



IN THE INCOME TAX APPELLATE TRIBUNAL "K", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM

&

SHRI RAM LAL NEGI, JM

ITA No.4361/Mum/2016

(Assessment Year :2010-11)

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| Assistant Commissioner of Income Tax – 15(1)(2), Room No.483A, 4 th Floor Aayakar Bhavan, Maharshi Karve Road, Mumbai – 400 020 | Vs. | M/s. Balmer Lawrie Van Leer Ltd., D-195/2, TTC Industrial Area, MIDC, Turbhe, Navi Mumbai – 400 705 |
| PAN/GIR No.AAACB2906R | | |
| Appellant) | .. | Respondent) |

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|------------------------------|------------------------|
| Revenue by | Shri Santosh Deshpande |
| Assessee by | Shri S.M. Pradhan |
| Date of Hearing | 26/10/2018 |
| Date of Pronouncement | 20/11/2018 |

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by Revenue against the order of CIT(A)-22, Mumbai dated 16/03/2016 for A.Y.2010-11 in the matter of order passed u/s.143(3) r.w.s. 92CA(4) of the IT Act.

2. Grounds taken by the Revenue reads as under:-

"Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in considering the date of signing the MOU for the purpose of adopting the value of the capital asset transferred, even though the actual possession was handed over at much later date i.e. at the time of executing the conveyance deed. Since, section 2(47) of I. T.Act read with Transfer of property Act, 1882, lays down possession of the property as essential requirement for transfer of property."

- ii. *The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary.*
- iii. *The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the assessing officer be restored.*

3. Rival contentions have been heard and record perused. Facts in brief are that assessee company is engaged in the business of manufacturing of drum closures and industrial plastic containers. During the course of assessment, AO found as under:-

A. The appellant company first entered into an agreement with the Hindustan ' Petroleum Corporation Ltd. (HPCL) for the transfer of its land and factory building situated at Mahul Village, Chembur, Mumbai for a total sale consideration of Rs.27,62,00,000/-.

B. The value adopted by the stamp valuation authorities for the purpose of stamp duty was determined at Rs.52,90,05,000/-.

C. Thereafter, information was received from the DIT (I&CI), Mumbai on 10.12.2012, to consider the applicability of section 50C of the IT. Act, 1961, as during the year, the appellant has entered into a conveyance deed on 29.04.2009 for sale of land and factory building at Mahul for Rs.27.62 cr and the value adopted by the stamp valuation authorities for stamp duty purpose was Rs.52.90cr.

D. It was also seen from the details filed by the appellant company that it had entered into a understanding for sale of its land and factory building with the HPCL on 14.08.2007 wherein lumpsum consideration of Rs.27,62,00,000/-was decided to be paid to it by the HPCL.

E. Further, a lumpsum payment of Rs.1,92,00,000/- was also agreed to be paid to M/s. Balmer Lawrie Ltd. for agreeing to surrender its leasehold rights granted by the appellant company to Balmer Lawrie.

F. The appellant company also stated that an amount of Rs.3,16,00,000/- had also been paid by it to Balmer Lawrie Ltd. for release of leasehold rights held by it.

G. The appellant company adopted the cost of acquisition of the asset as being combination of the WDV of the factory building of I and as on 01.04.2009 determined at Rs.2,86,95,244/- and indexed cost of freehold land at Rs.98,59,200/-.

H. Accordingly, the capital gain was worked out by the appellant company in the return of income filed by it at Rs.20,60,45,566/-

4. The above facts were confronted to the assessee company and it was asked to justify as to why provisions of section 50C of the Act should not be invoked in its case. The assessee company made a request to make reference u/s.50C(2) of the Act to the DVO for determination of the FMV of the capital asset transferred. Therefore, the valuation of the capital asset transferred was referred under the provisions of section 50C(2) of the Act to the District Valuation Officer-1, Mumbai by the then AO, vide letter dated 12.02.2013 for determining the fair market value of the capital asset transferred. The DVO, Mumbai vide letter dated 14.03.2014 had sent a preliminary report estimating the fair market value as on 29.04.2009 at Rs.42,83,00,000/-. In response to the same, the assessee vide letter dated 20.03.2014 had stated that the relevant date of valuation for section 50C should be 14.08.2007 when an agreement in the form of MOU was executed between the assessee company, HPCL and Balmer Lawrie & Co. Ltd. and due to various sanctions, clearances etc. required from various Govt Departments such as Director of Industries, Urban Land Ceiling Authorities etc, the actual date of executing the conveyance was delayed by about 2 years and the conveyance was executed on 29th April, 2009. In this regard, the assessee had placed reliance on the decision of Hyderabad Tribunal in the case of DCIT vs. Venkat Reddy (2013) 57 SOT 117 and requested that the relevant date should be taken as 14.08.2007 and the value adopted at Rs.29.53 cr should be considered as FMV.

5. The above contention of the assessee company had been duly considered by the A.O. but was not found acceptable. The A.O. referred to the provisions of section 50C of the Act and observed that it was quite clear from the plain reading of these provisions that it provided for determination of the full value of consideration in certain special cases, for the purpose of computation of capital gain u/s.48 of the Act. That capital gain u/s.45 arises only on transfer of a capital asset and, therefore, the valuation u/s.50C(2) of the Act had to be made on the date when the capital asset under question had actually been transferred within the meaning of section 2(47) of the Act. On the facts of the case, in the case of the assessee company it could not be said that the transfer of capital asset was deemed to be on 14.08.2007 i.e. date of initial understanding. This was because, as on that date only some understanding was reached between the buyer and the seller, but the assessee company continued to have possession of the capital asset in its hand and there was no sale agreement registered on that date by which the title over the land as well as factory building had passed on to HPCL. Hence, the date of actual transfer i.e. 29.04.2009 when all the conditions of transfer as per section 2(47) of the Act had been met in respect of the capital asset was to be considered for valuation of the FMV for the purposes of section 50C of the Act.

6. The DVO-II, IT. Dept, Mumbai vide letter No. DVO-II/Mum/CGT-255/2013-14/334 dated 24.03.2014 had submitted final valuation report determining the fair market value of the capital asset transferred as on 29.04.2009 at Rs. 42,83,00,000/-. The FMV of the capital asset transferred as determined by the DVO at Rs.42,83,00,000/- was adopted by AO as the full

value of consideration for the purpose of computation of capital gains and addition was made accordingly.

7. By the impugned order, CIT(A) deleted the addition after observing as under:-

“5.9 I have considered the facts and circumstance of the case. There is no dispute that as per the tripartite MOU signed on 14.08.2007 ,the sale consideration was fixed at Rs.27.62 crores against which a sum of Rs. 14.39 stood received by cheque at the time of signing the MOU. The final consideration received for the property as per the conveyance deed dated 29.04.2009 was also Rs. 27.62 crores as fixed by the MOU. The only dispute is the date on which the FMV is to be adopted for the purpose of section 50C. The Assessing Officer had considered the conveyance date of 29.04.2009 as against the appellant's contention that the date of MOU should be taken. I find that on the issue of determining the deemed consideration for the purpose of section 50C, the various courts have consistently held that the stamp duty value /fair market value on the date of agreement to sell and not the registration date is to be considered. In the case of ITO vs Modipon Ltd. relied upon by the appellant, the Hon'ble ITAT, Delhi had referred to the decision of the Hon'ble Supreme Court in the case of Sanjeev Lal & Anr. Vs. CIT & Anr. (2014) 365 ITR 389(SC)), wherein, it was held as under:-

"In normal circumstances by executing an agreement to sell in respect of an immoveable property, a right in persona is created in favour of the transferee/vendee. When such a right is created in favour of the vendee, the vendor is restrained from selling the said property to someone else because the vendee, in whose favour the right in personam is created, has a legitimate right to enforce specific performance of the agreement, if the vendor, for some reason is not executing the sale deed. Thus, by virtue of the agreement to sell some right is given by the vendor to the vendee. The question is whether the entire property can be said to have been sold at the time when an agreement to sell is entered into. In normal circumstances, the aforesaid question has to be answered in the negative. However, looking at the provisions of Section 2(47) of the Act, which defines the word "transfer" in relation to a capital asset, one can say that if a right in the property is extinguished by execution of an agreement to sell, the capital asset can be deemed to have been transferred. Relevant portion of Section 2(47), defining the word "transfer" is as under:

"2(47) "transfer", in relation to a capital asset, includes,-....

(ii) the extinguishment of any rights therein; or,....."

Now in the light of definition of "transfer" as defined under Section 2(47) of the Act, it is clear that when any right in respect of any capital asset is extinguished and that right is transferred to someone, it would amount to transfer of a capital asset."

The Hon'ble Tribunal also referred to the decision of the Vishakhapatnam Bench of ITAT in the case of Lahiri Promoters Vs. ACIT in ITA No.12/VIA/vizag /2009 wherein the decision of the Hon'ble Supreme Court in the case of K.P. Verghese Vs. ITO(1981) 131 ITR 597 and the decision of the Hon'ble Madras High Court in the case of K.R. Palani Swamy and others (2008-TMI-30601 in Appeal No W.P No 4387 of 2003 vide order dated 5-8-08.) was discussed at length and it was held as under:

"12. Thus, by executing the sale deed in June, 2005, the assessee has only completed the contractual obligation imposed upon it by virtue of the sale agreement, Since the process of sale has been initiated from the date of sale agreement, in our opinion, the character of the transaction vis-a-vis Income tax Act should be determined on the basis of the conditions that prevailed on the date the transaction was initially entered into. Accordingly, the applicability of the provisions of section 50C should be looked at only on the date of sale agreement."

The Hon'ble Tribunal observed that the ratio of the above decision, had also been followed in the case of Kodura Satya Srinivas ITA No.556/559 dated 02.07.2010 and Mook Rani Reddy 311A/isaka) dated 10.12.2010. That no contrary decision has been brought to its notice and accordingly allowed the assessee's appeal.

5.10 The ratio in the above case has also been followed by the Hon'ble ITAT, Hyderabad in the case of Shri Mohd. Imran Baig, Hyderabad and others in ITA Nos. 1942-1954/Hyd/2014 in its order dated 27.11.2015 wherein it was held as under:

"15. Having regard to the rival contentions and the material on record, we find that the issue is as to whether the date of agreement or the date of execution of sale deed has to be considered for the purpose of adopting the SRO value under S.50C of the Act. We find that : this issue is now settled in favour of the assessee by the decisions of the Hon'ble Supreme Court in the case of Sanjeev Lal and Smt. Shantilal Motilal V/s. CIT(365 ITR 389) as well as decisions of the coordinate bench of this Tribunal at Visakhapatnam in the cases of M/s. Lahiri Promoters Visakhapatnam V/s. ACIT, Circle 1(1), Visakhapatnam (ITA No.12/Vizag/2009 dated 22.6.2010) and

Moole Rami Reddy V/s. ITO (ITA No.31 l/Vizag/2010 dated 10.12.2010). It is therefore, now settled that the SRO value as on the date of agreement of sale has to be considered for the purpose of computation of capital gains."

5.11 The Hon'ble ITAT, Bangalore in the case of Bharathi Dev Anandani vs ACIT in ITA No.882/Bang/2014 vide order dated 12.02.2016 had also held that the date of agreement to sell is to be taken for determining the fair market value of the property as per provisions of sec,50C(2) of the Act. I also find that the Hon'ble Allahabad High Court in the case of CIT vs Shimbhu Mehra in ITA. No.373 Of 2010 in its order dated 12.10.2015 had referred to the decision of the Hon'ble Supreme Court in the case of Sanjeev Lal & Ann Vs. CIT & Anr. (2014) 365 ITR 389(SC)) and Explanation 2 to Section 2(47) of the Act which was added by Finance Act, 2012 with retrospective effect from 1.4.1962 and held as under:

"14. In the light of the aforesaid provision, it is apparently clear that the moment an agreement to sell is executed between the parties and part consideration is received, the transfer for the purpose of Section 50C of the Act takes places and computation under Section 48 of the Act will start accordingly, for the purpose of calculating the capital gains under Section 45 of the Act."

5.12 In view of the legal position on the issue as discussed above, the Assessing Officer is directed to consider the FMV of the property as on the date of signing MOD , i.e. 14.08.2007 , as the full value of the consideration received as per provisions of section 50C of the Act. The appellant's ground of appeal on this issue is allowed."

8. Against the above order of CIT(A), Revenue is in further appeal before us.

9. We have considered rival contentions and carefully gone through the orders of the authorities below and found from record that assessee has entered into agreement to sale of its factory line and building on 14/08/2007 wherein consideration of Rs.27.62 Crores was decided. Assessee also received a sum of Rs.14.39 Crores by cheque at the signing

of the agreement. However, agreement the sale was registered on 29/04/2009. The AO proposed to take valuation of property as on the date of registration i.e., 29/04/2009 and thereafter, at the request of the assessee matter was referred to the DVO. Dispute before the CIT(A) was that whether valuation to be taken as on the date of entering into agreement or as on the date when the sale deed is actually registered. The CIT(A) after relying on the various judicial pronouncements as quoted in his order reached to the conclusion that fair market value of the property is to be taken as on the date of agreement to sale. From the record, we found that at the time of entering into agreement to sale, the assessee has already received more than 50% of the advance, however, due to certain conditions, the sale deed could not be registered. Finally, it was registered only on 29/04/2009. The various decisions cited and relied on by the CIT(A), the Tribunal after relying on the decision of the Hon'ble Supreme Court has held that when agreement to sale is executed between the parties and part consideration is received, approval of the authorities of Section 50C of the Act takes place and computation u/s.48 of the Act will start accordingly. We do not find any infirmity in the order of CIT(A) for holding that provisions of 50C is applicable as on the date of execution of the agreement to sale. Accordingly, AO is directed to take the fair market value of property as on the date of agreement to sale i.e., on 14/08/2007. We direct accordingly.

10. In the result, appeal of the Revenue is disposed of in terms indicated hereinabove.

Order pronounced in the open court on this 20/11/2018

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 20/11/2018

Karuna Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai