

IN THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai
Before S/Shri B.R. Baskaran (AM) & Amarjit Singh (JM)

I.T.A. No. 7975/Mum/2011
(Assessment Year 2007-08)

M/s. Dhanraj Dhadha & Sons Pvt. Ltd. 1208, Panchratna Opera House Mumbai-400 004. (Appellant)	Vs.	ITO 5(1)(3) Aayakar Bhavan M.K.Road Mumbai-400 020. (Respondent)
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PAN No.AAACD2333E

Assessee by	Shri Yogesh A. Thar & Shri Fenil A. Bhatt
Department by	Shri Salman Khan
Date of Hearing	11.3.2016
Date of Pronouncement	1.6.2016

ORDER

Per B.R. Baskaran, AM :-

The appeal filed by the assessee is directed against the order dated 11.10.2011 passed by Ld CIT(A)-9, Mumbai and it relates to the assessment year 2007-08.

2. The primary issue urged by the assessee relates to the validity of assessment of long term capital gains of Rs.38.46 lakhs. The assessee has also urged certain additional grounds, which are in the nature of alternative contentions which are required to be decided if the primary issue is decided against the assessee.

3. The facts relating to the issue are stated in brief. There is a diamond market by name "Bharat Diamond Bourse" (BDB) in Bandra. The shops and car parking were allotted to the aspiring persons by lottery system. The assessee herein got allotment of two shops and two car parking spaces and it paid initial

deposit amounts in connection with said allotment. The initial amount of deposit was paid during the financial year 2000-01. Subsequently, the assessee filed an application with BDB on 28-02-2005 for transferring the allotment of one shop and two car parking spaces and also the relevant deposits to its sister concern named M/s Dhadda Diamonds Pvt Ltd. After satisfying the queries raised by BDB, the assessee filed an affidavit dated 10-07-2006 to BDB for transferring its rights to M/s Dhadda Diamonds Pvt Ltd and the BDB accepted the application of the assessee on 04-03-2007.

4. These facts came to the notice of the assessing officer during the course of assessment proceedings relating to AY 2005-06. The AO further noticed that the assessee has not declared any capital gain arising on transfer of the properties, referred above, in the return of income filed for AY 2007-08. Hence the AO reopened the assessment of AY 2007-08, i.e., the year under consideration. Before the AO, the assessee contended that it has transferred only Deposit amounts and hence the same does not give rise to any capital gain. However, the AO held that the assessee had held a right in the shop/parking space and the same has been transferred by it to its sister concern. The AO held that the right in the shop/parking space is a capital asset and extinguishment thereof shall give rise to capital gains. In support of this proposition, he relied upon the decision rendered by Hon'ble Bombay High Court in the case reported in 122 ITR 594 and also the decision rendered in the case of CIT Vs. Texspin engg. & Mft Works (263 ITR 345). Since the assessee did not declare any capital gain, the AO referred the matter of ascertaining market value to the DVO, who estimated the market value of office premise at Rs.56.12 lakhs and the market value of car parking spaces at Rs.16.00 lakh (Rs.8.00 lakhs each). Accordingly, the AO took the "full value of sale consideration" as Rs.72.12 lakhs. The AO computed the indexed cost of the shop and car parking

spaces at Rs.38.65 lakhs and accordingly worked out the Long term capital gain at Rs.33.47 lakhs. The Ld CIT(A) confirmed the order passed by the AO.

5. The Ld A.R submitted that the assessee cannot be considered to be owner of the shops/parking spaces, since it has only paid deposits. He submitted that these properties have not been transferred to the name of the assessee. He submitted that the assessee has obtained only a right of allotment of the shop/parking spaces. Accordingly he contended that, even if it is considered as a transfer, it has actually a transfer of a future right over the properties only. He further submitted that the assessing officer is not entitled to substitute the "fair market value" as full value of sale consideration for the purpose of computing capital gain. In this regard, he placed reliance on the decisions rendered by Hon'ble Supreme Court in the case of CIT Vs. George Henderson & Co. Ltd (66 ITR 622) and K.P. Verghese (121 ITR 597). He submitted that there is no allegation of understatement of consideration and hence the AO was not justified in taking the fair market value of the property as determined by the DVO as the alleged sales consideration. He further submitted that the provisions of sec. 50C alone in the Income tax Act provides for substitution of "Full value of sale consideration". He submitted that the provisions of sec. 50C shall apply only to "land or building or both" and not to the rights over the property. Accordingly he submitted that the deposit amount received by the assessee can alone be considered as the sale consideration. Accordingly he contended that the AO was not justified in substituting the fair market value of the property for sale consideration for the purpose of computing capital gains.

6. The Ld D.R submitted that the assessee has obtained the allotment of the properties through lottery system and the same do command higher market value. This fact has been brought on record by the AO by making reference to the decision rendered by Mumbai bench of Tribunal in the case of DCIT Vs.

