

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH ‘B’

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 2767/Ahd/2016

निर्धारण वर्ष/Assessment Year: 2013-14

Rahul G. Patel 402, 4 th Floor Balajikrupa, Plot No.16 Survarnpuri Jetalpur, Baroda. PAN : AEIPP 4816 K	Vs	DCIT, Cir.1(2) Baroda.
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
Assessee by :	Shri Deepak R. Shah, AR
Revenue by :	Shri Mudit Nagpal, Sr.DR

सुनवाई की तारीख/Date of Hearing : 02/08/2018

घोषणा की तारीख /Date of Pronouncement : 26/09/2018

ORDER

PER RAJPAL YADAV, JUDICIAL MEMBER : Assessee is in appeal before the Tribunal against order of the Id.CIT(A)-5, Vadodara dated 24.8.2016 passed for the assessment year 2013-14.

2. Registry has raised an objection that appeal is barred by 184 days. However, the Id.counsel for the assessee explained that Registry took incorrect date while calculating limitation. In form no.36 at serial no.9 the assessee has mentioned date of communication of order appealed against as “24/02/2016”. This is the date on which assessment order was passed and this has created confusion in the mind of authorized person receiving

the appeal. He calculated limitation from the assessment order, otherwise from order of the Id.CIT(A) appeal is within limitation. The assessee has filed fresh form no.36 rectifying the defect. Thus, the appeal is not time barred.

3. Ground no.1 and 2 are inter-connected with each other. The dispute involved in this appeal relates to computation of capital gain assessable in the hands of the assessee on transfer of a capital asset.

4. Brief facts of the case are that the assessee has filed his return of income on 11.7.2013 declaring total income at Rs.28,37,710/-. The case of the assessee was selected for scrutiny and notice under section 143(2) was issued and served upon the assessee. On scrutiny of the accounts, it revealed to the AO that the assessee was co-owner in an immovable property comprised at Block No.10, Revenue Survey No.451, Tandalja, Baroda admeasuring 1114 sq.meters. This property was sold on 5.6.2012 for a consideration of Rs.3,00,11,000/-. The AO further observed that as per the stamp duty valuation authority, the value of the property for the purpose of stamp duty payment was determined at Rs.3,94,48,890/-. The Id.AO confronted the assessee as to why full sale consideration for the purpose of computation of long term capital gain be not deemed equivalent to the amount on which the stamp duty was paid as contemplated under section 50C of the Income Tax Act. In response to the query of AO, it was contended by the assessee that agreement to sell for sale of this property was executed on 8.12.2010. In pursuance of this agreement, the assessee had received sufficient payment in advance through account payee cheques. It was further contended that the execution of sale deed on 5.6.2012 was fulfillment of a contractual

obligation imposed upon the assessee by virtue of sale agreement. Hence, the full value of consideration ought to be determined under section 50C(2) by taking into consideration encumbrance created on the immovable property by virtue of agreement dated 8.2.2010. In other words, the case of the assessee is that *jantri* value for the purpose of section 50C should be taken up as applicable on 8.2.2010. The Id.AO rejected this contention of the assessee, he took into consideration the sale value at Rs.3,94,48,890/- and computed long term capital gain.

5. Dissatisfied with the assessment order, the assessee carried the matter in appeal before the Id.CIT(A). But the Id.CIT(A) concurred with the conclusion of the AO. The Id.CIT(A) further recorded that transfer of an immovable property completes when sale deed is being executed. The assessee is also offering long term capital gain the Asstt.Year 2013-14, which is the year in whose accounting year the sale deed has been registered. Otherwise, the assessee should have offered capital gain in the accounting year when date of agreement i.e. 8.2.2010 falls. In other words, the Id.CIT(A) proceeded to take note of circle rate at the point of time when the sale deed was executed.

6. Before us, the Id.counsel for the assessee reiterated contentions as were raised before the Revenue authorities. He pointed out that vide Finance Act, 2016 w.e.f. 1.4.2017 a proviso to section 50C has been appended which contemplates that where the date of sale deed as well as sale agreement are different and falls within different assessment years, then for the purpose of deeming the full sale consideration contemplated in section 50C, the value declared on the date of agreement be taken for computing the gain. On the strength of ITAT order in the case of

Dharamshibhai Sonani Vs. ACIT, 75 taxmann.com 141 (Ahd) he contended that the Tribunal has held that this proviso is applicable with retrospective effect. In this way, he contended that *jantri* rate as on 8.2.2010 be applied for calculating full sale consideration of this property.

7. On the other hand, the Id.DR relied upon the Id.CIT(A). He submitted that the Id.CIT(A) has already taken into consideration all these aspects. The Id.CIT(A) has specifically dealt with the issue that execution of sale agreement does not confer a title. It does not translate the action into a transfer of a capital asset. Transfer of immovable property compulsorily requires registration under section 17 of the Indian Registration Act. In the present case, such registration taken place on 5.6.2012.

8. We 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.

9. 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.

10. 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. 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) to (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'

11. Before taking cognizance of any 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.]"

12. We 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 immovable 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."

13. 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. Thus on execution of an agreement, if it was not registered then transfer within the

meaning of section 2(47) will not happen. Like in the present case, agreement was executed on 8.2.2010 but not registered. Therefore, it is to be construed that transfer did not take place on 8.2.2010 rather took place on 5.6.2012 when sale deed was executed and registered. This may be the reason for the assessee to offer capital gain in the Asstt.Year 2013-14 only.

14. It is pertinent to observe that an agreement to sale was executed by the assessee on 8.2.2010 which is followed by payment through account payee cheque. Details of payments have been duly noticed by the Id.AO as well as by the Id.CIT(A). First cheque was received on 1.4.2011 for a consideration of Rs.10 lakhs; then Rs.30 lakhs on 23.7.2011; Rs.15 lakhs on 28.12.2011 and Rs.50 lakhs on 26.3.2012. Similarly on 1.5.2012 Rs.45 lakhs was received through account payee cheque. It means that sale consideration were received by the assessee before the registration of sale deed regularly on different intervals. As observed earlier, section 50C 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. The question before us is, what could be the full value of sale consideration i.e. whether the value on which stamp duty was paid at the time of sale deed or the value declared in the sale agreement ? In such a situation where the assessee is not satisfied with adoption of sale value on which stamp duty was paid, then scheme of the Act prescribes a mechanism under sub-section (2) of section 50C for making a reference to the DVO to determine fair market value of the property. The reasons for such a mechanism is that stamp duty fee is only

4.95% (herein Gujarat) on the total sale consideration, which is a small amount and can be borne by any vendor/vendee. But for the purpose of Income Tax Act, the liability would enhance multi fold, and due to this reason, mechanism has been provided in the Act for the assessee to demonstrate that the value received by him was far less than one adopted for the purpose of stamp duty valuation. For this, he can make a request to the AO under section 50C(2) for making a reference to the DVO. It is pertinent to observe that the assessee entered into an agreement to sell on 8.2.2010. The AO has not disputed this agreement. The assessee has received payment in pursuance of this agreement through account payee cheque. Let us take a situation where a vendee fails to get the sale deed executed. The assessee being vendor has a remedy for filing a suit for specific performance under the Specific Relief Act. The time limit to file a suit for specific performance has been provided in Indian Limitation Act, which is three years. In such situation, when the vendor files a suit for specific performance to force the vendee to purchase the property. In that situation, he will not pay anything over and above, the amount stated in the sale agreement. In that situation, the assessee would not get anything more than the amount mentioned in the agreement, though such situation may arise after three-four years on execution of the decree passed in a suit for specific performance. In between there may an appreciation or depreciation in the said property. Circle rate may rise or reduce. In other words, at the time of an agreement in respect of an immovable property, a *right in persona* is created in favour of the transferee/vendee. When such right is created in favour of the vendee, the vendor is restrained from selling the said property to someone else because vendee in whose favour *right in persona* is created has legitimate right to enforce such specific performance of the agreement, if the vendor for some reason is not

executing the sale deed. Thus, by virtue of agreement to sell, some right is given to the vendee by the vendor. It is encumbrance on the property. At this stage, we would like to make reference to new proviso appended to section 50C by way of Finance Act, 2016 and the background, under which such provision has been incorporated. In 2015, Government of India has set up Income Tax Simplification Committee headed by Justice R.V.Easwar, former judge of Delhi High Court. The Committee in its reported observed as under:

“6.1 RATIONALISATION OF SECTION 50C TO PROVIDE RELIEF WHERE SALE CONSIDERATION FIXED UNDER AGREEMENT TO SELL

Section 50C makes a special provision for determining the full value of consideration in cases of transfer of immovable property. It provides that where the consideration declared to be received or accruing as a result of the transfer of land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government (i.e. "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall be deemed to be the full value of the consideration, and capital gains shall be computed on the basis of such consideration under section 48 of the Income-tax Act.

The scope of section 50C was extended w.e.f. A.Y. 2010-11 to the transaction which were executed through agreement to sell or power of attorney by inserting the word "assessable" alongwith words "the value so adopted or assessed". Hence, section 50C is now also applicable in case of such transfers.

The present provisions of section 50C do not provide any relief where the seller has entered into an agreement to sell the asset much before the actual date of transfer of the immovable property and the sale consideration has been fixed in such agreement. A later similar provision inserted by way of section 43CA does take care of such a situation.

6.2 It is therefore proposed to insert the following provisions in section 50C:

(4) Where the date of an agreement fixing the value of consideration for the transfer of the asset and the date of registration of the transfer of the asset are not same, the value referred to in sub-section (1) may be taken as the value assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer on the date of the agreement.

(5) The provisions of sub-section (4) shall apply only in a case where the amount of consideration or a part thereof has been received by any mode other than cash on or before a date of agreement for transfer of the asset.

.....”

15. Taking a clue from the report, a proviso has been appended by way of Finance Act, 2016 to section 50C and such proviso reads as under:

"Provided that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer:

Provided further that the first proviso shall apply only in a case where the amount of consideration, or a part thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account, on or before the date of the agreement for transfer."

16. This amendment was explained in the Memorandum explaining the provisions of Finance Bill 2016. It reads as under:

Rationalization of Section 50C in case sale consideration is fixed under agreement executed prior to the date of registration of immovable property

Under the existing provisions contained in Section 50C, in case of transfer of a capital asset being land or building on both, the value adopted or assessed by the stamp valuation authority for the purpose of payment of stamp duty shall be taken as the full value of consideration for the purposes of computation of capital gains. The

Income Tax Simplification Committee (Easwar Committee) has in its first report, pointed out that this provision does not provide any relief where the seller has entered into an agreement to sell the property much before the actual date of transfer of the immovable property and the sale consideration is fixed in such agreement, whereas similar provision exists in section 43CA of the Act i.e. when an immovable property is sold as a stock-in-trade. It is proposed to amend the provisions of section 50C so as to provide that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of computing the full value of consideration. It is further proposed to provide that this provision shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by way of an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account, on or before the date of the agreement for the transfer of such immovable property. 30 These amendments are proposed to be made effective from the 1st day of April, 2017 and shall accordingly apply in relation to assessment year 2017-18 and subsequent years."

17. If we take all these aspects in their settings as a whole, then it would indicate that earlier whenever an assessee disputed adoption of sale equivalent to the amount on which stamp duty is paid, then reference to the DVO is made under section 50C(2). Normally, as observed earlier, when a sale agreement was executed, payment was received in part performance of the agreement, then vendor would not get anything more than the amount agreed in the sale agreement. There may be a time gap between execution of agreement to sell and execution of sale deed. In between if circle rate is being enhanced, then he would like to challenge adoption of higher sale value on the strength of sale agreement. In that situation, unnecessary energy would be devoted in ascertaining fair market value of the property on the date of sale. The encumbrance on the property by virtue of sale agreement would also goad the DVO to

determine the fair market value of the property on the date of sale at a lesser amount than the value adopted for the purpose of payment of stamp duty. We have already made a reference to Specific Relief Act and how a vendor or vendee could enforce the sale agreement under Specific Relief Act. Under such enforcement, they would settle their right on the basis of agreed terms in the sale agreement. This proviso would only simplify this exercise i.e. instead remitting the matter to the DVO under section 50C(2), he would conduct an inquiry as to what could be value of the property on the date of execution of the agreement, and whether such agreement has created any encumbrance or not. There could be a difference in the actual sale consideration than the amount on which stamp duty was paid. This proviso has simplified this thing. It contemplates that stamp duty valuation of the property for the purpose of stamp duty payment on the date of agreement can be deemed as full consideration of the capital asset. Thus, in this way, the proviso can be construed as clarificatory in nature, and can be applied on pending matters as already held by the ITAT in the case of Dharamshibhai Sonani (supra).

18. In the present case, we find that the assessee has contended that consideration of Rs.3,00,11,000/- is more than the valuation for the purpose of stamp duty as on 8.2.2010. No where the assessee has pointed out specific rate on the date of agreement. Therefore, we allow these two grounds of appeal for the statistical purpose. We set aside this issue to the file of the AO. The Id.AO shall call for circle rate for the purpose of stamp duty valuation of this property as on 8.2.2010. He shall determine the sale value of the property on the basis of circle rate applicable on this property on 8.2.2010, and thereafter compute long term capital gain assessable in the assessment year 2013-14. In other words, transfer of this

property would be construed on 5.6.2012, but the full value of consideration is to be equivalent to the amount on which stamp duty was payable on 8.2.2010.

19. In the next ground of appeal, grievance of the assessee is that the Id.CIT(A) has erred in not granting deduction/exemption under section 54EC of the Act amounting to Rs.50 lakhs.

20. Brief facts of the case are that after agreement to sell the assessee has received sale consideration from the vendee. He has made investment in NHAI bonds and claimed deduction under section 54EC. The Id.AO has observed that such investments were made before the registration of sale deed, and therefore, he is not entitled for the exemption. The issue is, whether investment made from the advance received on sale of capital asst will qualify for grant of exemption under section 50EC or not. Board has issued a circular whereby it has laid down that such assessee would be entitled for exemption. Circular bearing no.359 dated 10.5.1983 reads as under:

CIRCULAR : NO. 359 [F.NO. 207/8/82-IT(A-II)], DATED 10-5-1983

1. Section 54E provides for exemption of long-term capital gains if the net consideration is invested by the assessee in specified assets within a period of six months after the date of such transfer. A technical interpretation of section 54E could mean that the exemption from tax on capital gains would not be available if part of the consideration is invested prior to the date of execution of the sale deed as the investment cannot be regarded as having been made within a period of six months after the date of transfer.

2. On consideration of the matter in consultation with the Ministry of Law, it is felt that the foregoing interpretation would go against the purpose and spirit of the section. As the section contemplates

investment of the net consideration in specified assets for a minimum period and as earnest money or advance is a part of the sale consideration, the Board have decided that if the assessee invests the earnest money or the advance received in specified assets before the date of transfer of asset, the amount so invested will qualify for exemption under section 54E.

21. Considering the above circular, we allow this ground of appeal and direct the AO to grant exemption under section 54EC of the Act. Ground no.3 is allowed.

22. In the result, appeal of the assessee is partly allowed for statistical purpose.

Pronounced in the Open Court on 26th September, 2018.

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

**Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER**