

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH ' G', NEW DELHI)**

BEFORE SHRI N. K. SAINI, ACCOUNTANT MEMBER
AND SHRI KULDIP SINGH, JUDICIAL MEMBER

I.T.A. No. 3644/Del/2010

Assessment year : 2007-08

ACIT, Circle 32(1),
New Delhi

Vs.

Sunil Batra,
A-432, Defence Colony,
New Delhi.

GIR / PAN:AAFPB2382M

(Appellant)

(Respondent)

Appellant by : Shri Sujit Kumar, Sr. DR
Respondent by : Shri Sudhir S Silwal, Adv.

Date of hearing : 24.08.2015

Date of pronouncement : 30.09.2015

ORDER

PER KULDIP SINGH, JM:

The appellant, ACIT, Circle 32(1), New Delhi has filed the present appeal and sought to set aside the order dated 26.05.2010 passed by Ld. CIT(A) XXVI, New Delhi on the grounds inter alia that:-

"1) The Ld. CIT(A) has erred in deleting the addition of Rs.4,18,050/- on account of Short Term Capital Gain on sale of property located at PNA-013, The Pinnacle, Gurgaon as the assessee has not disclosed the expenses relating to sale of the above property. "
2) The Ld. CIT(A) has erred in deleting the addition of Rs.1133524/- on account of S.T.C.G. on sale of property-located at PC-II/303, Essel Tower, Gurgaon as the assessee was not able to file any document of any evidence for the claim of sale in 2004-05 and no evidence was furnished regarding any L.T.G.C. declared in relevant A.Y."

3) The Ld. CIT(A) has erred in deleting the addition of Rs.1133524/- on account of S.T.C.G. on sale of property located at PC-II/303, Essel Tower, Gurgaon as the assessee was in the business of real estate and the loan was disbursed after five months from the date of purchase of property. The loan was also far in excess of the share of assessee in the cost of property.”

2. Briefly stated, the facts of the case are: during the processing of income tax return filed by the assessee for the Assessment Year 2007-08 declaring total income of Rs.21,42,260/-, the case was put under scrutiny and consequently, notice u/s 143(2) of the Income tax Act, 1961 (hereinafter referred as the ‘Act’), was issued on 29.09.2008. Shri S. S. Silwal, Advocate attended the proceedings, filed details in response to questionnaire dated 14.07.2009, filed details / documents on record and has complied with the notice issued u/s 142(1) dated 14.07.2009 and 07.10.2009.

4. The assessee filed a computation regarding purchase and sale of property situated at PNA-013, The Pinnacle, Gurgaon, with A.O. by claiming sale consideration at Rs.,41,58,100/- and cost of acquisition as on 19.01.2006 at Rs.40,92,651/- and assessed the short term capital gain (STCG) at Rs.65,449/-. However, the A.O. assessed the STCG at Rs.4,83,500/- on the basis of receipt dated 25.07.2006 depicting sale price of Rs.43,51,500/- received by the assessee from Shri Rajan Ramanni and Smt. Rajini Ramanni Resident of 57, Anand Lok, New Delhi as full and final settlement against sale of aforesaid property. Sale proceeds of Rs.43,51,500/- depicted in the receipt (supra) includes an amount of Rs.38,68,000/- paid by the assessee for the property in question to M/s. DLF Universal Ltd. and consequently made an addition of rs.4,18,050/- being the income derived from STCG on the sale of aforesaid property.

5. The assessee has claimed STCG of Rs.17,38,753/- on the sale of property situated at PC-II/303, Essel Tower, Gurgaon by claiming sale consideration at Rs.50,00,000/- and the cost of acquisition at Rs.32,61,247/- (sale consideration Rs.50,00,000 – cost of acquisition Rs.32,61,247 = STCG Rs.17,38,753/-). However, the A.O. observed that the assessee has wrongly shown the cost of acquisition of the property at Rs. 32,61,247/- as against the actual acquisition cost of Rs. 21,27,723/- on the basis of the fact that there were three co-sharers in the property in question namely; Shri Sunil Batra, Shri Damodar Das Batra and Smt. Asha Batra, each having 1/3rd share and Shri Damodar Das Batra, father of the assessee has shown the cost of acquisition of Rs.21,27,723/- only. Consequently, excess payment of costs of acquisition claimed by the assessee to the tune of Rs.11,33,524/- has been added to the income of the assessee on the STCG.

6. Ld. CIT(A) deleted the additions made in the assessment order dated 21.12.2009. Feeling aggrieved, the Revenue has come up before the Tribunal by filing the present appeal.

7. At the very outset Ld. D.R. conceded that only grounds No. 1 & 2 are effective grounds to be argued before the Tribunal and contended that the Ld. CIT(A) has wrongly assessed the cost of acquisition of properties located at PNA-0134, the Pinnacle, Gurgaon and PC-II/303, Essel Tower, Gurgaon and relied on the judgement cited as CIT Vs Tata Iron & Steel Ltd. 231 ITR 285 (S.C.). On the other hand, Ld. A.R. relied upon the impugned order passed by Ld. CIT(A) and contended that when ICICI Bank has directly issued the cheque in favour of the builder to purchase the property and benefit of interest is required to be given to the assessee and prayed for dismissal of appeal.

8. Now, the first issue to be determined is, *“as to whether Ld. CIT(A) has erred in deleting the addition of Rs.4,18,050/- on account of short term capital gain on sale of property located at PNA-013, the Pinnacle, Gurgaon as the assessee has not disclosed the expenses relating to sale of the above property.”* As per the computation filed by the assessee along with his return of income, he has claimed short term capital gain (STCG) of Rs.65,449/-, which is detailed as under:

Sale consideration	Rs.42,58,100/-
Less COA on 19.01.2006	<u>Rs.40,92,651/-</u>
STCG	<u>Rs. 65,449/-</u>

8.1 However, on the other hand, A.O. by relying upon the receipt dated 25.07.2006 issued by the assessee himself in favour of Mr. Rajan Ramani and Mrs. Rajani Ramani lying at page 2 of the paper book filed by the assessee, observed that STCG comes to Rs.4,83,500/- instead of Rs.65,449/- as claimed by the assessee, tabulated as under:

Sale consideration	Rs.43,51,500/-
Less C.O.A.	<u>Rs.38,68,000/-</u>
STCG	<u>Rs.04,83,500/-</u>

8.2 Ld. CIT(A) in para 6.2 at page 9 of the impugned order observed that the A.O. has erroneously assessed the cost of acquisition of property at PNA-013, the Pinnacle, Gurgaon at Rs.38,68,000/- as against actual cost of acquisition of Rs.40,92,651/-. During the proceedings before Ld. CIT(A), he has called comments from Ld. JCIT, Range 32, New Delhi which are as under:

“In respect of the computation of capital gains on property located a PC-2/303, it is submitted that only two components

could be deducted from the full value of consideration while computing capital gains. These are expenditure incurred wholly and exclusively in connection with the transfer and the cost of acquisition of assets along with the cost of any improvement interest on capital for purchased property does not increase the cost of acquisition of asset (MLG Enterprises Vs CIT (Karnataka) (H.C.) 167 ITR 11 : ITO Vs Vikram Sadananda Hoskote (ITAT, Mum.) 1800 SOP 130). Therefore, the computation was done as per the provision of the I.T. Act, 1961.”

8.3 Ld. D.R. by relying upon the judgement cited as CIT Vs Tata Iron & Steel Co. Ltd. 231 ITR 285 (S.C.) contended that Ld. CIT(A) has wrongly ignored the law laid down by Hon'ble Supreme Court in the judgement (supra) by adding the amount of Rs.1,58,209/- as interest paid to Mrs. Gunjan Batra in the cost of acquisition.

8.4 Hon'ble Apex Court in the judgement (supra) held as under:

“The manner of repayment of a loan cannot affect the cost of the assets acquired by the assessee. What is the actual cost must depend on the amount paid by the assessee to acquire the asset. The amount may have been borrowed by the assessee, but even if the assessee did not repay the loan it will not alter the cost of the asset. If the borrower defaults in repayment of a part of the loan, the cost of the asset will not change. What has to be borne in mind is that the cost of an asset and the cost of raising money for purchase of the asset are two different and independent transactions. Even if an asset is purchased with non repayable subsidy received from the Government, the cost of the asset will be the price paid by the assessee for acquiring the asset.

Held accordingly, that for the assessment yeas 1960-61 and 1961-62, at the time of repayment of loan, there was a fluctuation in the rate of foreign exchange as a result of which the assessee had to repay a much lesser amount than he would have otherwise paid. This was not a factor which could alter

the cost incurred by the assessee for purchase of the asset. The assessee may have raised the funds to purchase the asset by borrowing but what the assessee has paid for it, is the price of the asset. That price cannot change by any event subsequent to the acquisition of the asset. In our judgment, the manner or mode of repayment of the loan has nothing to do with the cost of an asset acquired by the assessee for the purpose of his business.”

8.5 The ratio of the judgement (supra) is applicable to the facts and circumstances of the case and the cost of acquisition in the present case is to be taken at the actual amount of Rs.38,68,000/- paid by the assessee to M/s. DLF Universal Ltd. as is apparent from the receipt placed at page 2 of the paper book filed by the assessee and the amount of Rs.1,58,209/- cannot be added to the amount being the interest paid by him to Mrs. Gunjan Batra.

8.6 Ld. CIT(A) in para 6.2 and 6.3 of the impugned order has allowed the expenses to the tune of Rs.36,442/- as transfer charges and Rs.30,000/- stated to have been paid as commission by the assessee to Mr. P. K. Ganesh for the sale of property merely on the basis of assumptions and presumptions. There is no reference of making payment of transfer charges of Rs.36,442/- in the receipt dated 25.07.2006 lying at page 2 of the paper book filed by the assessee nor any separate receipt has been set up by the assessee during proceedings before the A.O. or Ld. CIT(A) as the case may be. Even otherwise, property in question has never been transferred in the name of assessee rather he has further sold the same on the basis of agreement / receipt dated 25.07.2006 by accepting part sale consideration of Rs.43,51,500/- and the balance payment of

Rs.1,25,04,000/- was to be paid by the purchaser to the builder directly. Only after making the full and final sale consideration, the transfer of property was to be effected in the name of purchaser.

8.7 So far as the issue of making payment of commission charges of Rs.30,000/- by the assessee to Shri K. P. Ganesh vide receipt lying at page 9 of the paper book filed by the assessee is concerned, again there is not an iota of evidence on record nor there is any reference in the receipt dated 25.07.2007 lying at page 2 of the paper book that Rs.30,000/- has been paid as commission to Shri K P Ganesh, otherwise receipt dated 25.07.2006 would have contained the reference of payment of commission charges of Rs.30,000/-. Had Shri K. P. Ganesh been the broker in the sale of property in question, he would have signed the receipt dated 25.07.2006 as witness. So, till the finalization of deal vide receipt dated 25.07.2006 Shri K. P. Ganesh was not in the picture nor the assessee has preferred to bring on record as to what services he has provided to qualify for receipt of commission of Rs.30,000/-and at what rate. So, claiming the transfer charges of Rs.36,442/- and commission charges of Rs.30,000/- by the assessee to be included in the cost of acquisition is misconceived. Ld. CIT(A) has allowed the same on mere asking of the assessee.

8.8 The assessee has subtracted the amount of Rs.1,93,400/- from the sale consideration of Rs.43,51,500/- on the pretext that the amount has been directly paid by the buyer to the builder and his claim has been allowed by Ld. CIT(A) without having any evidence on record in this regard. A bare perusal of the receipt dated 25.07.2006 lying at page 2 of the paper book issued by the assessee himself in favour of

the buyer clearly shows that property was sold by the assessee for Rs.43,51,500/- and there is no detail in the same as to which account the amount of Rs.1,93,400/- was transferred. Moreover, when the receipt dated 25.07.2006 is examined in totality, the assessee has received Rs.43,51,500/- from Mr. Rajan Ramani and Mrs. Rajini Ramani being full and final settlement amount which included the amount of Rs.38,68,000/- paid by the assessee to the builder M/s. DLF Universal Ltd., Gurgaon. Even otherwise, when the assessee himself has accepted the fact that he has sold the property for Rs.43,51,500/-, it does not lie in his mouth that out of the said amount he has paid Rs.1,93,400/- to the builder, particularly when it is categorically mentioned in the receipt dated 25.07.2006 that he has received an amount of Rs.43,51,500/- from the purchaser. So, the finding of Ld. CIT(A) qua the addition of Rs.4,18,050/- are perverse, hence, hereby set aside.

9. The second ground of appeal is. **“as to whether Ld. CIT(A) has erred in deleting the addition of Rs.11,33,524/- on account of STCG on sale of property located at PC-II/303, Essel Tower, Gurgaon as the assessee was not able to file any document of any evidence for the claim of sale in 2004-05 and no evidence was furnished regarding any LTCG declared in relevant Assessment Year.”**

9.1 Undoubtedly the assessee along with his father and mother, was having 1/3rd share in the property in question sold for Rs.1.50 crores to Sanjay Sucheta and Mrs. Ritu Sucheta. Assessee has claimed to have acquired the same at Rs.32,61,247/- i.e. 1/3rd share. The A.O. on the basis of undisputed fact that Shri Sunil Batra assessee being co-

sharer in the property in question to the extent of 1/3rd share along with Shri Damodar Das Batra and Smt. Asha Batra had purchased the same for Rs.50,00,000/- and as such the cost of acquisition qua each co-sharer comes to Rs.21,27,723/- and by treating the cost of acquisition at Rs.21,27,723/- computed the STSCG at Rs.28,72,276/- at par with his (assessee) father Shri Damodar Das Batra, who has also 1/3rd share in the property and thereby made addition of Rs.11,33,524 to the income of assessee.

9.2 Ld. CIT(A) by erroneously relying upon the judgement cited as CIT Vs Hindustan Petroleum Ltd., 98 ITR 167 (S.C.) and CIT Vs Mithlesh Kumari, 92 ITR 09 extended the relief of interest paid by the assessee on the borrowed loan of Rs.35,00,000/- used for the purchase of property in question by adding the same to the cost of acquisition, which is not permissible under law and the judgements cited as Hindustan Petroleum Ltd. and Mithlesh Kumari (supra) are not applicable to the facts and circumstances of the case.

9.3 Hon'ble Supreme Court in case cited as CIT Vs Tata Iron and Steel Co. Ltd. (supra) discussed in preceding paras 8.3 and 8.4, held that the actual cost of acquisition is the amount paid by the assessee to acquire the asset which does not include the interest if any paid by the assessee on the loan borrowed for the purpose of purchasing such asset.

9.4 So, in the light of undisputed facts and law discussed above, the cost of acquisition of property in question in the hands of the assessee, is Rs.21,27,723/-, as has been claimed by Shri Damodar Das Batra, father of the assessee one of the co-sharer in the property in question

to the extent of 1/3rd share. So, Ld. CIT(A) has committed patent illegality by considering the cost of acquisition at Rs.32,61,247/-. We, therefore, set aside the impugned order of the Ld. CIT(A) on this issue.

10. Consequently, the present appeal filed by the Revenue is hereby allowed.

11. Order pronounced in the open court on 30th Sep., 2015.

Sd./-
(N. K. SAINI)
ACCOUNTANT MEMBER
Date: 30th Sep., 2015 2015

Sd./-
(KULDIP SINGH)
JUDICIAL MEMBER

Sp

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

True copy.

By Order

(ITAT, New Delhi).

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	9/9		Sr. PS/PS
2	Draft placed before author	10,11,18,23,30/9		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS	30/09/15		Sr. PS/PS
6	Kept for pronouncement	30/09		Sr. PS/PS
7	File sent to Bench Clerk	30/9		Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			

