

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ, अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER

आयकर अपील सं./ **ITA.No.1626/Ahd/2016**

निर्धारण वर्ष/ **Asstt. Year: 2011-2012**

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| Dharmidevi Kanaiyalal Suthar 26, Krishna Park Society Jasodanagar Road Nr. Sahjanand School Maninagar, Ahmedabad 380 008. PAN : AWRPS 2282 F | ITO, Ward-3(2)(6) Ahmedabad. |
| अपीलार्थी/ (Appellant) | प्रत्यर्थी/ (Respondent) |

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| Assessee by : | Shri Ashwin C. Shah, AR |
| Revenue by : | Shri Satish Solanki, Sr.DR |

सुनवाई की तारीख/**Date of Hearing** : **11/08/2016**
घोषणा की तारीख /**Date of Pronouncement**: **22/09/2016**

आदेश/ORDER

Assessee is in appeal before the Tribunal against the order of the Id.CIT(A)-3, Ahmedabad dated 11.5.2016 passed for the Asstt.Year 2011-12.

2. Assessee has taken substantial three grounds of appeal. Out of which ground no.1 relates to challenge to reopening of the assessment, and in ground no.2, the assessee has challenged confirmation of addition of Rs.31.00 lakhs, which was made by the AO with aid of section 50C of the Income Tax Act, 1961. Other grounds are peripheral arguments to those main issues.

3. As far as reopening of the assessment is concerned, the ld.counsel for the assessee did not press this ground. Accordingly, the ground no.1 is rejected.

4. Brief facts with regard to second fold of grievance is that the assessee was owner and in possession of a plot bearing no.105, admeasuring 1000 sq.meters situated in industrial area, GIDC Kerala. This plot was purchased by the assessee on 23.5.2006 for a sum of Rs.9.50 lakhs. The assessee has entered into an agreement to sell of this plot with M/s.Marvel Metal & Alloys on 7.5.2007 for a consideration of Rs.11.50 lakhs. According to the assessee, the payment was received through banking channel and possession was delivered at the time of execution of the agreement. The sale deed of the plot was executed on 21.10.2010. The assessee has filed its return of income on 26.9.2011 declaring total income at Rs.7,59,710/-. The ld.AO had proposed to compute long term capital gain on sale of plot as per section 50C of the Income Tax Act. He observed that on the basis of stamp duty valuation, the value of the plot is to be adopted at Rs.59,18,367/-. The assessee has objected this computation of value of the plot, and ultimately as per sub-section 2 of section 50C, the matter was referred to DVO, who made preliminary valuation of plot at Rs.56 lakhs, and after objection of the assessee, he adopted the value at Rs.42.50 lakhs. The capital gain computed by the AO reads as under:

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| <i>Valuation as per DVO Report</i> | <i>Rs.42,50,000/-</i> |
| <i>Less: Indexation</i> | <i>Rs.6,35,660/-</i> |
| <i>Net LTCG</i> | <i>Rs.36,14,340/-</i> |
| <i>Less: Disclosed by the assessee</i> | <i>Rs.5,14,340/-</i> |
| <i>Net Addition</i> | <i>Rs.31,00,000/-</i> |

5. Appeal to the CIT(A) did not bring any relief to the assessee.
6. Before the Tribunal, the assessee has raised three fold submissions. In his first fold of submissions, he contended that the assessee has received full sale consideration at the time of execution of the agreement. He has handed over the possession to the vendee. Therefore, as per section 2(47)(v) of the Income Tax Act read with section 53A of the Transfer of Property Act, 1882, the transaction has taken place on 7.5.2007 when the assessee has handed over the possession, and any gain arisen to the assessee is taxable in the Asstt.Year 2008-09 and not in Asstt.Year 2011-12.

In his next fold of contentions, he contended that ld.DVO has erred in not considering the objection of the assessee, and has erred in taking the rates w.e.f. 1-4-2010, that is the period when the sale deed was executed. The ld.DVO ought to have taken the rates when agreement was executed by the assessee.

In his last fold of submissions, he contended that an amendment has been effected in section 50C, which has been brought on the statute book by Finance Bill, 2016. Though the amendment has been made effective from 1st day April, 2017 and it is intended to be applied in the Asstt.Years 2017-18, but it is a procedural aspect, and it can be applied even in the pending matters. According to this amendment, it has been provided that wherever, section 50C is being applied, it is to be applied from the date of agreement fixing the amount of consideration for the transfer of immovable property, and the date of registration, which are

not same, may not be considered. On the other hand, the ld.DR relied upon the orders of the Revenue authorities.

7. I have duly considered rival contentions and gone through the record carefully. Section 48 of the Income Tax Act provides mode of computation of capital gain. It contemplates that income arising under the head “capital gains” shall be computed by deducting from the full value of the consideration received or accruing, as a result of the transfer of the capital assets the following amounts, viz. (a) expenditure incurred wholly and exclusively in connection with such transfer; and (b) the cost of acquisition of the asset and the cost of any improvement thereto.

8. Section 50C further provides that where the consideration received or accruing as a result of transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed by any authority for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall for the purposes of section 48, be deemed to be the full value of the consideration. In other words, full consideration mentioned in section 48 is to be replaced by the consideration on which value of the property was adopted for the purpose of payment of stamp duty.

9. Sub-Section (2) of section 50C further contemplates that in case assessee alleges that stamp duty valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of transfer, then, the AO may refer the valuation of the capital asset to the Valuation Officer. In the present case, this procedure has been followed.

A reference was made to the DVO under sub-section(1) of section 50C and has valued the property at Rs.42.50 lakhs. At this stage, let me first deal with first fold of submission made by the assessee. Sub-clause (v) of Section 2(47) has a direct bearing on the controversy. Therefore, it is pertinent to taken note of this clause. It reads as under:

“Section 2

.....

.....

(47) "transfer", in relation to a capital asset, includes,—

(i)

(ii)

(iii)

(iv)

(iva)

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or”

10. The case of the assessee is that he had executed an agreement to sell on 7.5.2007 and handed over the possession to the vendee, therefore, the transfer within the meaning of section 2(47)(v) was complete, and any gain ought to be assessed in the Asstt.Year 2008-09. This argument was not dealt with by the Id.Revenue authorities in detail, because, before the AO, it was not raised. Before taking cognizance of this argument, it is pertinent to take note of Registration and other related Laws, Amendment Act, 2001 which has brought about radical changes in the rights flowing on the basis of the agreement executed in part performance of the contract under section 53A of 1882 Act. The

amendments have been made to sections 17 and 49 of the Indian Registration Act, 1908. It is pertinent to take note of section 17(1A) as well as Section 49 of the Registration Act.

“17.(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.

49. Effect of non-registration of documents required to be registered.—No document required by section 17 1[or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall—

*(a) affect any immovable property comprised therein, or
(b) confer any power to adopt, or
(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:*

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument.]

11. I also deem it pertinent to take note of Section 53A of the Transfer of Property Act, 1882. It reads as under:

“53A. Part performance.—Where any person contracts to transfer for consideration any immoveable property by writing signed by

him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.”

12. A perusal of section 53A of the TPA would indicate that it provides a protection to transferee to retain his possession which was taken in part performance of the contract. He was able to protect his possession even after expiry of limitation to bring a suit for specific performance. But after the amendment effected in the Registration and Other Related Laws Amendment Act, 2001, it has been provided that though a contract accompanied by either of possession or executed in favour of a person in possession is compulsorily registerable under section 17(1A) of the Registration Act, 1908, if he failed to register such contract, then, he would not be able to protect his possession or any benefit conferred by section 53A of the TPA. *Proviso* appended to section 49 of the Indian Registration Act only postulates that such

agreement could be tendered in evidence in a suit for specific performance. In other words, validity of unregistered agreement has not been denied for the purpose of adducing it as evidence for obtaining the benefit flowing from such contract. But for the purpose of protecting the possession, un-registered contract could not be enforced. The “transfer” within the meaning of section 2(47) of the Income Tax Act would complete, if possession is protected. Therefore, I do not find any merit in the first fold of submissions raised by the ld.counsel for the assessee.

13. As far as second fold of submission is concerned, the ld.counsel for the assessee drew my attention towards page nos.3 to 6 of the paper book. He contended that the stamp duty valuation authority has notified the rates in the area on 1.4.1999. The rates were Rs.50/- per sq.meter. On 8.2.2007 these rates have been revised. According to the revised rates, an enhancement has been made in valuation of market rate to the extent of 50% from the rate notified in 1999. In other words, the rates notified at Rs.50/- per sq.meter had been revised to Rs.75/- per sq.meter. The assessee has sold the property on 7.5.2007. The rates notified on 8.2.2007 ought to be adopted by the DVO for working out value of the property for the purpose of stamp duty. The ld.AO has taken rates of 2010 i.e. date on which sale deed was registered. On due consideration of this line of arguments, I am of the view that the ld.Revenue authorities have failed to appreciate the controversy in right perspective. The assessee has extinguished his right in the property on 7.5.2007 when this agreement was executed. Vendee could enforce this agreement by way of suit for specific performance, and in that proceedings, the agreement is to be tendered as evidence, as provided in *proviso* to

section 49 of the Indian Registration At. In other words, right to obtain sale deed executed was accrued in favour of the vendee. The rates applicable on 7.5.2007 ought to be applied for determining the value of the property for the purpose of computing capital gain. It has been brought to my notice that Id.DVO has adopted rates as applicable on 20.10.2010. I accepted this fold of contentions and directed the AO to compute the value of the property by adopting the rate at Rs.75/- per sq.meter. If this value exceeds the value declared by the assessee in the sale deed, and adopted for computing the capital gain, then, the AO would take this value, otherwise, capital gain would be computed on sale consideration disclosed by the assessee in his computation. The Id.AO shall carry out this exercise after providing opportunity of hearing to the assessee.

5. As far third fold of contention is concerned, I do not deem it necessary to consider, because under second fold of contentions, I have accepted the stand of the assessee that value on the date of agreement for the purpose of computing the capital gain ought to be adopted

6. In the result, appeal of the assessee is party allowed for statistical purpose.

Order pronounced in the Court on 22nd September, 2016 at Ahmedabad.

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

Ahmedabad; Dated 22/09/2016