

IT : Where Assessing Officer made addition to income of assessee towards long term capital gain on sale of properties by virtue of power of attorney executed by NRIs, who were real owners of properties sold, properties did not belong to assessee and, therefore, capital gain arising from those properties could not be taxed in hands of assessee solely on ground that persons being real owners had not filed their income tax return

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IN THE ITAT AHMEDABAD BENCH 'SMC'

Samir Trikambhai Patel

v.

Income Tax Officer

WASEEM AHMED, ACCOUNTANT MEMBER
AND MS. MADHUMITA ROY, JUDICIAL MEMBER
IT APPEAL NO. 1440 (AHD.) OF 2016
[ASSESSMENT YEAR 2011-12]
AUGUST 8, 2018

S.N. Divatia and Mehul Talera *for the Appellant.* **Keyur Patel, Sr. DR** *for the Respondent.*

ORDER

Ms. Madhumita Roy, Judicial Member - The instant appeal has been filed by the assessee before us against the order dated 30.02.2016 passed by the Commissioner of Income Tax(Appeals)-3, Ahmedabad [Ld.CIT(A) in short] for Assessment Year (AY) 2011-12 arising out of the order dated 20.03.2014 passed by the ITO, Ward-6(5), Ahmedabad.

2. The main grievance of the assessee is that against the order passed u/s.250 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") by the Ld. CIT(A) in upholding the addition of Rs.38,65,755/- towards Long Term Capital Gain (LTCG) on sale of property without taking into consideration the submissions made by the assessee and the evidence adduced in support of the contentions that the assessee acted as a constituted Attorney by virtue of two Power of Attorney executed by the NRIs in the sale transactions in question. Further that, the decision of the Ld. CIT(A) making the assessee liable to pay tax u/s.5 of the Act being the representative of non-residents on the LTCG arising out of sale of the immovable properties by the NRIs, the real owners of the properties has also been challenged before us.

3. The facts leading to the issues is that the assessee is an individual having income from share from partnership-firms, capital gain and income from other sources filed his return of income for the AY 2011-12 on 28.03.2012 declaring the return of income Rs.11,11,270/-. Upon scrutiny u/s.143(3) of the Act addition of Rs.38,65,757/- towards LTCGs was made and the total income was assessed at Rs.49,77,020/-. During the assessment proceedings upon verification of details furnished by the assessee in respect of AIR information, it appears that the assessee has sold immovable property for sale consideration of Rs.41 lakhs and Rs.34 lakhs out of which Long Term Capital Gain was of Rs.9,24,371/- and Rs.29,41,386/- respectively accrued. The assessee submitted before the Ld. AO that he has only signed those documents by virtue of Power of Attorney executed by Shri Arvindbhai Ambalal Patel and Shri Bhikhabhai Dahyabhai Patel, the original vendors of such sale transactions. On 07.02.2014, a

show-cause notice was issued directing the assessee to explain as to why capital gain of Rs.9,24,371/- and Rs.29,41,386/- would not be taxed in the hands of the assessee. In response whereof, the assessee by and under the written submission dated 27.02.2014 contended before the Ld. AO, which, however, was not accepted on the premise that the residential address of the vendors was not furnished by the assessee neither the vendors filed their return of income. The AO considered the assessee as goods as the owner of the property and added the amount of Rs.38,65,657/- to the income of the assessee towards capital gain.

4. In appeal, the Ld. CIT(A) confirmed the order passed by the Ld. AO and hence the instant appeal.

5. The Advocate appearing for the assessee submitted before us that the assessee has executed the sale deed by virtue of Power of Attorney executed by the NRIs to act on their behalf. Neither the consideration amount of those transactions were credited in the account of the assessee. He further contended before us that the AO has not made any enquiry on the genuineness of the whereabouts of the NRIs in the address as mentioned in the sale deed as well as the POA. In the absence of any enquiry done by the authorities below as mentioned hereinabove to come to the finding that the sale consideration has ultimately received by the assessee the assessee cannot be made liable to pay tax on LTCG out of the transaction in question. Since the authority has failed to levy tax on the capital gain accrued to the vendors additions made on the assessee is arbitrary and erroneous and thus liable to be set aside.

5.1 On the other hand, the Ld. Representative of the revenue supported the orders passed by the authorities below.

6. We have heard the Representatives of the respective parties. We have perused the relevant materials available on record. We find from the records that the assessee contended before the Ld. AO that the assessee executed the deed of sale dated 12.10.2010 as a constituted Attorney of Shri Arvindbhai Ambalal Patel as a vendor, by virtue of a Power of Attorney dated 03.06.2010 registered in the Office of the Sub-Registrar, Ahmedabad-2, Vadaj. The consideration money of such sale to the tune of Rs.41 lakhs was credited in the bank account of the said Shri Arvindbhai Ambalal Patel who is a Non Resident Indian. The residential address of the actual vendor being Shri Arvindbhai Ambalal Patel is also mentioned in the second page of the Sale Deed as well as the first page of the General Power of Attorney as mentioned above conferring power upon the assessee to execute the said sale deed as follows:

(3) My Attorney Mr. Samir Trikambhai Patel can carry out all activities for protecting my ownership rights in respect of the said property and I have appointed him as attorney independently. All activities carried out by him will be admitted by and binding to me and all activities carried out by him will be treated as carried out by me personally. This General Power of Attorney will be limited only for the land of Sub Plot Number 10 situated in the scheme or plots on non agricultural land of part number 2 of Revenue Survey Number 76 of the limit of village Sola and I give assurance that I shall never revoke or cancel this power of attorney."

7. Similarly, the assessee has also executed the sale deed dated 23.11.2011 by virtue of a Power of Attorney dated 02.06.2010 executed by the original vendor Shri Bhikhabhai Dahyabhai Patel in favour of assessee for execution of sale deed. The power of attorney was executed by said Shri Bhikhabhai Dahyabhai Patel on 02.06.2010. The address of such Shri Bhikhabhai Dahyabhai Patel was also available at page-2 of the Sale Deed and page-1 of the Power of Attorney (PAO). All the documents were executed before the Sub-Registrar, Ahmedabad-2, Vadaj. The sale consideration of Rs.34,00,000/- has been credited in the bank account of Shri Bhikhabhai Dahyabhai Patel, the original vendor of the transaction.

7.1 It is also evident from the records available before us that the copy of the purchase agreement, Power of Attorney and the Sale Deeds of those immovable properties were duly produced by the assessee before the Ld. AO during the assessment proceedings. It appears from those documents that nowhere it is mentioned the assessee is the real owner of the property or the consideration money has been received by the assessee. It is clearly evident that those properties are not belonged to the assessee and therefore capital gain arising from those properties cannot be taxed in the hands of the assessee solely on the ground that the person being the real owners have not filed their income-tax returns. The earlier purchase agreement of Plot No.10 dated 18.04.2007 of a consideration of Rs.4,07,000/- speaks of the name of Shri Arvindbhai Ambalal Patel at page-2 of the said agreement as the purchaser of the said property. Similarly, at page No.2 of the purchase agreement of Plot No.6 dated 18.04.2007 of a consideration of Rs.3,35,400/- speaks of Shri Bhikhabhai Dahyabhai Patel as purchaser of the said property. Therefore, it is evident from those two purchase deeds that it was not the assessee but Shri Arvindbhai Ambalal Patel and Shri Bhikhabhai Dahyabhai Patel were the original owners of those two properties who subsequently sold the same out of which the LTCG have been accrued to them. The assessee in those two transactions in question have acted only as a constituted attorney by virtue of the POAs executed in his favour by the original vendors. Since both the vendors are NRIs in absence of whom the assessee acted as a representative on their behalf and executed the transaction by way of deed of sale. It also appears from the records that upon verification of the bank statement of various banks of the assessee as submitted by the assessee before the AO, nothing revealed that the assessee has received the said consideration of Rs.41,00,000/- and Rs.34,00,000/- as paid by the purchasers in respect to those two transactions. We find that though the assessee has made his submissions before the AO stating the entire facts relating to the transaction of sale faithfully, the same was not considered by the AO in its proper perspective.

7.2 In the penultimate paragraph, the AO concluded that the assessee failed to furnish the residential address of the vendors and the vendors have not filed returns of income, in the absence of which he considered the assessee as good as the owner of the properties in question and made him liable to be taxed on the capital gain on sale of these properties. Accordingly, an addition of Rs.38,65,657/- was also made in the income of the assessee. We find in the appellate proceedings, the Ld. CIT(A) has not doubted the ownership of those two NRs in respect of the respective properties which were purchased by their sources of finance more than three years ago. Neither he has denied that the sale consideration amount has been credited in the bank account of the vendors. While coming to a conclusion, the Ld. CIT(A) observed that those two NRIs had purchased properties out of their own funds and transferred the same by way of sale for making profit in India evaded tax through constituted Attorney through a colorable device which is not approved under the Income Tax Act, 1961. According to him, income arisen in India from certain real estate transaction in India is liable to be taxed u/s.5 of the Income Tax Act, 1961. He further observed that the NRIs have not filed return of income; no PAN being on record. The AR, according to the Ld. CIT(A) was unable to supply sufficient information about those two NRIs to take further action against them. In the impugned order, the Ld. CIT(A) particularly mentioned that the assessee has failed to discharge its onus so as to enable the AO to take recourse to the provisions of section 5(2)(a) of the Act. There is nothing on record that the income arisen in India has been taxed in United States in terms of the other provisions of DTAA. He, thus, dismissed the appeal preferred by the assessee and confirmed the addition made by the AO.

8. With utter surprise we note that in spite of having the information about the residential address of those two NRIs in India, the AO had not taken any initiative to make an enquiry about the genuineness of the whereabouts of the said vendors with intend to impose tax on capital gain upon them. Instead of doing so, he has made the assessee liable for payment of tax by making addition of Rs.38,65,755/- without any documents since he failed to make addition on the income of the vendors knowing fully well that the payments made by the purchasers have not been credited in the accounts of the assessee but

in the NRIs. Neither any investigation has been conducted by the AO of the amount credited in the accounts of those two NRIs made by the purchasers. The genuineness of the receipt of the consideration has neither been questioned by the AO not been investigated in the absence of which the addition is liable to be set aside. During the appellate proceeding, the Ld. CIT(A) was provided with the copies of Passport Card No.498676570 issued by the United States, Department of State (USA) of Shri Arvindkumar Ambalal Patel and Passport Card No.C00736040 issued by United States, Department of State (USA) of Shri Bhikhabhai Dahyabhai Patel as identity proof. No step, whatsoever, taken by the first appellate authority so as to make an investigation into the matter by the CIT(A) on the basis of such passport Cards or the residential address mentioned both in the sale deed and the Power of Attorney which were already available with the AO, a minimum remand report was also not called for while discharging the function as an appellate authority before confirming the addition made by the AO. On the other hand, he has made the assessee responsible to discharge its onus so as to justify the action of the AO to take recourse to the provisions of section 5(2)(a) or (b) of the Act. We, therefore fail to appreciate the stand taken by the first appellate authority who has acted in such lackadaisical manner and without any cogent document against the assessee while confirming the addition made by the AO.

8.1 The Representative of the Revenue prayed before us to send the matter to the AO for further verification of the consideration of the sale in question. We are declined to entertain such a prayer made on behalf of the revenue before us. Allowing such prayer at this stage would be nothing but a further burden and/or harassment and/or hardship on the assessee and of course it will be a seal of premium on the inaction/non-action and also arbitrary action on the part of the authorities below. We therefore taking into consideration of the entire aspects of the matter as discussed above find it fit to delete the orders of the addition of the authorities below.

9. In the result, appeal of the assessee is allowed.

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