essa Associate on 18.12.2003. As per clause 14 in the Trust deed the assessee filed petition before Bombay High Court for approval of sale of land. The Bombay High Court granted permission to sale the said land and the agreement to sale was registered on 10.08.2010 and the stamp duty was paid on the current market value. However, the assessee received the sale consideration of Rs. 27,93,285/- only. The assessee prayed that the provisions of section 50C should not be applied. The assessing officer recorded that the assessee agreed for referring the agreement to sale for District Valuation Officer. The contention of the assessee was not accepted by assessing officer holding that section 50C is deeming provision which is mandatory in nature is to be applied on the basis of stamp duty valuation irrespective of the fact that the value was approved by High Court or not. The assessing officer also took the view that essence before the High Court was consent and not the valuations. The assessing officer also recorded that during assessment summon under section 131 was issued

to Mr. Nissar Ahmed Patel sole proprietor of M/s Essa Associate. Nissar Ahmed Patel stated that the land was conveyed to him and he made all payment to the trust to settle the litigation and technical formalities. The assessing officer adopted the stamp value of the consideration of the piece land as cost of consideration and computed LTCG. No set off of cost of improvement was granted to the assessee. Since, the assessee's share in the land was 50% therefore LTCG of Rs. 588,17,750/- was worked out by assessing officer. The assessing officer also concluded that the report of DVO is not received and that the working of LTCG is subjected to rectification on receipt of valuation report.

3. The Assessing Officer also noted that the assessee has shown the income from other sources of Rs. 23.57 Lakhs on account of rent from hoarding interest on RAC Bond, interest on NHB Bond, interest on bank interest, interest on FDR's and miscellaneous income. The assessee in the computation of income for the period under consideration has shown receipt of Rs. 31.18 Lakh and after deducting expenses, the assessee claimed Rs. 28.37 Lakh as Income from Other Sources. The Assessing Officer took the view that assessee has not offered the difference of Rs. 4.80 Lakh and made the addition accordingly brought the same under the head "income from other sources". On appeal before the Id. CIT(A), the action of assessing officer on both the additions were upheld. Thus,

further aggrieved by the order of Id CIT(A), the assessee has filed the present appeal before us.

4. We have heard the submission of Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the Revenue and perused the material available on record. Ground No.1 to 3 relates to invoking the provision of section 50C of the Act. The Id. AR of the assessee submits that the assessee is a Private Family Discretionary Trust settled by Sir Mohammed Yusuf in 1929. The Trust is registered as per the provision of Mohammedan Law. The certain provision of trust was amended in pursuance Hon'ble Bombay High Court order and decree dated 19.02.1952 passed by in Suit No. 1286 of 1951. During the assessment proceeding, the assessee submitted the computation of LTCG earned on sale of land and declared LTCG. The assessee-trust was in possession of certain right in the land which was in the name of assessee. However, the assessee was not in possession. The land was encroached by unauthorized occupant/hutments. There were other certain part of land in which even as per land record, the name of assessee was not appeared. Therefore, the assessee trust was not having clear and marketable title over the said land nor the assessee was in possession. The assessee trust issued a public notice for inviting bids for sale of their rights in the said properties on the basis of "as is where is" vide public notice published in Newspaper in Hindustan Times and Urdu News

paper, copy of which is placed on record at page no. 145 and 146 of Paper Book. The assessee in the public notice published that cost with regard to verification of revenue record and verification of title would be borne by the bidder. In response to the notice the trust received four bids. The bids were open in the presence of Advocates appointed by assessee on 22.07.2003 the said bids were placed before the Board of Trustees on 17.09.2003. The bid of M/s Essa Associates was accepted being highest bidder. The Board of Trustees of assessee approved the bid of Essa Associates. Pursuant to the bid accepting the assessee entered into Memorandum of Intent (MOI) on 18.12.2003, copy of which is placed on record as per page no. 147 to 154 of the Paper Book. As per MOI, the assessee agreed only to sale the land which was in the name of assessee, however, the assessee was not in possession and it was in possessing of unauthorized occupant. Therefore, M/s Essa Associates agreed to pay Rs. 13.06 Lakh per acre. For the land which were in the name of assessee was not shown though, it was earlier owned by assessee, M/s Essa Associates agreed to pay Rs. 6.53 Lakh per acre to the assessee. In the MOI, the assessee entered into registered agreement with M/s Essa Associates on 10.08.2010 for 4 Acre and 11 Gunta out of which the assessee was having only 50% of share, remaining 50% of share in the land was owned by 3 different parties, which were also parties to the said conveyance. Thus, out of total consideration of Rs. 27,93,285/-, the

assessee's share being 50% is Rs. 13,96,642/- which was received by assessee before 26.09.2009.

5. The Id. AR further submits that as per Clause 14 & 20 of Trust-Deed dated 29.04.1929, the said MOI was subject to the sanction of Hon'ble Bombay High Court. The assessee filed a petition before Hon'ble Bombay High Court on 08.07.2004. The Hon'ble Bombay High Court vide its order dated 01.10.2004 approved the MOI. The copy of the petition presented before the Hon'ble Bombay High Court dated 08.07.2004 and the order passed by Hon'ble High Court dated 01.10.2004 is also placed on record. Therefore, after sanction/approval of the Hon'ble Bombay High Court, the assessee executed the registered agreement with M/s Essa Associates on 10.08.2010 for sale of rights in land of 4 Acre and 11 Gunta as stated above.
6. The Id. AR of the assessee further submits that the provision of section 50C have no application as the assessee has transferred only right in the land which would not be equated to land or building or both as per the language of section 50C of the Act. The Id. AR of the assessee submits that the reference of section 50C is not absolute but subject to certain condition, which is mentioned in sub-section (2) of section 50C. The land under reference was not having clear title and many claims were there. The Id. AR of the assessee submits that the right in the said land cannot be described as capital asset which can be described as "land &

building or both” then section 50C would cease to apply. The Fair Market Value of the right was ascertained by the assessee on the basis of highest bidder of the participants received by assessee, which was duly approved by Hon’ble Bombay High Court accepted and granted the approval. The Assessing Officer is under obligation to accept the same as correct. Section 50C was brought to curb the black money and not for the genuine transaction. In support of his submission, the ld. AR of the assessee relied upon the following decisions:

- (1) Devindra Barot [70 taxmann.com 235 (Ahmadabad Trib.)],
- (2) Smt. D. Anitha [2015] 68 SOT 266 (Hyderabad Trib.),
- (3) Green Field Hotels & Estates (ITA No. 735 of 2014) (Bom. HC),
- (4) Shri Atul G. Puranik (ITA No. 3051/Mum/2010 (Mum Trib.),
- (5) Tej Singh [2012] 138 ITD 489 (Agra Trib.),
- (6) K.P. Varghese [1981] 7 TAXMAN (SC),
- (7) K.R. Palanisamy [2008] 306 ITR 61 (Madras HC),
- (8) Khoobsurat Resorts (211 taxman 510 (Del.HC) and
- (9) Hanuman Prasad Generiwala [2014] 43 taxmann.com 133(Delhi).

7. On the point that the valuation as on the date of execution of MOI date 18.12.2003 be adopted, the ld AR for the assessee relied on the following decisions;

- (1) Sanjeev Lal [2014] 365 ITR 389(SC),
- (2) Modipon Ltd [2015] 154 ITD 369 (Delhi Tribunal),
- (3) Dharmasibhai Soni [2016] 161 ITD 627 (Ahmedabad Tribunal) and
- (4) Chalasani Naga Ratna Kumari (ITA No. 639/Vizag/2013 (Vishakhapatnam Tribunal)

8. On the other hand the Id. DR for the revenue supported the order of the authorities below. The Id DR further submits that the assessee has raised certain new grounds of appeal which were not raised before lower authorities, therefore, the issue may be restored to the lower authorities for adjudication afresh.
9. We have considered the rival submissions of the parties and have gone through the orders of the authorities below. We have also deliberated on the various case laws referred and relied by lower authorities. The assessing officer treated the stamp valuation as value of consideration holding that section 50C is deeming provision which is mandatory in nature is to be applied on the basis of stamp duty valuation irrespective of the fact that the value was approved by High Court or not. The assessing officer also took the view that essence before the High Court was consent and not the valuations. The assessing officer also took his that he has recorded that the statement of Mr. Nissar Ahmed Patel sole proprietor of M/s Essa Associate. Nissar Ahmed Patel stated that the land was conveyed to him and he made all payment to the trust to settle the litigation and technical formalities. The assessing officer adopted the stamp value of the consideration of the piece land as cost of consideration and computed LTCG. The Id CIT(A) confirmed the action of assessing officer on similar lines.
10. We have gone through the various documentary evidences filed by the assessee. From the documentary evidences we have seen that the assessee

issued a Public notice for sale of the piece of land (page 145 of PB). In the said notice the assessee clearly mentioned that the land under offer for sale is encroached wrongfully. It was also published that the title of the land is also not perfect. In response to the notice the assessee received bid from M/s Essa Associate. The bid of Essa Associate was accepted by the trusty of the assessee and executed MOI date 18.12.2003. The perusal of the MOI dated 18.12.2003 reveals M/s Essa Associate agreed to acquire the piece of land from assessee on “ as is where is” basis. It is clearly mentioned in clause ‘D’ at page 3 of the said MOI that it is impossible to define and determine the exact area of non- acquired land at that stage until the purchaser actually succeeded in clearing and perfecting title of the owner’s title. Further, vide clause ‘5’ on page 5 of the said MOI, the purchaser was allowed to act in a lawful manner in clearing the title of the owner on the encroached upon land and /or wrongfully deleting the title of the owner(assessee) from revenue record of the authority concerned. Vide clause ‘6’ of MOI the purchaser was restricted not to transfer or delegate or sub-contract the benefit of the agreement ton any other person. In our view there is no doubt from the Public notice issued by the assessee for sale of the piece of the land and from MOI that other documentary evidence produced by the assessee that the was sufficient to indicate that the property was under various encumbrances and the assessee could not be said to be the absolute marketable title of the said property. At the same

time, it is also true that the said documentary evidence read with the MOI entered into by the assessee with M/s. Essa Associate that the assessee was still holding certain rights in the property and the same constituting capital asset. Moreover, the MOI was duly approved by Hon'ble Bombay High Court in its order dated 01.10.2004.

11. So far as the issue involved in the appeal relating to the applicability of the provisions of section 50C in the case of the assessee, it is observed that the market value of the property for stamp duty purpose was determined by the concerned authority at Rs.11.76 Crore and accordingly the stamp duty thereon was also duly paid, while registering the relevant agreement. The value adopted for the purpose of payment of stamp duty is not disputed by the assessee. The assessing officer has not brought on record that the property under sale was not under various encumbrances and the assessee was having the absolute marketable title of the said property. No material is brought on record by assessing officer that the assessee has received much more consideration than shown in the MOI. The assessing officer treated the stamp valuation rate as the value of consideration, despite the facts that the assessee throughout the proceedings contended that the assessee was neither having possessing of the impugned piece of land nor having marketable title. The assessee offered the said piece of land on the basis 'as is where is'. These vital facts were ignored by the lower authorities.

12. The Hon'ble Apex Court in celebrated case of K.P. Varghese Vs ITO (supra) held that literal interpretation of section 52(2) leads to manifestly unreasonable and absurd consequences, the same should be construed having regard to the object and purpose for which it has been enacted and the setting in which it occurs. A fair and reasonable construction of section 52(2) would be to read into it a condition that it would apply only where the consideration for the transfer is understated or, in other words, the assessee has actually received a larger consideration for the transfer than what is declared in the instrument of transfer and it would have no application in case of a bona fide transaction where the full value of the consideration for the transfer is correctly declared by the assessee. Accordingly, if the revenue seeks to bring a case within section 52(2), it must show not only that the fair market value of the capital asset as on the date of the transfer exceeds the full value of the consideration declared by the assessee by not less than 15 per cent of the value so declared, but also that the consideration has been understated and the assessee has actually received more than what is declared by him. There are two distinct conditions which have to be satisfied before sub-section (2) can be invoked by the revenue and the burden of showing that these two conditions are satisfied rests on the revenue. This burden may be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has not correctly declared or

disclosed the consideration received by him and there is understatement of concealment of the consideration in respect of the transfer.

13. The Hon'ble Delhi High Court in CIT Vs Khoobsurat Resort (supra) while considering the question of law with regard to the addition on account of difference between the circle rate and the purchase price of immoveable properties, declared by the assessee held that that the express provision of Section 50-C enabling the revenue to treat the value declared by an assessee for payment of stamp duty, ipso facto, cannot be a legitimate ground for concluding that there was undervaluation, in the acquisition of immovable property. If Parliamentary intention was to enable such a finding, a provision akin to Section 50-C would have been included in the statute book, to assess income on the basis of a similar fiction in the case of the assessee who acquires such an asset. No doubt, the declaration of a higher cost for acquisition for stamp duty might be the starting point for an inquiry in that regard; that inquiry might extend to analyzing sale or transfer deeds executed in respect of similar or neighboring properties, contemporaneously at the time of the transaction. Yet, the finding cannot start and conclude with the fact that such stamp duty value or basis is higher than the consideration mentioned in the deed. The compulsion for such higher value is the mandate of the Stamp Act, and provisions which levy stamp duty at pre-determined or notified dates. In the present case, the revenue did not rely on any objective fact or circumstances; consequently,

the Court holds that there is no infirmity in the approach of the lower authorities and the Tribunal, granting relief to the assessee. Thus, the question was accordingly answered in favour of the assessee, and against the revenue.

14. The coordinate bench of Hyderabad Tribunal in Smt. D. Anitha Vs ITO (supra) held that Where property held by assessee was encumbered and, thus, she was not absolute owner of property, while computing capital gain arising from transfer of such a property, market value of property as taken for purpose of payment of stamp duty could not be adopted as sale consideration by applying provisions of section 50C.

15. Considering the above discussed legal position as held by superior courts in K. P. Varghese (supra) by Hon'ble Apex Court, Hon'ble Delhi High Court in CIT Vs Khoobsurat Resort (supra) and the coordinate bench of the Tribunal in Smt D. Anita (supra) and the undisputed fact that when the land under sale was having encumbrances the adoption of stamp valuation as a sale consideration by applying the provisions of section 50C was not justified by assessing officer, in absence of any evidence that the sale consideration was more than the value shown in the MOI. Therefore, we direct the assessing officer to work out the capital gain on the basis of consideration shown by the assessee. In the result the grounds No. 1 to

3 of the appeal are allowed. No contrary decision is brought to our notice. The contention of the ld. DR for the revenue has no force that the assessee has raised new grounds of appeal before this Tribunal. The sum and substance of the grounds of appeal raised by the assessee before the lower authorities and before the Tribunal is the same.

16. Ground No. 4 relates to treating the income in AY 2010-11 instead of AY 2011-12. Since we have granted relief to the assessee on grounds No. 1 to 3, therefore, this ground needs no specific adjudication.

17. Ground No. 5 & 6 relates to addition of Rs. 4.80 lakhs under the head 'income from other sources', which has already been offered in the hand of individual. The ld. AR for the assessee submits that the amounts distributed in the hands of beneficiary have been taxed at the hand of assessee, though it has been offered to tax in their individual return. Thus, there is double taxation of the same amount.

18. On the other hand the ld DR for the revenue submits that the assessee failed to furnish the require copies of return of the alleged individual to the ld. CIT(A) despite specific direction. The ld DR submits that the assessee be directed to file relevant evidences before assessing officer to verify the claim of assessee.

19. We have considered the rival submissions of the parties and gone through the orders of the lower authorities. We have noted that the ld CIT(A) has

recorded that the assessee failed to established the shares of the various beneficiary on the basis of trust deed and their return of income to substantiate that the sums received from the assessee have been offered to tax by those individual. Considering the contention of both the parties this issue is restored to the file of assessing officer to verify the fact and grant relief to the assessee in accordance with law. Needless to direct that the assessing officer shall grant opportunity to the assessee for filing relevant documentary evidences to substantiate its contention. The assessee is also directed to provide the relevant documentary evidences at the earliest possible date and not to seek time without any valid reasons. In the result this ground of appeal is allowed for statistical purpose.

20. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 08/03/2019.

**Sd/
N.K. PRADHAN,
ACCOUNTANT MEMBER**

Mumbai, Date: 08.03.2019

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Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "D" Bench, ITAT, Mumbai
6. Guard File

**Sd/-
PAWAN SINGH
JUDICIAL MEMBER**

BY ORDER,

**Dy./Asst. Registrar
ITAT, Mumbai**