

Bombay High Court

Commissioner Of Income-Tax vs Shakuntala Kantilal on 19 March, 1991

Equivalent citations: 1991 190 ITR 56 Bom

Author: T Sugla

Bench: B Srikrishna, T Sugla

JUDGMENT T.D. Sugla J.

1. In this departmental reference relating to the assessee's assessment for the assessment year 1968-69, the Income-tax Appellate Tribunal has referred to this court two questions of law under section 256(1) of the Income-tax Act, 1961. The questions read thus :

"(1) Whether, on the facts and in the circumstances of the case, the compensation amount of Rs. 35,504 paid by the assessee to M/s. Raida and Sons (Pvt.) Ltd., is deductible in computing the capital gains arising on sale of the land under section 45 of the Income-tax Act, 1961 ?

(2) Whether, on the facts and in the circumstances of the case, the assessee was rightly allowed by the Tribunal to exercise the option of substituting the fair market value of the plot of land as on January 1, 1954 for the actual cost thereof as contemplated under section 55(2), the Income-tax Act, 1961, in computing the capital gains arising on sale of plot under section 4 of the Income-tax Act, 1961 ?"

2. The assessee had purchased a plot of land admeasuring 5,072 sq. yards at Borivli in the year 1948 for Rs. 15,774. On August 2, 1963, the assessee entered into an agreement for sale of the said property with Radia and Sons Sons (Pvt.) Ltd., at the rate of Rs. 29 per sq. yard. For reasons not necessary to be referred to. Disputes and differences cropped up between the parties. Raida and Sons (Pvt.) Ltd., filed a suit against the assessee in our High Court being suit No. 337 of 1966 for specific performance, inter alia, praying for (i) that the agreement for sale dated August 2, 1963 be declared valid and subsisting between the parties; and (ii) in the alternative, Radia and Sons (Pvt.) Ltd., be given compensation of Rs. 75,720. Eventually, there was a settlement between the parties. It was agreed that the assessee shall pay to Radia and Sons (Pvt.) Ltd., compensation of Rs. 35,504 at the rate of Rs. 7 per sq. yard upon which Radia and Sons would withdraw the above suit.

3. In the meantime, that is, on March 30, 1967, the assessee had entered into another agreement for sale in respect of the same property with Messrs. Cosmos Co-operative Housing Society Ltd., at the rate of Rs. 51 per sq. yard. As a result of the settlement between the assessee and Radia and Sons (Pvt.) Ltd., the assessee's solicitors had to give an undertaking to the solicitors of Radia and Sons (Pvt.) Ltd., that the amount of Rs. 35,504 will be paid to Radia and Sons (Pvt.) Ltd., as compensation. It appears that the mere undertaking did not satisfy Radia and Sons (Pvt.) Ltd., and, ultimately. The purchasers, Messrs. Cosmos Co-operative Housing Society Ltd., had to give an assurance to Radia and Sons that, on the compensation of sale, they would deduct Rs. 35,504 from the total sale consideration of Rs. 2,58,672 and would pay the same to Radia and Sons (Pvt.) Ltd.

4. The assessee claimed that this amount of Rs. 35,504 should be allowed as deduction for the purpose of computing her income under the head "Capital gains" either as expenditure incurred in

connection with the transfer or as cost of improvement or under section 48 itself. The departmental authorities rejected the claim. On further appeal, the Tribunal accepted the assessee's contention that the transfer of the property to Messrs. Comos. Co-operative Housing Society Ltd., could not have taken place unless the compensation of Rs. 35,504 was paid to Messrs. Raida and Sons (Pvt.) Ltd. It was held that the expenditure was thus incurred wholly and exclusively in connection with the transfer as contemplated under section 48(i) of the Act, the tribunal also held that the expenditure in question could be said to have been incurred with a view to remove the obstruction and obtain a clear title to the property before sale and, in that view of the matter, such expenditure would also form part of the cost of acquisition of the capital asset or the cost of improvement thereto as contemplated under section 48(ii) of the Act. For this and other reasons stated in the order, the Tribunal allowed the assessee's claim.

5. It must be stated in fairness to Dr. Balasubramanian for the Revenue that he did not dispute the fact of payment or even the necessity of making such a payment. His contentions is that the language in which section 48 is couched does not contemplate deduction of such an amount. Reference in this regard was made to section 48 of the Act to show that the payment herein could neither be termed as expenditure incurred wholly and exclusively for the transfer or the cost of acquisition or of any improvement thereto. None had appeared on behalf of the respondent-assessee.

6. In order to appreciate Dr. Balasubramanian's submission, it is desirable to refer to the provisions of section 48 which read as under :

"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 capital asset and the cost of any improvement thereto."

7. The section broadly contemplates three amounts for the purpose of computing income chargeable under the head "Capital gains". The first is the full value of the consideration for which the capital asset has been transferred. The second is the expenditure incurred wholly and exclusively in connection with such transfer and the third and the last is the cost of acquisition of the capital asset including the cost of any improvement thereto. We have already referred to the facts of the case in detail earlier. It cannot be disputed that, unless the assessee had settled the dispute with Radia and Sons (Pvt.) Ltd., the sale transaction with Messrs. Cosmos Co-operative Housing Society Ltd., under the agreement dated March 30, 1967, would not, rather would not, have materialised. If this transaction had not materialised, there would perhaps have been no question of capital gains. The sale would then have taken place at the rate of Rs. 29 per sq. yard as against Rs. 51 per sq. yard. One way of looking at the problem could be to say that the full value of the consideration in this case was not the apparent consideration, i.e., Rs. 2,58,672, but Rs. 2,23,168 (i.e., 2,58,672 minus Rs. 35,504). The Legislature, while using the expression "full value of consideration", in our view, has

contemplated both additions to as well as deductions from the apparent value. What it means is the real and effective consideration, that apart, so far as clause (i) of section 48 is concerned, we find that the expression "for the transfer". The expression used is "the expenditure incurred wholly and exclusively in connection with such transfer". The expression "in connection with such transfer" is, in our view, certainly wider than the expression "for the transfer". Here again. We are of the view that any amount the payment of which is absolutely necessary to effect the transfer will be an expenditure covered by this clause. In other words, if, without removing any encumbrance including the encumbrance of the type involved in this case, sale or transfer could not be effected, the amount paid AGEB for removing that encumbrance will fall under clause (i). Accordingly, we agree with the Tribunal that the sale consideration requires to be reduced by the amount of compensation. The first question is, therefore, answered in the affirmative and in favour of the assessee.

8. Before concluding. It may be desirable to observe that Dr. Balasubramanian fairly stated that there are no judgments on the issue either way and that the question is required to be decided on first principles and that is what we have done.

9. As regards the second question, Dr. Balasubramanian's argument appears to be that once an assessee exercises has option under section 55(2)(i) to have the market value of the asset as on January 1, 1954, instead of the actual cost price in the case of an asset acquired prior to January 1, 1955, there is no further scope for deduction on account of any type of expenditure whether it is in connection with the transfer or it is in connection with the improvement of the capital asset. This submission, to our mind, is too good to be accepted. Section 55(2)(i) clearly envisages the exercise of option by an assessee to opt for the market value of an asset as on January 1, 1954. Section 48, which provides the method for computation of the capital gains, does not, directly or indirectly, prohibit disallowance of any exercised which can be claimed under that section in case a person has exercised his option under section 55(2)(i). Even otherwise, we see no reason why after an assessee exercises the option and in case any expenditure has been incurred after that notional date, the said expenditure could not be taken into account, having regard to the above discussion, we are in agreement with the Tribunal on the second question also and answer the question accordingly in the affirmative and in favour of the assessee.

10. There will be no order as to costs.