2016 (8) TMI 470 - ITAT JAIPUR

Smt. Annu Tribhuvan Khandelwal Versus The Addl. CIT, Range-1, Jaipur

ITA Nos. 809/JP/2012

Dated: - 17 June 2016

Deduction of traveling expenditure from Capital gains - whether travelling expenditure is an allowable deduction u/s 48(i) of the Act while computing capital gains in connection with transfer of property - assessee is a non-resident Indian and residing in Japan - Held that:- The appellant is living in Japan and has filed her return of income in the status of an NRI disclosing the capital gains on sale of the property. She has travelled to India from Japan on number of occasions in connection with transfer of the subject property. The detail breakup of such visits in terms of travel dates, purpose and place of visits has been submitted during the course of assessment proceedings and is on record. Regarding travelling to Bombay and Jaipur is concerned, the appellant has submitted that she has to meet her advisors and prospective buyers from time to time requiring her to travel to these two places. Being the Co-owner and holding 1/3rd share in the property, she was present in India to execute various documents such as execution of MOU, conveyance deed sale deed etc. The necessity of her presence in India and execution of the various documents related to sale of the property have not been disputed by the lower authorities. It is thus seen that the appellant has proved the direct linkage/nexus between her travel to India and the corresponding travel expenditure with the transfer of the property, capital gains arising out of which has been duly offered to tax. We accordingly delete the disallowance of the travelling expenditure of 850,000 and hold the same as an allowable deduction under section 48(i) of the Act. - Decided in favour of assessee.

Judgment / Order

SHRI VIKRAM SINGH YADAV, AM & SHRI LALIET KUMAR, JM

For The Assessee bys by : Shri P.P. Pareek (CA)

For The Revenue : Ms Roshanta Kumari Meena (JCIT)

ORDER

PER SHRI VIKRAM SINGH YADAV, A.M.

The appeal filed by the assessee is arising from the order dated 21.08.2012 passed by the learned CIT (A)-I, Jaipur for the A.Y. 2009-10. The assessee has raised the following ground of appeal:-

> *" That the ld. Assessing Officer has erred in law as well as in facts by disallowing travelling expenditure incurred by the assessee, who is a nonresident and residing in Japan and ld. CIT (Appeals) have further erred in confirming the same without giving any relief to the appellant."*

2. The brief facts of the case are that the assessee is a non-resident Indian and has filed her return declaring income of 93,66,179/- for the year under consideration on 31.07.2009. The case of the

assessee was scrutinized under section 143(3) of the IT Act and assessment was completed on 27.12.2011 at an income of □ 1,02,16,180/-. During the year under consideration, the assessee has sold a property along with her brother and sister and the share of each co-owner is 1/3rd. The assessee, while calculating her share of capital gain arises on sale of said property, claimed an expenditure of □ 8,50,000/- towards travelling in connection with the said transaction, under section 48(i) of the IT Act. The AO asked the assessee to furnish justification regarding claim of travelling expenses against capital gain. In compliance, the assessee submitted her reply which was considered by the AO but he could not found it acceptable. The AO observed that in various judicial decisions it has been held that travel expenditure is not allowable expenditure in connection with transfer of property. In support, he placed reliance on the cases of B.N. Pinto vs. CIT (1974) 96 ITR 306 (Mys.) and Sah Roop Narain vs. CIT (1987) 63 CTR (Raj.) 362. In view of the above, the AO disallowed the claim of the assessee and made the addition of □ 8,50,000/- to the total income of the assessee.

3. Being aggrieved by the order of AO, the assessee carried the matter before ld. CIT (A) who confirmed the action of the AO. The ld. CIT (A) observed that it is not clear firstly whether the assessee is actually an NRI because a copy of her passport has not been filed. Secondly, considering the fact that her brother and her sister were co-owners of the said property and resident therein it is unlikely that the entire burden of meeting the prospective buyers etc. was on her shoulders. The ld.CIT (A) further observed that on perusal of the details of travel, it is not clear why the assessee was required to travel from Delhi to Bombay and Delhi to Jaipur etc. The ld. CIT (A), therefore, held that assessee has not been able to establish that the expenses claimed for traveling were for transfer of the said property.

4. The ld. A/R for the assessee submitted that Appellant has claimed travelling expenditure u/s 48(i) of the Income Tax Act, 1961 which reads as under:

> *“48. The income chargeable 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 asset the following amounts, namely:-*
>
> *i) Expenditure incurred wholly and exclusively in connection with such transfer,*
>
> *ii) The cost of acquisition of the asset and the cost of any improvement thereto”.*

The ld. A/R submitted that the section does not say that which particular expenses are allowable or not allowable. However, it stipulates that any amount which is expenditure in nature and have incurred wholly and exclusively in connection with such transfer can be deducted from the consideration for the purpose of calculation of capital gain. Therefore, it is very much clear that travelling expenses per se is not disallowable, it can only be disallowed, if it is not wholly and exclusively in connection with such transfer. Under the facts and circumstances and the legal provisions discussed hereinbefore the finding of the Ld. AO to the extent that such expenditure is not allowable under the law is contrary to the legal provision. The ld. A/R submitted that travelling conducted by the assessee was to complete the transaction. Hence it is obviously wholly and exclusively in connection with the transfer only and the same is allowable as per section 48(i) of IT Act. The ld. A/R has further submitted that the AO has failed to take into account the entire break-up of the travelling and the nexus with the events of the transactions, which were very well filed before him with full details and supporting. It is evident from the fact that while discussing the said reply in para 2.4 of his order, he had not discussed said part of the submission and neither rejected the evidence and submissions made by the assessee in this regard anywhere in his order.

4.1 The ld. A/R further submitted that the order of ld. CIT (A) is based on certain suspicion, surmises, conjectures and presumptions. The ld. CIT (A) has doubted the status of assessee as NRI. In this regard

he submitted that it is an admitted fact that Income tax return has been filed by the assessee declaring her residential status as Non-Resident India, which has neither doubted by the AO nor the ld. CIT (A) herself. Therefore, to that extent observations of ld. CIT (A) is contradictory.

4.2 The ld. A/R further submitted that the property under consideration is co-owned and one of the co-owners is Appellant. A co-owner is having his/her economic interest in the property to the extent of his/her share. In this materialistic world, it is unreasonable to expect that the revenue will be shared equally, whereas efforts of the different co-owner would be unequal. Further Ld. CIT (A) is factually incorrect while observing that other two co-owners were living in the property since it is evident from the Sale Deed itself that one of the co-owners i.e. Mrs. Asha Khanna, the sister of the Appellant was living in USA. It is also important to note that the participation of different co-owners depends upon different facts and circumstances i.e. personality of a person, satisfaction of the buyer, commercial understanding of a particular person among the different co-owner, belief in each other between the co-owner, understanding of the issue, convincing skill of a particular person among different co-owner, etc. Under the facts and circumstances, Ld. CIT (A) has erred in believing that the burden of meetings with the prospective buyers was not on the shoulders of the Assessee. Thus, the belief of the CIT(A) is solely based on her own surmises. In this regard, the ld. A/R placed reliance on the decision in the matter of Deputy Commissioner of Income Tax vs. Sophisticated Marbles & Granite Industries (2010) 3 ITR (Trib) 220 (Del), wherein it was held that “The business interest is well understood by the assessee and the AO cannot step into the shoes of the businessman so as to determine how the business is to be conducted.”

4.3 The LR AR further submitted that regarding Ld. CIT(A) raising the question about the travelling between Delhi to Mumbai and Delhi to Jaipur, such transaction are not getting completed in single slot of hours or days, it requires lot of deliberations, consultations, efforts to complete stipulations, gathering of documents, dealing with different government departments to fulfill the conditions of the prospective buyers, etc. in the instant case, Appellant is permanently living at Japan. As far as travelling to Jaipur is concerned, some time she has to come to consult her Advisors based at Jaipur and sometime once she came to India for that work and staying in Delhi for long time then she travelled to Jaipur or Mumbai, where buyers were residing, to avoid not burdening the relative living at Delhi for long or to avoid otherwise have to incur extra cost for staying in hotel. Thus, the travelling from Delhi to Jaipur or to Mumbai either in connection of the transactions or based on commercial expediency in connection to said transactions.

4.4 LR AR further submitted that Ld. A.O. and Ld. CIT(A) have utterly failed to appreciate the facts that they have at one hand disallowed the entire travelling expenditure, which includes for meeting, executing MOU, Conveyance Deed, Sale Deed, etc. on the other hand, they have not denied the requirements of the presence of the Appellant to sign different documents executed on different dates and for such purpose, necessity to come from Japan to India. Under the facts even if for sake of arguments the doubts of the CIT(A) considered correct, the entire expenditure cannot be disallowed.

4.5 LR AR further submitted that the Appellant under consideration is living in Japan without her presence in India, none of the events of the transaction under consideration could have been completed. However, as far as execution of MOU, Conveyance Deed, Sale Deed, Affidavit and other documents executed in relation to said transactions. Her presence was must or forceful to complete the said transaction. This part of the fact of the instant case has neither been addressed by Ld. AO or by Ld. CIT(A). This fact itself at prima-facie establishes that to complete the transaction under consideration, her travelling from Japan to India was necessary and was in connection with said transaction only. The dates of the travelling from Japan to India and the date of execution of different documents clearly establish the nexus between travelling undertaken and execution of different documents.

Under the facts and circumstances of the case, the ld. A/R requested that the disallowance made by AO and confirmed by ld. CIT (A) is unjustified, hence needs to be quashed and expenditure incurred to effect transfer of property should be allowed as deduction under section 48 of the IT Act.

4.6 On the other hand the ld. D/R for the revenue supported the orders of the authorities below and requested that the order of ld. CIT (A) may be confirmed.

