

Alok Kumar Vs. Joint Cit

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Feb-23-2007

Judge : N Vasudevan, R Sharma

Appellant : Alok Kumar

Respondent : Joint Cit

Judgement :

1. These are cross appeals filed by the assessee and revenue against the order of Commissioner (Appeals) dated 4-6-2001 for the assessment year 1998-99, in the matter of order passed under Section 143(3) of the Income Tax Act, 1961.

1. That the learned Commissioner (Appeals) has erred both in law and on fact in determining the alleged taxable interest of Rs. 2,41,000 on the basis of initial option price of Rs. 15,05,990 for two years is wrong and without any basis and is wholly irrelevant to determine the relevant issue.

2. That the learned Commissioner (Appeals) first time fixed the perquisite income of Rs. 2,41,000 being interest on stock option price and had not been confronted to assessee which is wrong and illegal and is contrary to the material available on records.

3. That in any case addition of taxable interest Rs. 2,41,000 as made by the learned Commissioner (Appeals) is illegal and highly arbitrary and unjustified.

4. That the learned Commissioner (Appeals) further erred in law and on facts in rejecting the assessee claim under Section 54F of the Income Tax Act, 1961 and illegally disallowed the assessee valid claim of deduction Rs. 4,50,000 under Section 54F of the Act. The learned Commissioner (Appeals) has not correctly appreciated the fact of the case.

5. That the learned Commissioner (Appeals) has further erred in not given direct relief under Section 54F of the Income Tax Act, 1961 and remand back to assessing officer with direction while the assessee submit the relevant evidence before the learned Commissioner (Appeals).

6. That the learned Commissioner (Appeals) has further erred in allowing only consequential relief in respect of charging of interest failing to appreciate that no interest was leviable. In any case the Commissioner (Appeals) should have appreciated that interest was leviable on the tax on income declared in the return and not on the income assessed.

1. The learned Commissioner (Appeals) has erred in law and on facts in deleting addition of Rs. 32,32,410 made by the assessing officer as income from other sources.

2. The learned Commissioner (Appeals) has erred in law and on facts in accepting assessee's version in respect of cost of shares without verifying or reminding the matter regarding cost price or the market price and the concession received at the time of alleged purchase of shares.

3. The learned Commissioner (Appeals) has erred in law and on facts by not verifying/remanding the matter and by concluding that option price is near about the market price without any evidence in this regard. The difference of option price and market price is to be treated as perquisite in the hands of the assessee in the year of purchase ie., assessment year 1996-97 for which no decision has been given.

4. The learned Commissioner (Appeals) has erred in law and on facts in admitting fresh evidence/submission without allowing opportunity to the assessing officer as

required under Rule 46A of the I.T. Rules, 1962.

5. The order of the learned Commissioner (Appeals) is erroneous on facts as well as on law, therefore, the order of the learned Commissioner (Appeals) deserves to be set aside and that of assessing officer be restored on this issue.

4. Rival contentions have been heard and record perused. Brief facts of the case are that the assessee is a Software Engineer employed with Cadence Design System (I) Pvt. Ltd. The assessee declared long-term capital gain on the sale of bonus stock which was computed as under after claiming deduction under Section 54F and under Section 54EF. Less : Exemption under Section 54F being investment made for construction of Residential house property In order to explain the long-term capital gain on the sale of bonus stock, the assessee stated that as per the policy of Cadence Design Systems (India) Pvt. Ltd., an American Company, the employees are allowed stock option to purchase at an option price time-to-time. It was also stated that the option price is not paid at the time of option agreement but the American Company purchases shares on behalf of the employees and the cost is debited to the account of the employees and whenever the stock option is sold, the option price is deducted from the sale proceeds and the balance is remitted to the employees. It was further stated that the assessee opted for the stock option on 29-8-1995 whereby the assessee was granted 2,690 shares and the total option price of \$ 41,396 was debited to the account of employee in the accounts of American Company. These shares were sold on 27-8-1997 for a total consideration of \$ 1,30,465 and after deducting the above price at \$ 41,396 from this sale proceeds, the balance \$ 89,068 equivalent to Indian rupees 32,32,409 were remitted to the assessee-employee through the banking channel. The assessee stated that since the option price was deducted from the sale proceeds, the assessee has shown cost at NIL and accordingly the total amount received has been shown as long-term capital gain at Rs. 32,32,409. The assessee stated that since these shares were granted on 29-8-1995 and were sold on 27-8-1997, the period of holding was thus stated to be more than one year and accordingly capital gain was claimed to be long-term capital gain.

However, the assessing officer was not satisfied with this explanation on the ground that the assessee has not submitted any details with the American Company, who purchases shares on behalf of the assessee as no distinctive numbers of the purchased shares have been submitted, nor any proof of payment for the purchase of shares by the American Co. was furnished. There is also no cost of acquisition in the hands of the assessee and the assessing officer therefore, held that the stock option agreement is merely a device to remunerate the assessee through various schemes in lieu of salary and therefore, the sale consideration of Rs. 32,32,409 was held to be nothing, but a remuneration in lieu of salary. The assessing officer further observed that when the assessee has shown its cost at NIL, computation of long-term capital gain cannot be made and accordingly income shown has to be treated as income from other sources. The assessing officer referred to the decision in *Universal Radiators v. CIT*, *Raghuvanshi Mills Ltd. v. CIT* and *Maharaj Kumar Gopal Saran Narain Singh v. CIT (1935) 3 ITR 237 (PC)*. The assessing officer accordingly taxed the income of Rs. 32,32,409 as income from other sources in the hands of the assessee. The assessee then claimed deduction of Rs. 4,50,000 under Section 54F and Rs. 12,00,000 under Section 54EA. The assessee stated that he has purchased a residential house No. 1523, Sector-19, Noida for Rs. 9,90,000 on 24-3-1997 as per sale agreement. The assessee then claimed further investment of Rs. 4,50,000 on the addition/alteration in this house subsequent to the purchase of the flat on 24-3-1997. The assessing officer held that this deduction under Section 54F is not allowable because the deduction is not admissible on the alteration/addition of the house already purchased. The assessing officer therefore, did not allow deduction under Section 54F. The assessee then stated that he has invested Rs. 12 lakhs in the UTI MIP, 1997 (v) on 22-12-1997 and claimed exemption under Section 54EA. However, the assessing officer did not allow this exemption on the ground that there is no income from long-term capital gains.

5. By the impugned order, Commissioner (Appeals) held that the shares were held by the foreign company in the portfolio of the assessee and that after deducting the option price, the balance was remitted to the assessee, therefore, transaction was relating to the stock option and its consequent sales. The Commissioner (Appeals) further stated that the shares were purchased by the foreign company

from the open market near about the date of exercise of the option and the same were allotted to the assessee employee at an option price. He further observed that even though nothing was paid by the assessee to its employer company at the time of exercise of the option, but it cannot be said that there was no cost price of the stock option allotted to the assessee. He, thereafter, computed the interest of Rs. 2,41,000 on the basis of amount paid by the employer with respect to the option exercised by the assessee by applying 8% interest for a period of two years on the amount of option price of 41,396 dollars, which worked out to be Rs. 15,05,990. Accordingly, he held that the perquisite for providing the funds for purchase of stock option by the foreign company amounts to Rs. 2,41,000 which should be added in the hands of the assessee-employee as his salary income. The Commissioner (Appeals) further stated that 2,690 shares sold by the assessee were held for more than 12 months, the sale of these shares has to be taken as long-term capital gain. Since the assessee did not pay any amount on account of option price which was arranged by the foreign company, the amount was not deducted from sale consideration, and no indexation was allowed. With regard to assessee's claim for deduction under Section 54F, the Commissioner (Appeals) found that expenditure incurred by the assessee on the addition alteration of the house property which was purchased on 24-3-1997, will not be eligible for deduction under Section 54F, as the expenditure was on the cost of improvement of the house. Similarly, with regard to deduction claimed under Section 54F of the Act, the Commissioner (Appeals) restored the matter back to the file of the assessing officer with a direction to allow deduction for investment made in the prescribed securities under Section 54EA, if the assessing officer finds the investments as proper and within the conditions prescribed therein.

6. Aggrieved by the above order of the Commissioner (Appeals), both the assessee and revenue are in appeal before us.

7. The revenue is basically aggrieved for Commissioner (Appeals)'s action for treating the income of Rs. 32,32,410 as income from long-term capital gains which was assessed by the assessing officer as 'income from other sources'. The department is also aggrieved for admitting fresh evidence/submissions without allowing opportunity to the assessing officer as required under Rule 46A of the IT

Rules with regard to the details of shares acquired under stock option scheme and its holdings for more than 12 months before its sale etc.

8. On the other hand, the assessee is aggrieved for making addition on account of interest of Rs. 2.41 lakhs computed for two years on the amount of option price paid by the employer and for treating the same as perquisite income in the hands of the assessee.

9. The assessee is also aggrieved for not granting deduction under Section 54F and for not giving direct relief under Section 54EA and remanding the matter back to the assessing officer.

10. We have considered the rival contentions, carefully gone through the orders of the authorities below and also the entire material placed before us. We have also carefully gone through the documents placed in the paper book comprises of 36 pages. From the record, we found that in the return of income, the assessee has declared long-term capital gain on sale of bonus stock amounting to Rs. 32,32,409. Deductions were claimed under Section 54F of the Act, in respect of residential house amounting to Rs. 4,50,000, and under Section 54EA on account of investment in UTI, MIP SI amounting to Rs. 12 lakhs. During the course of scrutiny assessment, the assessee was asked to show how the bonus stock was acquired. The assessee only submitted copy of agreement with the Cadence Design System (India) Pvt. Ltd. The assessee further submitted that assessee has not paid any amount on account of purchase of bonus shares, and that its employer foreign company has purchased certain shares in the market for and on behalf of the assessee. The assessing officer further noted that no distinctive number of the said shares purchased for and on behalf of the assessee were furnished nor any proof of payment by foreign company for purchase of the alleged shares were furnished. The assessing officer, therefore, held that since there is no cost of acquisition of these shares in the hands of the assessee, the non-statutory stock option agreement was merely a device to reumerate the employee through various schemes in lieu of salary. He, therefore, held that the amount received by the assessee was nothing but a remuneration in lieu of salary. However, Commissioner (Appeals) in his appellate order without indicating any

particular documentary evidence either furnished before him or assessing officer, stated that shares were held more than 12 months and, therefore, amount received by the assessee in respect of alleged sale of shares was long-term capital gain. He has also not controverted the findings recorded by the assessing officer. Under these facts and circumstances, the main question which falls for our consideration is as to whether any shares were held by the assessee which were allotted to him in respect of stock option scheme. The next question which falls for our consideration is the computation of the period for which these alleged shares were held by the assessee, so as to qualify the same for long-term capital gain tax benefit. On perusal of various material placed on record, it cannot be inferred which particular shares having distinctive numbers/master folio No. etc. were allotted to the assessee in the stock option scheme. However, it is not clear nor any particular documents were referred by the Commissioner (Appeals) so as to identify the particular shares with reference to the date of acquisition, for reaching to the conclusion that before their sale, the same were held by the assessee for more than 12 months. Unless it can be held on the basis of certain documentary evidence, that the alleged shares were held by the assessee for more than 12 months, the same cannot be branded as eligible for exemption under Section 54F or 54EA of the Act.

While going through the orders of the Commissioner (Appeals), we found that he has referred certain shares allotted by the employer, but the same are without any distinctive number,, exact date of acquisition, its price as on the date of allotment in favour of the assessee.

It is also not clear from the material placed on record as to whether these shares were transferred and registered in the name of assessee, nor it is clear if any income/dividend being generated from these shares during the intervening period of its holding. As per the law laid down by the House of Lords in the case of *Abbot v. Philbin* (1962) 44 ITR 144, in case of any stock option being allowed in favour of the assessee, the difference between the prevailing market price on the date of offer of such option vis-a-vis the offer, is to be treated as perquisite accruing to the assessee in the previous year in which the option is given. The Legislature has however altered this position by laying down in the proviso to Section 17(2)(iiia)

with effect from 1-4-2000 that perquisite will accrue when the option is exercised. When the option is exercised by the employee that date will be the date of acquisition of the shares for the purpose of determining whether the shares were long-term or short-term capital asset. The price at which the option is exercised will be the cost of acquisition for the purpose of computing capital gains. We may add here that the statement of law on the issue as explained by the Commissioner (Appeals) in para 4.1 of his order is correct, subject to what we have stated above. It is not clear from the record as to whether the assessee has declared any such value as perquisite in the year in which stock option was exercised by him. We also do not find any merit in the order of learned Commissioner (Appeals) insofar as he had computed the interest of Rs. 2.41 lakhs, so as to treat the same as perquisite in the hands of assessee. As per the provisions of the Act, whenever shares held under stock option is being sold, the difference between the selling price and the cost of acquisition is to be treated as capital gain, whether short-term or long-term, depending on the period of holdings. When such shares are sold after holding for more than 12 months, the same is eligible to be branded as long-term capital assets, and the assessee is entitled to claim all the benefits/deduction/exemption as provided under Section 54 of the Income Tax Act, 1961.

11. In view of the above discussion, both the orders of the lower authorities are being set aside and the matter is restored back to the file of the assessing officer for deciding the issue afresh as per law.

Assessee is also directed to produce documentary evidence with regard to detailed particulars of the shares acquired under particular stock option scheme with reference to its date of acquisition, distinctive numbers etc. and their sale. If on final scrutiny the assessing officer finds that alleged shares were held by the assessee for more than 12 months ' he should allow all the deductions permissible under Section 54 of the Income Tax Act. Needless to say that assessee should be given due opportunity of being heard. We direct accordingly.

12. In the result, both the appeals of the assessee and revenue are allowed for statistical purposes.

