IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC-1', NEW DELHI

Before Sh. N. K. Saini, Accountant Member

ITA No. 1511/Del/2016 : Asstt. Year : 2012-13

Sh. Ankit Mittal, 105, Vidya Enclave, GH-11, Gurgaon-122011	Vs	Income Tax Officer, Ward-11(1), Gurgaon
(APPELLANT)		**(RESPONDENT)**
PAN No. ALCPM2482P		

Assessee by : Sh. Ved Jain, Adv.
Revenue by : Sh. V. R. Sonbhadra, Sr. DR

Date of Hearing : 24.05.2016		**Date of Pronouncement : 23.08.2016**

ORDER

This is an appeal by the assessee against the order dated 05.01.2016 of ld. CIT(A)-1, Gurgaon.

2. Following grounds have been raised in this appeal:

"1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad both in the eye of law and on facts.

2(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the disallowance of Rs.1,57,839/- made by A.O. being 50% loss from house property.

(ii) That the disallowance has been confirmed without properly appreciating the facts of the case and ignoring the judicial pronouncements cited by the assessee in this regard.

3(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the disallowance of Rs.1,25,550/- made by A.O. on account of short term capital loss.

(ii) That the disallowance has been confirmed arbitrarily rejecting the explanation and evidences brought on record by the assessee.

4. Without prejudice to the above and in the alternative, the learned AO has erred both on facts and in law in disallowing the whole of short term capital loss amounting to Rs.1,25,550/- despite giving a finding that assessee is only a 50% owner of the said property.

5. The appellant craves leave to add, amend or alter any of the grounds of appeal."

3. Ground Nos. 1 & 5 are general in nature so do not require any comment on our part.

4. Vide Ground Nos. 2(i) & (ii), the grievance of the assessee relates to the confirmation of disallowance of Rs.1,57,839/- made by the AO on account of loss from house property.

5. The facts related to this issue in brief are that the assessee filed the return of income on 09.07.2014 declaring an income of Rs.10,74,650/-. The case was selected for scrutiny. The AO during the course of assessment proceedings noticed that the assessee had claimed loss from house property at Rs.3,15,679/- on the property which was in the joint name of the assessee and his wife having 50% share each. The contention of the assessee before the AO was that all the installments of housing loan were paid by the assessee out of his taxable income and that the said property was purchased in joint name with his wife for family safety purposes but the whole investment was made by the assessee himself, therefore, he had claimed the income from house property in his hands and claimed deduction u/s 24(1)(vi) of the Income Tax Act, 1961 (hereinafter referred to as the Act). However, the AO restricted the loss from the house property to 50% and balance 50% was disallowed, on the ground that as per the provisions of Sections 22 to 24 of the Act for determining the income from house property, the assessee should have been the owner of the property and in this case the assessee was legal owner of the property to the extent of 50%.

6. Being aggrieved the assessee carried the matter to the ld. CIT(A) and submitted as under:

> ***"Disallowance of the House Property loss u/s 24(l)(vi)***
> *22. During the year under consideration appellant earned rental income from the House 1-401, SPS Residency, Vaibhav*

Khand Indrapuram, Ghaziabad. Purchase of flat was funded by the appellant. However, the house was registered in jointly with his spouse. The wife's name was added as a precautionary or safety measure, that is, in order to retain to ownership or smooth transfer of ownership in the case of any mishappening with appellant. The appellant has funded the property purchase as is evident from his bank statement while wife is just a co-owner. Not even a single penny was contributed by wife for the purchase of house.

It is evident from the rent agreement and bank statement that the appellant is getting the rental income in his individual saving account. Since the appellant is beneficial owner of the house, all the liabilities and rights ideally be the appellant's, therefore he disclosed the rental income in his ITR of A.Y. 2011-12 and 2012-13.

23. Although loan taken by assessee for purchasing of flat was also in jaint name with his wife Ritu Mittal, but that was only for increasing the loan amount. By making the wife co-applicant in loan, income of all applicants was considered by the bank and assessee could get the higher loan than the eligibility in his individual name.

It is clearly evident from the bank statement that the EMI of loan repayment has been made by assessee from his income chargeable to tax. Wife of assessee Smt. Ritu Mittal has not contributed even a single penny towards repayment of loan. Since the loan was being repaid by the assessee from his income chargeable to tax, therefore he claimed the 100% deduction of intt. paid on loan.

24. The assessing officer while passing the assessment order disallowed loss of Rs. 1,57,839/- u/s 24(1)(vi) of the Income

Tax Act, 1961 by bringing out following reasoning in the assessment order:-

2…"It has been noticed that the property is in joint name with his wife Smt. Ritu Goel and as such he is only 50% of the owner of the said property. Accordingly, vide this office notice dated 09.09.2014 the assessee was *required to* give *reasons as to why the rental income as well as deduction be not restricted to 50% being one half percent of owner of the property. In response to this, the assessee vide written submission filed on 31.10.2014 stated that all the installment of housing loan are paid by the assessee, 100% from his taxable income during the year and also he has purchased the said property in joint name with his wife only for family safety purposes and whole investment in said property is done by the assesses himself and as such the assessee has claimed 100% from the property and also 100% deduction u/s 24(1)(vi). The above contention of the assesses is not correct because it's very clear from the plain reading of the section 22 to 24 for determining the income from House property that the assessee should be owner of the said property and any sum, be should be paid by him. In view of the fact that the assessee is only 50% legal owner of the property. It is further pertinent to mention here that Smt. Ritu Mittal is also earning income in his individual capacity and also filing her returns of income ".*

The above said disallowance has been made by the ld. A.O. only on the ground that the wife of assessee is also co-owner in the property and assessee is only 50% legal owner of the property.

25. The action of the Id. A.O. is against the facts on record as well as the position of taw. The Ld. A.O. has erred in appreciating the facts that it is the only assessee who is making the repayment of loan. Wife of assessee has never

contributed any amount for repayment, then how she can be get tax benefitted by allowing deduction of interest to her.

Disallowance of loss by Rs.1,57,839/- made by Ld. A.O, stating that the plain reading of the section 22 to 24 for determining the income from house property that the assesses should be the owner of the said property and any sum should be paid by him.

The Ld. A.O, has not examined whether the wife has contributed any amount toward the purchase of house from the details submitted to her. She has simply slated that the assessee should be owner of the property and Smt. Ritu Mittal, wife, is also earning the Income.

The Ld. AO has erred to consider the appellant as 50% owner in total disregard to the provisions of Income from house property u/s 22 to 27 of the Income Tax Act, 1961.

The Ld. AO has erred not to consider provisions of section 27(1) that in absence of adequate consideration even if a transfer is made by an individual to his spouse he shall be deemed to be the owner of the house property. The relevant extract is reproduced as under for ready reference.

"Owner of house property", "annual charge", etc., defined.
For the purposes of sections 22 to 26—

i. an individual who transfers otherwise than for adequate consideration any house property to his or her spouse, not being a transfer in connection with an agreement to live apart, or to a minor child not being a married daughter, shall be deemed to be the owner of the house property so transferred;

Your honour, the Ld. AO, based on the details furnished during the assessment proceedings has not come out in the assessment order that any consideration was paid by the spouse for purchase of house. On this count as well, the assumption of 50% ownership of spouse is against the statutory provisions."

7. The reliance was placed on the following case laws:

- *CIT Vs Podar Cement (P) Ltd. Etc. (1997) 226 ITR 0625 (SC)*
- *CIT Vs AIR Deal Traders (2010) 327 ITR 0034 (P&H)*
- *CIT Vs Babu Khan Builders & Ors. (2010) 325 ITR 133 (A.P.)*
- *Pallonji M. Mistry (DECD.) Vs CIT (2009) 319 ITR 0167 (Bom.)*
- *Universal Radiators Ltd. Vs CIT (2006) 281 ITR 0261 (Mad.)*
- *Mysore Minerals Ltd. Vs CIT (1999) 239 ITR 775(SC)*
- *S.V. Chandra Pandian Vs S.V. Sivalinga Nadar (1995) 212 ITR 592 (SC)*
- *CIT Vs Fazilka Dabwali TPT. CO. (P) Ltd. (2004) 270 ITR 0398 (P&H)*
- *Addl. CIT Vs U.P. State Agro Industrial Corporation Ltd. (1981) 127 ITR 97 (All.)*

8. The ld. CIT(A) after considering the submissions of the assessee observed that as per the provisions of Section 22 of the Act, the ownership of a property is a condition precedent for levy of tax and the word ñownerò in Section 22 of the Act is related with the taxability of the income from house property and not with the interest of a person in the property. He further observed that in the present case, the loan had been taken by the assessee and his wife from the bank which would

mean that both have subjected themselves to the terms and conditions of the Banking loan and the property had been registered jointly in both names. Therefore, the making of the payment of EMI made no difference which was an internal arrangement of both spouse. He further observed that the dominion over the property existed in the name of wife and she was lawfully entitled to claim the income emerging from the property. Therefore, the right of the wife could not have been denied because she was co-borrower of the amount on the bank and her ownership over the property was by virtue of loan and her registration and that the mere fact of EMI were paid by the husband would not disentitle her domineer over the property. He, therefore, sustained the disallowance made by the AO. The reliance was placed on the following case laws:

- *R.B. Jodha Mal Kuthiala Vs CIT (1971) 82 ITR 520 (SC)*
- *Kaur Singh Vs CIT (1983) 144 ITR 756 (P&H)*
- *Biraj Mohan Biswal Vs CIT (1992) 198 ITR 465 (Ori.)*
- *Keshar Deo Chamaria Vs CIT (1937) 5 ITR 246 (Cal.)*

9. Now the assessee is in appeal. The ld. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that during the year under consideration there was a loss of Rs.3,15,679/- while computing the income from house property but the AO restricted the same to 50% of the loss by holding that as per the purchase deed, the property was in the joint names of the assessee and his wife Smt. Ritu Mittal. It was further submitted that the ld. CIT(A)

ignored all the submissions made by the assessee who categorically stated that the property was registered jointly as a precaution/safety measures. However, the purchase had been funded entirely by the assessee, which was evident from the bank statement and the wife of the assessee was just a co-owner who did not contribute even a single penny for the purchase of the property. It was stated that as per the provisions of Section 45 of the Transfer of the Property Act, the ownership of the property in a case of a joint transfer belongs in the ratio in which the amount had been contributed by each of the person and in the present case, the entire amount having been contributed by the assessee, the entire ownership will be that of the assessee. It was further submitted that the decision relied by the ld. CIT(A) are not applicable to the facts of the assesseeôs case because the case of R.B. Jodhamal Kuthiala Vs CIT was not a case of joint ownership and as the property having vested in the custodian in Pakistan, the assessee was not owner of the property, and hence was not entitled to the loss. On the contrary, the said case supports the assesseeôs case because in that case, it has been held that the property vested in the person who is the owner in its own right and does not go with the title of the property and in the case of Kaur Singh Vs CIT (supra), the facts were that the brothers purchased the property which was registered in their name and one of the brother claimed that his share to be divided alongwith his two sons in view of the arbitration award and decree passed by the Court but the assessee had not been able

to prove that his two sons also had share in his share. It was further submitted that the provisions contained in Section 45 of the Transfer of Property Act are squarely to the facts of the present case, therefore, the ld. CIT(A) was not justified in confirming the disallowance made by the AO. The reliance was placed on the following case laws:

- *CIT Vs Podar Cements Pvt. Ltd. (1997) 226 ITR 625 (SC)*
- *ACIT Vs C.K. Malik (2004) 89 ITD 245 (Ald. Trib)*
- *CIT Vs Ajit Kumar Roy (2002) 252 ITR 468 (Cal.)*

10. In his rival submissions the ld. DR strongly supported the orders of the authorities below and reiterated the observations made therein.

11. I have considered the submission of both the parties and carefully gone through the material available on the record. In the present case, it is not in dispute that the assessee purchased the property in the joint name with his wife. However, the whole of the investment was made by the assessee which is evident from para 2 of the assessment order dated 31.0l.2014 wherein the AO has not rebutted this contention of the assessee that the total investment was made by the assessee himself. It is also noticed from the copy of the cash book of the assessee placed at page nos. 20 to 22 of the assesseeôs paper book that the assessee had made the payment of Rs.2,62,200/- on 15.12.2009, Rs.3,50,000/- on 31.12.2009 and Rs.3,00,000/- on 31.01.2010 for the house at Indrapuram. The assessee also claimed that the installments towards the

repayment of the loan taken from bank for purchase of the property were paid by him only not by his wife.

12. On a similar issue the Hon'ble Supreme Court in the case of CIT Vs Podar Cements Pvt. Ltd. (supra) held as under:

> *Though under the common law 'owner' means a person who has got valid title legally conveyed to him after complying with the requirements of law such as the Transfer of Property Act, the Registration Act, etc., but in the context of section 22 having regard to the ground realities and further having regard to the object of the Act, namely, 'to tax the income', 'owner' is a person who is entitled to receive income from the property in his own right.*

13. Similarly, the Hon'ble Calcutta High Court in the case of CIT Vs Ajit Kumar Roy (supra) held in paras 6 & 7 as under:

> ***"6.*** *In CIT v. Podar Cement (P.) Ltd. (1997) 141 CTR (SC) 67 : (1997) 226 ITR 625 (SC), their Lordships have considered the question as to whether for the purpose of ownership, the registration is necessary to consider the income in the hands of the purchaser or the seller, their Lordships observed as under :*
>
> *"We are conscious of the settled position that under the common law, 'owner' means a person who has got valid title legally conveyed to him after complying with the requirements of law such as the Transfer of Property Act, Registration Act, etc. But, in the context of section 22 of the Income-tax Act, having regard to the ground realities and further having regard to the object of the Income-tax Act, namely, 'to tax the*

income', we are of the view, 'owner' is a person who is entitled to receive income from the property in his own right."

When their Lordships have taken the view that having regard to the ground realities and further having regard to the object of the Act, namely, to tax the income in the hands of real owner, their Lordships have taken the view that the owner is the person who is entitled to receive income from the property in his own right.

***7.** On the same analogy when the entire investment was made by the assessee and simply the flat is in the name of wife of the assessee. In such case, the income from that property should be taxed in the hands of the assessee and not in the hands of his wife."*

14. On a similar issue the ITAT Allahabad Bench in the case of ACIT Vs C.K. Malik (supra) held as under:

"The language of s. 45 of the Transfer of Property Act is very clear and provides that where immovable property is transferred for a consideration to two or more persons and such consideration is paid out of funds belonging to them in common, they are entitled to interest in such property identical as nearly as may be with the interest to which they were respectively entitled in the fund. If such consideration is paid out of separate funds belonging to them respectively then such persons will be entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced. The last requirement of section is that in the absence of evidence as to the interest in the funds to which they were respectively entitled or as to the shares which they respectively advanced such persons shall be presumed to be equally interested in the property. The third requirement is

the exception to rule. The first two conditions of s. 45 of the Transfer of Property Act clearly specifies that in the absence of contract to the contrary, the persons will be entitled to the share in the property according to their shares in the consideration which they have invested or advanced out of common fund or separate fund. If no evidence is available, then all such persons will be presumed to be equally interested in the property. In the case of the assessee the AO has clearly spelt out the shares of the investment made by the assessee and his family members."

15. In the present case also nothing is brought on record to substantiate that the wife of the assessee made any contribution towards purchase of the house under consideration or the income from that house was assessable in her hands also. Furthermore, this claim of the assessee that the entire investment was made by him and installments towards term loan were paid has not been rebutted. Therefore, the income of the house, if any, should have been taxed in the hands of the assessee. Similarly, if loss from the house property was there the benefit was to be given towards that loss to the assessee only since the house was shown by the assessee in joint ownership with his wife for safety purposes. In that view of the matter the impugned order is set aside on this issue and the AO is directed to allow the claim of the assessee.

16. The next issue vide Ground Nos. 3(i), (ii) & 4 relates to the disallowance of the short term capital loss amounting to Rs.1,25,550/-.

17. The facts related to this issue in brief are that the AO during the course of assessment proceeding noticed that the assessee during the year under consideration had sold his house property but in the return of income filed on 09.12.2012, no capital gain had been shown but in the revised return, the assessee had claimed short term capital loss from the property and also filed copies of the purchase & sale deed, copy of the bank account for obtaining loan and amount spent for renovation. The assessee claimed short term loss of Rs.1,25,650/- as under:

"Full Value	*43,75,000*
Less: Cost of acquisition	*38,06,550*
Less: Cost of improvement	*6,50,000*
Less: Expenditure on transfer (Brokerage)	*44,000*
Short term loss	*125650/-"*

During the course of assessment proceedings, the AO also asked the assessee to explain as to why no capital gain had been shown in the original return and to substantiate the claim with documentary evidence.

18. In response, the assessee submitted that no income from capital gain was earned, he, therefore, forgot to show in the original return. It was further stated that the renovation of the said flat was made by raising loan from the bank, in support of the said claim, the assessee filed copies of bills for renovation as well as the brokerage paid. The AO observed that all the payments for renovation were made in cash during the period of December 2009 and January 2010 which was completely

not verifiable from the withdrawals made from bank during the said period. He, therefore, disallowed the claim of short term capital loss amounting to Rs.1,25,650/-.

19. Being aggrieved the assessee carried the matter to the ld. CIT(A) and submitted as under:

> ***"Disallowance of STCL of Rs.1,25,550/- due to non verifiability of cash withdrawn from bank for paying off expenses on renovation.***
> *26. During the year under consideration i.e. a/y 2012-13, assesses sold the same flat from which he was earning rental income for total sales consideration of Rs.43,75,000/-. Apart from the cost of acquisition of Rs.38,06,550/-, assesses also incurred renovation expenses on the said flat amounting to Rs.6,50,000/-. On sale of said flat assesses claimed STCL of Rs.1,25,550/-, however Ld. A.O. disallowed loss because she didn't find the cash paid verifiable from the withdrawn made from bank. Your Honour, it may kindly be noted that the Ld. A.O. had nowhere objected why the full sale consideration and cost of acquisition and improvement be allowed to the assessee whereas he is the owner in property to the extent of 50% only. Actions of Ld. A.O. clearly indicate that she agreed the investment purely pertains to the assessee only and his wife is co-owner in the property for the family reasons.*
>
> *It may also be noted that the out of sale proceed of Rs.43,75,000/-, Rs.23,00,000/- was used by assessee to make FDR in the joint name of assessee with his wife Smt. Ritu Mittal. Intt income from the said FDR was taken by assessee in his ITR and TDS on the intt was also deducted on PAN of assessee as evident from the computation of income and form 26AS. Funds used for investment were solely pertain to the*

assessee, therefore sale proceeds also pertain to the assessee only. Sale proceed was used to make FDR in the joint name, but since the funds were belong to assessee, therefore he disclosed intt income in his ITR and the same was nowhere objected by Ld. A.O

27. Assessee borrowed loan of Rs.6,30,000/- from ICICI Bank on dated 18.12.2009 for the renovation of house. The same was credited in OBC Bank, Sector 17, Gurgaon. Please refer page no 48 & 50 of paper book.

Cash from the OBC Bank, Sector-17, Gurgaon was withdrawn on different dates to meet the expenditure incurred on renovation of house. Please refer copy of bank statement and cash book placed at page no 31, 32 & 50 of paper book.

Details of expenditure with copy of bills of expenses is also placed at page no 55-69 of paper book.

Date on the bills of expenses is of the month of Dec 09, Jan & Feb 2010 as it is evident from the copy of bills. Assessee has also withdrawn cash from bank during the period of Dec, 09 and Jan 10. Your Honour, it may be appreciated that the petty contractor as per practice take money in cash. And sometime they have to be paid in advance for getting the work to be done on priority.

Contention of Ld. Assessing officer that the expenses are not verifiable from the withdrawn made from bank account is totally incorrect having regards to the fact of case. Cash withdrawal during the period Dec 09 and Jan 10 as it is clearly apparent from the bank statement, expenses on renovation was also incurred during the period Dec 09, Jan & Feb 2010 as evident from the copy of bills and cash book. It is also be noted that during the course of renovation work,

assessee advanced some amount to contractor which the contractor deducted while making bill (page no. 68 of paper book).

Assesses is a salaried person and working in corporate sector, it is not possible for him to visit the bank frequently for withdrawing cash. Therefore during the course of renovation work he withdraws cash from bank in lump sum on 3-4 dates and paid the contractors accordingly.

Further Ld. Assessing officer disallowed STCL of Rs.1,25,550/- whereas the expenditure on renovation is of Rs.6,50,000/-. From the disallowance it seems that out of total expenses of Rs.6,50,000/- she didn't find expenses verifiable from withdrawn to the extent of Rs.1,25,550/- only. Out of total expenditure of Rs.6,50,000/- what amount of expenditure Ld. A.O. didn't find verifiable or considered, for denying the STCL of Rs.1,25,550/- to assessee, has not been stated clear anywhere in the order. From the order it seems, Ld. AO disallowed STCL as if she was bound to do the same. The said action is highly unappreciable and against the provision of law and thus disallowance made is liable to be deleted."

20. The ld. CIT(A) after considering the submissions of the assessee observed that the property was in the joint ownership of the assessee and his wife, therefore, the loss would also be apportioned in equal proportion. He, therefore, reduced the disallowance by 50%.

21. Being aggrieved the assessee is in appeal. The ld. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the assessee had taken a loan of Rs.6,30,000/-

from ICICI Bank on 18.12.2009 and transferred this amount to his bank account with Oriental Bank of Commerce, Sector-17 Gurgaon. From where, he had made withdrawals and all the necessary evidences in support thereof were furnished. A reference was made to page nos. 8 to 67 of the assesseeôs paper book. It was further submitted that the ld. CIT(A) appreciated the above facts and agreed that the assessee had incurred a loss of Rs.1,25,550/-. However, he restricted the loss to 50% on the ground that this loss has to be apportioned between the assessee and his wife, since the property was in the joint name of the assessee and his wife. It was further submitted that the property was purchased by the assessee out of his own funds and the name of his wife was added only for the purpose of security. Therefore, the action of the ld. CIT(A) in not allowing the entire loss was against the facts and circumstances of the case and thus, the entire loss claimed by the assessee for Rs.1,25,550/- should have been allowed to the assessee.

22. In his rival submissions the ld. DR strongly supported the order of the AO and reiterated the observations made in the assessment order dated 31.01.2014.

23. I have considered the submissions of both the parties and carefully gone through the material available on the record. In the former part of this order it has already been observed that the assessee made the entire payments for purchasing the house property and the name of his wife

was entered only for the security purposes. Therefore, the ld. CIT(A) was not justified in restricting the short term capital loss claimed by the assessee to the extent of 50%. I, therefore, considering the peculiar facts of this case set aside the impugned order on this issue and direct the AO to allow the claim of the assessee for short term capital loss.

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

(Order Pronounced in the Court on 23/08/2016)

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 23/08/2016
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR