

**IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.156/Jodh/2020
(ASSESSMENT YEAR- 2015- 2016)**

Shri Madhusoodan Paliwal, 95-96D, Hiran Magri, Sector-14, Udaipur-313002 (Raj)	Vs	ITO Ward-1(1) Udaipur (Raj)
(Appellant)		(Respondent)
PAN No. AHLPP1550C		

Assessee By	Shri Sandeep Jhanwar, CA
Revenue By	Shri S.M.Joshi, JCIT-DR
Date of hearing	21/03/2023
Date of Pronouncement	22/03/2023

ORDER

PER KUL BHARAT, J.M.:

The present appeal filed by the assessee for the assessment year 2015-2016 is directed against the order of Ld. CIT(A)-1, Udaipur dated 11.09.2020. The assessee has raised following grounds of appeal:-

1. *“Under the facts & circumstances of the case the Ld.CIT(A)-1, Udaipur has erred in upholding the addition of Rs.28,86,600/- in respect of alleged unexplained investment made in immovable property by applying the provision of section 69.*
2. *The appellant craves to amend, alter, add the ground (s) before or during the course of hearing.”*

2. Facts giving rise to the present appeal are that in this case, original return of income was filed by the assessee on 07.09.2015, declaring total income at INR 6,37,410/-. The return was processed u/s 143(1) of the Income Tax Act, 1961 (“the Act”). Thereafter, the case was selected for limited scrutiny for the reason large cash deposits in saving bank accounts and the assessee had also transferred one or more properties during the year. Thereafter, the Assessing Officer (“AO”) assessed the income of the assessee u/s 143(3) of the Act at INR 51,25,510/-. The AO while assessing the income at INR 51,25,510/-, had made addition in respect of unexplained cash deposit of INR 10,10,500/- and unexplained investment of immovable property u/s 69 of the Act at INR 34,77,600/-.

3. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A), who after considering the submissions, partly allowed the appeal. Thereby, Ld.CIT(A) sustained the addition made u/s 69 of the Act. However, in respect of bank deposits, Ld.CIT(A) accepted the contention of the assessee and deleted the addition.

4. Aggrieved against the sustaining of addition of INR 34,77,600/- by Ld.CIT(A), the assessee is in appeal before this Tribunal.

5. At the outset, Ld. Counsel for the assessee submitted that in this case, assessment was taken up for limited scrutiny and the items to be scrutinized, was related to cash deposits and transfer of one or more properties during the year. Ld. Counsel for the assessee submitted the decision of the authorities below is contrary to the reasons for which the scrutiny was to be made. The scrutiny was related to transfer of the assets. However, the impugned addition has been made on the basis of acquisition of the property. He therefore, submitted that the impugned addition deserves to be deleted on this ground alone as the AO was not having necessary jurisdiction to scrutinize this item without prior approval of the Competent Authority.

6. On the other hand, Ld. JCIT DR opposed these submissions and supported the orders of Assessing authority. He submitted that the term “transfer of property” would include the “purchase of property” as well. He submitted that there is no infirmity in the impugned order, same deserves to be sustained.

7. We have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. The Revenue has not disputed the

fact that one of the items for scrutiny was that the assessee had also transferred one or more properties during the year. Ld.CIT(A) dismissed the contention of the assessee by observing as under:-

“In the written submissions filed before me, the appellant has contended that the issue of purchase of immovable property has not been a reason for selection of assessee's case for scrutiny under CASS as the reason for selection of the case was transfer of the property whereas the assessee purchased an immovable property. By raising this contention, the appellant resorted to the plea that the "transfer" does not include purchase. However, I am not inclined to agree with this contention of the appellant. Here we need to consider what is transfer? According to section 8 of the Transfer of Property Act 1882 (The Act), by transferring property, transferor transfers all rights in a property. The term 'transfer' has been defined u/s 2(47) of the Act which includes any transaction allowing the possession of the property as per section 53A of the Transfer of Property Act, 1882. Section 5 of the Act defines "Transfer of Property" as "In the following sections 'transfer of property' means an act by which a living person conveys property in present or in future, to one or more other living person, or to himself, and one or more." Section 2(47) of the Income Tax Act defines transfer as under:-

" Transfer, in relation to a capital asset, includes,—

- (ii) the extinguishment of any rights therein; or*
- (iii) the compulsory acquisition thereof under any law; or*

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment;] 6[or]

(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 1 (4 of 1882); or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect, of transferring, or enabling the enjoyment of, any immovable property."

It is also necessary to understand the definitions of "immovable property" and "transfer" in section 269UA(d) and (f) of the Act, which read as under:-

269UA.....

(2)(d) "immovable property" means-(1) any land or any building or part of a building, and includes, where any land or any building or part of a building is to be transferred together with any machinery, plant, furniture, fittings or other things, such machinery, plant, furniture, fittings or other things also.

Explanation. --For the purposes of this sub-clause, "land, building, part of a building, machinery, plant, furniture, fittings and other things" include any rights therein ;

(ii) any rights in or with respect to any land or any building or a part of a building (whether or not including any machinery,

plant, furniture, fittings or other things therein) which has been constructed or which is to be constructed, accruing or arising from any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement of whatever nature), not being a transaction by way of sale, exchange or lease of such land, building or part of a building ;

(f) "transfer"-

(i) in relation to any immovable property referred to in sub-clause(i) of clause (d), means transfer of such property by way of sale or exchange or lease for a term of not less than twelve years, and includes allowing the possession of such 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).

Besides, the conditions defined in Section 53A of the Transfer of Property Act are satisfied in the appellant's case. This section is reproduced below for ready reference:

"Section 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 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 the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed thereof 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 the right specifically 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."

A plain reading of Section 53A of the Transfer of Property Act shows that in order that a contract can be termed to be "of the nature referred to in Section 53A of the Transfer of Property Act" it is one of the necessary preconditions that transferee should have or is willing to perform his part of the contract. In order to attract Section 53A of the transfer of property Act, the following conditions need to be fulfilled:-

- (a) There should be contract for consideration;*
- (b) It should be in writing;*
- (c) It should be signed by the transferor;*
- (d) It should pertain to the transfer of immovable property;*
- (e) The transferee should have taken possession of property;*
- (f) Lastly, transferee should be ready and willing to perform the contract.*

From the legal position as referred to above, it is clear that in every case of transfer of immovable property, there has to be one seller and one purchaser or to say one transferor or one transferee. Seller or transferor (seller) is someone who transfers his property to another while transferee (purchaser) is a person to whom property is transferred. Sale is the most convenient mode of transfer of immovable property and consequently purchase is the ideal mode for acquiring title. There is no dispute in appellant's case that there took an "act of transfer" of immovable property vide registered document dated 25-11-2014 and the appellant acquired title over the property by way of purchasing this property in the said transfer by acting as transferee. Transfer of property is an act of conveying property from one person to another. In this act of conveying property, the appellant was a purchaser. Therefore, it is not legally correct to argue that the transfer of property does not include the purchase of property and only restricted to sale of property. In simple words, definition of transfer includes both purchase and sale of property. If appellant's contention be accepted then the whole purpose of various Acts gets defeated. The appellant's case was selected for scrutiny mainly for following reasons:-

- a. Large cash deposits in savings bank account*
- b. Assessee has also transferred one or more property during the year.*

The AO duly examined the issue of cash deposits in the bank account and also the issue of transfer of property and duly completed the assessment making additions on the issues for which the case was selected for limited scrutiny. The appellant

has raised vague and frivolous contention / plea that transfer of property does not include purchase of property or purchase of property was not the reason for which the case was selected for scrutiny. However, these contentions of the appellant have already been negated in the light of the legal position and discussion made above. Even judgment relied on by the appellant in the case of M/s. Nazare Vikas Karykari Seva Shakari Samiti Society Ltd. (supra) is misplaced and not applicable to the facts of the present case. In the said judgment, the Hon'ble ITAT Pune Bench allowed the assessee's appeal on the ground that the addition was made on the non-CASS issue without obtaining due permission from the superior authorities. Whereas in the instant case, the AO only examined the issues for which the case was selected for scrutiny and made the additions on these issues only. Accordingly, this contention of the appellant is rejected being devoid of merits.”

8. We are unable to affirm the aforesaid reasoning of Ld.CIT(A) as the term “transfer” as defined u/s 2(47) of the Act speaks as under:-

2(47) *"transfer", in relation to a capital asset, includes,—*

- (i) the sale, exchange or relinquishment of the asset ; or*
 - (ii) the extinguishment of any rights therein ; or*
 - (iii) the compulsory acquisition thereof under any law ; or*
 - (iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ;*
- or*

- (iva) the maturity or redemption of a zero coupon bond; or*
- (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*
- (vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.*

Explanation 1.—For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA.

Explanation 2.—For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India].”

9. Acquisition of capital assets would not fall under this definition as it is the case of acquisition of capital asset but not of a sale of capital asset. The assessee should have pre-existing rights into the capital asset which he intends to transfer in favour of a third party. Hence, the pre-existing rights, interests and the title is *sine qua non* for transferring. In this case, vendor of capital asset is a third party and the assessee is a vendee. In our considered view, there were two options available with the AO; either he could have rectified the mistake so occurred u/s 154 of the Act or replacing the word “acquire” in place of “transfer”, in the reasons for limited scrutiny, if it was a typographical error and if it was not so, then he would have sought the approval from the Competent Authority for examining this aspect. The AO failed to do so. Now, at this stage when the facts are undisputed that the case was taken up for limited scrutiny for the reasons stated to be cash deposits in the bank account and transfer of immovable property. We find merit in the contention of the Ld. Counsel for the assessee that the Assessing Authority exceeded its jurisdiction for making assessment in respect of acquisition of the property by the assessee during the year. Thus, the AO is directed to delete the impugned addition. Grounds raised by the assessee are hence, allowed.

10. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 22/03/2023.

Sd/-

(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

Amit Kumar

Copy to:

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Asstt. Registrar
Jodhpur Bench