4.7 We have heard the rival contentions and perused the material available on record. The issue under consideration relates to whether travelling expenditure is an allowable deduction u/s 48(i) of the Act while computing capital gains in connection with transfer of property. What can be deducted under section 48 is expenditure incurred wholly and exclusively in connection with the transfer contemplated under Section 45 of the Act. The provisions nowhere specifiy what kind of expenditure or the specified nature of the expenditure which shall be allowed as a permissible deduction while computing the capital gains. All it provides is that the expenditure so incurred, should have been incurred wholly and exclusively in connection with the transfer of the property. The words “in connection with such transfer” are occurring in the provisions means that the expenditure is intrinsically related to the transfer of the property. In other words, the assessee has to establish a nexus between incurring of the expenditure and the transfer of the property.

4.8 The lower authorities have relied on the decision of High Court of Mysore in case of B.N. Pinto vs CIT (96 ITR 306). In that case, the assessee executed a release deed in favour of the firm in which her husband was a partner and received certain amount in consideration. During the course of assessment proceedings, she gave a breakup of the consideration amount and claimed deduction in respect of lawyer's fee, traveling expenses and damages for mental worry and suffering on account of wrongful withholding and detention of the property. The ITO held that the break up given of the amount of consideration was not supported by any documentary evidence and could not be accepted. The AAC as well as the Tribunal upheld order of the ITO. On reference, it was held that:

> *“The breakup of the amount given by the assessee itself implied that the amount was part of the consideration for the release, though she tried to apportion a part of the total consideration as representing lawyer's fees, etc. It was not claimed that there was any evidence on record in support of the plea that certain amount represented lawyer's fees, etc., apart from her own assertion to that effect. In the circumstances referred to by the ITO in his order, such a plea could not be accepted. The Tribunal was, therefore, correct in proceeding on the basis that there was no evidence in support of the assessee's contention. Even assuming that what the assessee represented was correct, the deduction was not permissible in terms of section 48(i). What can be deducted under section 48(i) is expenses incurred wholly and exclusively in connection with the transfer. The damages for mental worry and suffering on account of wrongful withholding and detention of her property could not, by any stretch of imagination, be said to be expenses incurred wholly and exclusively in connection with the transfer. The claim in respect of lawyer's fees was also indefinite and vague and was not specific that it was in connection with the transfer, like, for example, drafting of the deed or such purposes intimately connected with the transfer. Similarly, regarding the travelling expenses, it was not specific that it was in connection with the transfer. Therefore, the nature of expenses as represented by the assessee would not bring them within the ambit of section 48(i), so as to be a permissible deduction.”*

4.9 The order of the Hon’ble High Court of Mysore therefore has to be seen in the context of facts which were presented before it. In this case, given that there was no evidence produced for payment of lawyer’s fees in connection with the transfer of order of any travelling expenditure genuinely incurred in connection with the transfer, it was held that the expenditure would not qualify as a permissible deduction. Similarly in

case of Shah Roop Narain the Hon'ble High Court of Rajasthan has held that no question of law arises out of the order of the Tribunal which has confirmed the disallowance of travelling expenses in absence of proof of incurrence of such expenditure in connection with the transfer.

4.10 The principle that emerges is that there is no restriction on the nature of expenditure that can be claimed as a permissible deduction under section 48(i) of the Act. At the same time, the expenditure so incurred, should have been incurred wholly and exclusively in connection with the transfer. In other words, the expenditure should be intimately connected with the transfer and the appellant has to establish the necessary nexus between the incurring of the expenditure and the transfer of the property. In the instant case, we therefore agree with the contention of the learned AR that travelling expenditure is per se not a disallowable expenditure under section 48(i) of the Act.

4.11 The appellant is living in Japan and has filed her return of income in the status of an NRI disclosing the capital gains on sale of the property. She has travelled to India from Japan on number of occasions in connection with transfer of the subject property. The detail breakup of such visits in terms of travel dates, purpose and place of visits has been submitted during the course of assessment proceedings and is on record. Regarding travelling to Bombay and Jaipur is concerned, the appellant has submitted that she has to meet her advisors and prospective buyers from time to time requiring her to travel to these two places. Being the Co-owner and holding 1/3rd share in the property, she was present in India to execute various documents such as execution of MOU, conveyance deed sale deed etc. The necessity of her presence in India and execution of the various documents related to sale of the property have not been disputed by the lower authorities. It is thus seen that the appellant has proved the direct linkage/nexus between her travel to India and the corresponding travel expenditure with the transfer of the property, capital gains arising out of which has been duly offered to tax. We accordingly delete the disallowance of the travelling expenditure of □ 850,000 and hold the same as an allowable deduction under section 48(i) of the Act.

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

Order pronounced in the open court on 17/06/2016.

Citations: in 2016 (8) TMI 470 - ITAT JAIPUR

1. Sah Roop Narain Versus Commissioner Of Income Tax - 1986 (10) TMI 327 - RAJASTHAN HIGH COURT
2. BN. Pinto Versus Commissioner of Income-Tax, Mysore. - 1973 (8) TMI 19 - KARNATAKA High Court
3. DCIT Versus Sophisticated Marbles and Granite Industries - 2010 (2) TMI 918 - ITAT, Delhi