Bombay diamond Co. Ltd (ITA No.7488/Mum/07). The assessee, in the above said case, has transferred the right over the premises allotted to it in BDB for a sum of Rs.10.38 crores. The Ld D.R submitted that the assessee has transferred the shop/parking space to its sister concern at cost. He submitted that, since the sale transaction has taken place between related parties, the various case laws relied upon by the Ld A.R are not applicable. He further submitted that the AO was constrained to determine the fair market value, since the assessee did not declare capital gain at all and it has also denied its liability.

7. We have heard the rival contentions and perused the record. The assessee has contended that it has transferred only the deposit amount and not any property. However, the facts discussed in the preceding paragraphs would show that the assessee has obtained a right in the shops/parking spaces by way of allotment of them through lottery system. The decision rendered by the Tribunal in the case of Bombay Diamond Co. Ltd (supra) shows that the right over the properties allotted by BDB carry good market value. Hence, we are unable to agree with the submission of the assessee that it was a simple case of transfer of deposits. The fact remains that, by transferring the deposit amount, the assessee has actually transferred its right over the properties to its sister concern. Accordingly, we agree with the view taken by the tax authorities in this regard.

8. The Ld A.R contended that the assessing officer is not entitled to substitute the "fair market value" for "full value of sale consideration" for the purpose of computing capital gain. The Ld A.R submitted that the deposit amount should be taken as "full value of sale consideration". In support of these contentions, the Ld A.R placed reliance on two decisions rendered by the Hon'ble Supreme Court, referred above. However, it is the contention of the assessee that it has not transferred any property and accordingly it did not declare any capital gain.

The issue relating to "full value of consideration" shall arise only if the assessee has declared capital gains by adopting some amount as "full value of consideration". In the instant case, the assessee has not computed any capital gain and it has only contended that it has not transferred any property. Another important fact is that the assessee has transferred the properties to its sister concern. In the case of transaction between related concerns, in our considered view, it is permissible for the AO to adjudicate the issue by considering human probabilities and surrounding circumstances. The AO has brought on record (decision rendered by the Tribunal in the case of Bombay Diamond Co. Ltd (supra)) that the surrounding circumstances show that the right over the properties obtained by way of allotment command good market value. The human conduct and human probabilities would show that the assessee would not have transferred its right to the third parties "at cost". Under these set of facts, we are of the view that the AO was justified in taking the "fair market value" of the properties as "Full value of consideration" for the purpose of ascertaining the capital gains.

9. The Ld. A.R placed reliance on various case laws rendered in the context of provisions of sec. 50C of the Act. In our view, they are not applicable to the facts prevailing in the instant case, since the question of registering the transfer of properties with stamp duty authorities does not arise at all.

10. In view of the above, we confirm the view taken by the tax authorities that the transfer of the right held by the assessee over the impugned properties is exigible to capital gains.

11. The assessee has raised certain additional grounds. The first additional ground relates to the year of taxability of Capital gains. The contention of the assessee is that it has filed an application for transfer of properties with BDB on

28-02-2005 and hence the capital gain incidence, if any, shall arise only in AY 2005-06. However, we notice that the BDB has given its approval only 04-03-2007. Since the capital asset transferred was a right over the property obtained by way of allotment, we are of the view that the transfer shall conclude only upon its approval by the competent persons. Accordingly, we are of the view that the assessing officer was justified in assessing the capital gains in AY 2007-08.

12. The second additional ground raised by the assessee relates to the indexation benefit granted by the AO. According to the assessee, the AO has not considered the actual dates of payment of deposits for the purpose of ascertaining indexation benefit. Since the contentions made by the assessee in this regard require factual verifications, we set aside this issue to the file of the AO with the direction to examine the claim of the assessee and take appropriate decision in accordance with the law.

13. The third additional ground raised by the assessee relates to the determination of "full value of consideration". The submission of the assessee is that the deposit amounts for the properties have been paid both by the assessee and the transferee. Accordingly it is being contended that the full value of consideration should be apportioned in the ratio of those payments and the assessee should be charged to capital gains tax on the proportionate amount only. We are unable to agree with the said contentions. It is the assessee who owns the right and what is transferred is only the right over the properties obtained by way of allotment. In consequent to the intended transfer of that right only, the transferee might have paid subsequent installments of the deposit. The payment of deposit by the transferee does not bring any right over the properties to the transferee and such payments should be considered as

payments made on behalf of the assessee only. Hence, in our view, the question of apportionment of full value of sale consideration does not arise.

14. In the result, the appeal of the assessee is treated as partly allowed for statistical purposes.

Order has been pronounced in the Open Court on 1.6.2016.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 1/6/2016

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

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BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai