

आयकर अपीलीय अधिकरण, न्यायपीठ – “C” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA
(समक्ष)Before श्री महावीर सिंह, न्यायीक सदस्य एवं/and श्री शामीम याहया, लेखा सदस्य)
[Before Shri Mahavir Singh, JM & Shri Shamim Yahya, AM]

आयकर अपील संख्या / I.T.A No.1065/Kol/2011
निर्धारण वर्ष / Assessment Year: 2006-07

Income-tax Officer, Wd-35(1), Kolkata Vs. M/s. Onkarmal Kajaria Family Trust
(अपीलार्थी/Appellant) (PAN: AAATO1474C)
(प्रत्यर्थी/Respondent)
&

C.O. No. 35/Kol/2013
In आयकर अपील संख्या / I.T.A No.1065/Kol/2011
निर्धारण वर्ष / Assessment Year: 2006-07

M/s. Onkarmal Kajaria Family Trust Vs. Income-tax Officer, Wd-35(1), Kolkata
(Cross Objector) (Respondent)

Date of hearing: 25.09.2014
Date of pronouncement: 27.10.2014

For the Appellant: Shri Dilip Kr. Mitra, JCIT, Sr. DR
For the Respondent: Shri S. M. Surana, Advocate

आदेश/ORDER

Per Shri Mahavir Singh, JM :

This appeal by revenue and Cross Objection by assessee is arising out of order of CIT(A)-XX, Kolkata in Appeal No. 143/CIT(A)-XX/Ward-35(1)/2010-11/Kol dated 23.05.2011. Assessment was framed by ITO, Ward-35(1), Kolkata u/s. 147/143(3) of the Income-tax Act, 1961 (hereinafter referred to as “the Act”) for Assessment Years 2006-07 vide his order dated 26.11.2010.

2. The first issue in this appeal of revenue is against the order of CIT(A) in holding that the transaction of an immovable property (in dispute) took place in FY 2004-05 relevant to AY 2005-06 as against the actual deed of conveyance registered on 22.07.2005 i.e. in FY 2005-06 relevant to AY 2006-07. The second inter-connected issue is as regards to the order of CIT(A) in adopting the value for the purpose of

computation of long term capital gain i.e. fair market value as on 01.04.1981 for the purpose of indexation at Rs.24,03,838/- for its 1/6th share i.e. the total value of the property at Rs.1,44,23,028/-. The assessee has also moved cross objection and the inter-connected issue raised by assessee trust is as regards to the order of CIT(A) in not adjudicating the deemed sale consideration to be taken for the purpose of computation of Long Term Capital Gains as on the date of sale of the property i.e. the value as adopted by stamp valuation authority on the basis of circle rates or the property should be referred to DVO in term of section 50C(2) of the Act.

3. At the outset, the Cross Objection filed by assessee is time barred by 564 days and assessee has filed condonation petition stating the reason that the Cross Objection was filed as per the direction of the Bench in the course of hearing on 19.03.2013 as the Bench was of the opinion that the issue raised herein has to be addressed to the Bench by filing a Cross Objection. But, according to Ld. counsel for the assessee, this issue can be raised even under Rule 27 of Income Tax (Appellate Tribunal) Rules, 1963. On query from the Bench, the Ld. Sr. DR has not objected for condonation of delay. Since the issue being legal and after going through the records it is seen that the same was raised before CIT(A), who has adjudicated the issue against the assessee, which requires now adjudication as the main issue is under challenge. In term of the above, the delay is condoned.

4. Briefly stated facts are that the assessee Trust has undivided 1/6th share in the property No. 6, Russel Street, Kolkata. This property is occupied by tenants and also a partition suit is pending in the High Court in respect to this property. The assessee trust is entered into agreement for sale of its undivided 1/6th share for a sum of Rs. 25 lakhs vide dated 24.03.2005. The assessee received part considerations vide cheques of Rs.15 lakhs and Rs.5 lakhs against agreement for sale of this property on 24.03.2005. Actually and factually the property was sold by a registered conveyance deed dated 22.07.2005 and as per circle rates the value for the purpose of stamp duty for assessee's 1/6th share of this property was determined at Rs.1,16,58,995/-. The assessment year involved in this appeal is AY 2006-07 but the origin of dispute lies in AY 2005-06 also. The assessee filed its return for AY 2005-06 on 31.03.2007 declaring Long Term

Capital Gains of Rs.90,38,422/- on the sale of its abovementioned property. The relevant computation filed along with return was as under:

<i>“Total consideration received</i>	<i>Rs. 25,00,000</i>
<i>Less: Indexed cost of acquisition</i>	
<i>As per Approved Valuer’s report dt. 18.10.06</i>	
<i>the value of the property as on 1.4.1981 was Rs.24,03,838</i>	
<i>Applying indexed cost on this value @ 480/100,</i>	
<i>the cost of acquisition</i>	<u><i>Rs.1,15,38,422</i></u>
<i>Long term capital loss (-)</i>	<u><i>Rs. 90,38,422”</i></u>

5. The assessee has wrongly declared Long Term Capital Gains at Rs.9,03,842/- in its return of income actually it was Rs.90,38,622/-. The AO during the course of original assessment proceeding accepted Long Term Capital Loss of Rs.9,03,842/- while completing assessment u/s 143(3) of the Act, ignoring Long Term Capital Loss declared by assessee in the computation of income at Rs.90,38,422/-. Subsequently, the assessment was revised by CIT, Kolkata-XII u/s. 263 of the Act for the reason that the assessment completed is without application of mind as regards to genuineness of sale value of Rs.25 lakhs shown by the assessee, as he failed to take into account the value determined by stamp valuation authority based on circle rates in view of the provisions of section 50C of the Act at Rs.1,16,58,995/- for the purpose of computation of Long Term Capital Gains. Accordingly, CIT directed the AO to complete fresh assessment after obtaining valuation report from the DVO. In pursuance to revision order passed by CIT u/s. 263 of the Act, the AO completed assessment u/s. 143(3) read with section 263 of the Act dated 24.12.2009 computing the total income at nil ignoring Long Term Capital Loss declared in the return of income for AY 2005-06 with the following observations:

“The Ld. CIT-XII, Kolkata vide his order dated 12.09.08 set aside the said order with a direction to the present AO to complete the said assessment after obtaining the valuation report from the DVO. Accordingly, the case was fixed for hearing by me. Scrutiny of the record reveals that the property in question had been transferred on 22.07.05 relevant to the assessment year 2006-07. Hence the implications of the valuation report as also the observation made by the Ld. CIT in his order u/s. 263 will be applicable in the assessment year 2006-07 only. In view of this the assessment proceeding initiated for this year is completed at Rs. ‘nil’ income ignoring the long term capital loss claimed by the assessee in his return of income.”

6. Simultaneously, in view of the above observation of the AO in the assessment order for AY 2005-06, he issued notice u/s. 148 of the Act dated 24.12.2009 for the reason that the property in question was actually transferred on 22.07.2005 relevant to AY 2006-07 and, as such the taxable gain on sale of such property has escaped assessment within the meaning of section 147 of the Act. The AO in the meantime referred the matter to DVO for valuation of the property as on 01.04.1981, who vide letter dated 16.12.2009 estimated the fair market value of the property as on 01.04.1981 at Rs.11,92,295 qua 1/6th share of assessee. According to AO, the deemed sale consideration as per circle rates of stamp valuation authority, the property was valued at Rs.1,16,58,995/- as against the sale consideration declared by the assessee at Rs.25 lacs. The AO computed the Long Term Capital Gains after taking the fair market value assessed by DVO as on 01.04.1981 at Rs.11,19,295/- and deemed sale consideration assessed by stamp valuation authority based on circle rates at Rs.1,16,58,995/- as under:

$$\begin{aligned} &\text{"As on 01.4.1981 – Cost of acquisition of the property: } \frac{\text{Rs. } 1119295 \times 497}{100} \\ &= \text{Rs. } 5562896 \text{ 9after indexation)} \end{aligned}$$

$$\text{Stamp Duty Valuation} = \text{Rs. } 11658995/-$$

$$\text{Therefore, Long Term Capital Gain is (Rs. } 11658995 - \text{Rs. } 5562896) = \text{Rs. } 6096099/- \text{"}$$

Aggrieved, assessee preferred appeal before CIT(A), who upheld the action of AO for reopening of assessment u/s. 147 read with section 148 of the Act and assessing the long term capital gains in AY 2006-07. To this, now the assessee has not challenged the issue of assessment of long term capital gain in AY 2006-07 for the reason that the property was actually transferred by conveyance deed dated 22.07.2005 falling in this AY 2006-07 and even full and final payment for consideration was made in this year. According to assessee, the possession was also handed over in this year. The revenue's main contention was that the long term capital gain is to be assessed in AY 2006-07. Hence, we adjudicate this issue in favour of revenue that the long term capital gains arising out of transaction of this property will be assessed in AY 2006-07 and not in AY 2005-06.

7. Now question arises what will be the base value for adopting the fair market value as on 01.04.1981 for determining the indexed cost for the purpose of computation of long term capital gain. Admittedly, this property was acquired by assessee trust

much before 01.04.1981 and assessee has filed approved valuer's report dated 18.10.2006, who valued the assessee's 1/6th share as on 01.04.1981 at Rs.1,15,38,423/- by applying cost inflation index, the value estimated by registered valuer was at Rs.24,03,838/- as on 01.04.1981. The assessee has filed this valuation report by registered valuer at pages 31 to 36 of assessee's paper book. The DVO has also valued this property as on 01.04.1981 at Rs.11,19,295/-. The first question arises whether the property as on 01.04.1981 can be referred to DVO for determining fair market value for the purpose of computation of long term capital gains u/s. 55A of the Act or not. This issue has been answered by Hon'ble Calcutta High Court in the case of CIT Vs. Umedbhai International (P) Ltd. (2011) 338 ITR 506, wherein in similar situation, there was a substitution of the cost as on 1.4.1981, value based on DVO's report on a reference under section 55A of the Act, held that such a reference could not be made unless and until the Assessing Officer formed an opinion that value shown by the assessee was less than fair market value. Paras 4 to 8 of the judgment is reproduced hereunder:-

“4. The assessee on the basis of registered valuer's report worked out indexed cost as on 1st April, 2002 at Rs.3,06,37,281/-. It was taken opening stock of land in the assessment year under consideration. With the returns the aforesaid valuation report was submitted. However, the AO did not accept valuation and referred the matter to the Departmental Valuer under section 55A of the said Act to determine the fair market value as on 1st April, 1981 and it was done by the Departmental Valuer at Rs.18,73,800. The AO did not accept valuation report submitted by the assessee on the ground that the same was not prepared on the basis of any sale instance. Naturally the AO proceeded on the basis of the valuation of the Departmental Valuer which made a lot of difference in assessing tax liability. Basing Departmental valuation report the AO came to conclusion that the assessee had overstated the value of the opening stock at Rs.2,26,54,893/- and instead of accepting the loss, as shown in the return the AO has determined the net profit of Rs.6,09,025/-. Thus the conclusion arrived at by the AO based on valuation. Therefore, the point raised before the CIT(A) that the valuation was got to be done by the AO without compliance of s. 55A of the IT Act, 1961. According to the assessee reference to the valuation officer is without jurisdiction as per- condition for reference was not satisfied. According to the assessee before making any reference the AO has to form opinion that the value so claimed is less than the fair market value without doing so reference is without jurisdiction. On this limited point the CIT(A) allowed the appeal and held that the reference was not done by the AO in compliance of provisions of sec. 55A of the said Act. The Tribunal also upheld this finding.

5. Reading the aforesaid question we are not concerned with any other portion of the judgment and order of the learned Tribunal.

6. *The CIT(A) as well as the learned Tribunal has come to fact finding that the Department has not brought any material on record that AO had formed an opinion having regard to the nature of the assessment and considering the other relevant circumstances for making reference to Departmental Valuation Officer under s. 55A of the said Act. This concurrent fact finding of two authorities are not questioned to be perverse.*

7. *This Court cannot make any endeavour to make any fact finding nor does it wish to do in absence of plea of perversity. In this case the admitted position is that the assessee submitted valuation made by the registered Valuer. Hence cl. (a) of the aforesaid section is applicable in this case which is set out hereunder-*

"55A. With a view to ascertaining the fair market value of a capital asset for the purposes of this chapter, the (Assessing) Officer may refer the valuation of capital asset to a Valuation Officer-

(a) in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the (Assessing) Officer is of the opinion that the value so claimed is less than its fair market value.

(b) In any other case, if the (Assessing) Officer is of the opinion

(i) that the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such amount as may be prescribed in this behalf, or

(ii) that having regard to the nature of the asset and other relevant circumstances, so to do".

8. Thus it is clear based on the aforesaid concurrent fact findings that the formation of opinion of the AO that the value claimed by the assessee less than its fair market value is sine qua non Reasons recorded after order of reference for valuation of the registered Valuer is not the substitute of pre-decisional formation of opinion."

8. As the issue is covered by Hon'ble jurisdictional High Court in the case of Umedbhai International (P) Ltd., supra and once the assessee has filed approved valuer's report, which is in the case of the assessee is dated 18.10.2006 valuing the property as on 01.04.1981 at Rs.24,03,838/-, is final. No further reference u/s. 55A can be made for estimating the fair market value of the property for determining the value as on 01.04.1981 unless and until the AO forms an opinion that value shown by the assessee was less than fair market value.

9. The second issue raised by assessee is as regards to the value adopted by the AO based on deemed value determined on the basis of circle rates by stamp valuation

authority at Rs.1,16,58,995/- is to be taken for the purpose of computation of long term capital gain or the property is to be referred to DVO for determining the fair market value in term of section 50C of the Act. Now, the assessee has referred to the decision of jurisdictional High Court in the case of Sunil Kumar Agarwal Vs. CIT in GA No. 3686 of 2013 ITAT No. 221 of 2013 order dated 13.03.2014, wherein Hon'ble Calcutta High Court has laid down certain principles in regard to valuation to be made by DVO in term of section 50C of the Act, which are as under:

“We have considered the rival submissions advanced by the learned advocates appearing for the parties. The submission of Ms. Ghutghutia that the requirement of clauses a) and (b) of sub-Section 2 of Section 50C has not been met by the assessee, can hardly be accepted. The requirement of clause (b) of sub-Section 2 of Section 50C was evidently met. The only question is whether the requirement of clause (b) of sub-Section 2 of Section 50C was evidently met. The only question is whether the requirement of clause (a) of sub-Section 2 of Section 50C was met by the assessee.

We have already set out hereinabove the recital appearing in the Deeds of Conveyance upon which the assessee was relying. Presumably, the case of the assessee was that price offered by the buyer was the highest prevailing price in the market. If this is his case then it is difficult to accept the proposition that the assessee had accepted that the price fixed by the District Sub Registrar was the fair market value of the property. No such inference can be made as against the assessee because he had nothing to do in the matter. Stamp duty was payable by the purchaser. It was for the purchaser to either accept it or dispute it. The assessee could not, on the basis of the price fixed by the Sub-Registrar, have claimed anything more than the agreed consideration of a sum of Rs.10 lakhs which, according to the assessee, was the highest prevailing market price. It would follow automatically that his case was that the fair market value of the property could not be Rs.35 lakhs as assessed by the District Sub Registrar. In a case of this nature the assessing officer should, in fairness, have given an option to the assessee to have the valuation made by the departmental valuation officer contemplated under Section 50C. As a matter of course, in all such cases the assessing officer should give an option to the assessee to have the valuation made by the departmental valuation officer.

For the aforesaid reasons, we are of the opinion that the valuation by the departmental valuation officer, contemplated under Section 50C, is required to avoid miscarriage of justice. The legislature did not intend that the capital gain should be fixed merely on the basis of the valuation to be made by the District Sub Registrar for the purpose of stamp duty. The legislature has taken care to provide adequate machinery to give a fair treatment to the citizen/taxpayer. There is no reason why the machinery provided by the legislature should not be used and the benefit thereof should be refused. Even in a case where no such prayer is made by the learned advocate representing the assessee, who may not have been properly instructed in law, the assessing officer, discharging a quasi judicial function, has the bounden duty to act fairly and to give a fair treatment by giving him an option to follow the course provided by law.”

From the above facts and legal proposition laid down by Hon'ble jurisdictional High Court in the case of Sunil Kumar Agarwal, supra, we are of the view that the value of the property estimated by DVO as on the date of sale is to be taken as the final consideration for the purpose of computation of Long Term Capital Gains u/s. 50C of the Act. The assessee sold the property for a total consideration of Rs.25 lacs during the relevant financial year relevant to this assessment year. The AO has taken the fair market value at Rs.1,16,58,995/- as per the circle rate fixed by Sub-registrar. The AO as well as CIT(A) has taken the value as adopted by Sub-registrar based on circle rate for assessing the long term capital gain arising out of sale of the above property. Before us, now the Ld. counsel for the assessee stated that in view of the proposition laid down by Hon'ble jurisdictional High Court in the case of Sunil Kumar Agarwal, supra, the property is to be referred to DVO in term of the provisions of section 50C(2) of the Act for estimating the fair market value of the property as on the date of sale. We are of the view that the value of the property estimated by DVO as on the date of sale is to be taken as the final consideration for the purpose of computation of Long Term Capital Gains u/s. 50C(2) of the Act. Accordingly, AO is directed to refer the matter to DVO u/s. 50C(2) of the Act and also allow opportunity of being heard to the assessee. The assessee will be allowed opportunity to represent before DVO, if he desires so. This issue of assessee's appeal is set aside to the file of AO for fresh adjudication in term of the above.

10. In the result, appeal of revenue is dismissed and the issue of the Cross Objection of assessee is allowed for statistical purposes.

11. Order is pronounced in the open court on 27.10.2014.

Sd/-
शामीम याहया, लेखा सदस्य
सदस्य (Shamim Yahya)
Accountant Member

Sd/-
महावीर सिंह, न्यायीक
(Mahavir Singh)
Judicial Member

Dated : 27th October, 2014

वरिष्ठ निजि सचिव Jd.(Sr.P.S.)

आदेश की प्रतिलिपि अग्रेषित:- Copy of the order forwarded to:

1. अपीलार्थी/APPELLANT – ITO, Ward-35(1), Kolkata.
2. प्रत्यर्थी/ Respondent – M/s. Onkarmal Kajaria Family Trust, 18, Amratolla Street, Kolkata-700 001.
3. आयकर कमिशनर (अपील)/ The CIT(A), Kolkata
4. आयकर कमिशनर/ ACIT Kolkata
5. विभागीय प्रतिनीधी / DR, Kolkata Benches, Kolkata

सत्यापित प्रति/True Copy,

आदेशानुसार/ By order,

सहायक पंजीकार/Asstt. Registrar.