IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.6962 OF 2010

The Commissioner of Income Tax-12,
Ayakar Bhavan, M.K.Road,
Churchgate, Mumbai-20. ..Appellant.

v.

Mr. Raman Kumar Suri,
10A, Dolphin Apartment, Pilot Bunder Road,
Coloba, Mumbai-400005. ..Respondent.

.....

Mr. P.C.Chhotaray for the Appellant.
Mr. Porus Kaka, Sr. Advocate with Ms. Vasanti B. Patel for the Respondent.

CORAM : J.P. DEVADHAR AND
M.S. SANKLECHA, JJ.

DATE : 27th November, 2012

JUDGMENT :(Per M.S. SANKLECHA, J.)

This appeal by the revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") challenges the order dated 30/4/2010 passed by the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") for the Assessment Year 2006-07.

2) Being aggrieved, the revenue has formulated the following questions of law for the consideration of this Court.

a) Whether the Tribunal was justified in approving the decision of Commissioner of Income Tax (Appeals) in deleting the addition of capital gain assessed in the hands of the assessee ignoring the fact that the Memorandum of Understanding entered into by the assessee with his brother is a personal arrangement between the brothers and the relinquishment of the assessee's share in favour of his brother is application of capital gain income which has arisen to the assessee?

b) Whether the Tribunal was justified in upholding the decision of the Commissioner of Income Tax (Appeals) in considering FMV as on 1/4/1981 estimated by the registered valuer ignoring the fact that rates adopted by the A.O. as from Nabhi's Guide to house to Delhi based on L& DO rates is more in consonance with the FMV?

c) Whether the Tribunal was justified in upholding the findings of the Commissioner of Income Tax (Appeals) to adopt the FMV as per register valuer ignoring the fact that the valuer has

not given any reasons for not adopting the Government approved rates in absence of comparable sales instances?

d) Whether the Tribunal was justified in approving the decision of Commissioner of Income Tax (Appeal) to determine the cost inflation index of the property as on 1/4/1981 ignoring the fact that as per clause 3 of the inflation given in Section 48 of the Income Tax Act benefit of indexation can be given only from the year 1999 which is the year when the assessee inherited the property and became the owner and not from 1974?

e) Whether the Tribunal was justified in confirming the decision of Commissioner of Income Tax (Appeals) in allowing the exemption u/s. 54 for investment in two new flats viz. 416A and 516A by treating the same as one single unit ignoring the fact that the assessee purchased two different flats in the same society and converted them into one duplex flat?

f) Whether the Tribunal was justified in treating the two flats viz. 416A and 516A purchased by the assessee as one singular unit for the purpose of

deduction under Section 54 and not as two separate and distinct units?

3) Regarding Question -(a) :

(a) The respondent is an individual deriving income from salary, house property and other sources. For the Assessment Year 2006-07, the respondent filed return of income declaring a total income of Rs.2.25 crores and inter alia disclosed a long term capital gain from the sale of property at 3/35, Shanti Niketan, New Delhi. (New Delhi Property). The respondent and his brother had inherited New Delhi property from their mother in accordance with her Will dated 11/10/1987. This inherited property was sold by Deed of Conveyance dated 14/10/2005 for a consideration of Rs.14 crores.

(b) However, the total consideration of Rs.14 crores was shared between the two brothers in accordance with Memorandum of Understanding in writing arrived at between them which provided that the respondent's brother would receive Rs.1 crore more than the respondent's half share from the sale proceeds of New Delhi property. This understanding was reached

between the brothers keeping in view the desire of their late father one Uttamchand Suri as recorded in his last Will and Testament dated 12/11/1968. Consequently, the sale consideration of Rs.14 crores was distributed between the respondent and his brother at Rs.6 crores and Rs.8 crores respectively.

(c) The Assessing Officer by his order dated 22/12/2008 held that the sale consideration of the inherited property has to be distributed between the two brothers at Rs.7.00 crores each. This was on the basis that Rs.1 crore received by respondent 's brother was in excess of that received by the respondent and is, in fact, an application of income received by the respondent and not diversion of income at source. Therefore, Assessment Order dated 22/12/2008 brought to tax the capital gain taxable in the hands of the respondent on the basis of the net consideration of Rs.7 crores as against Rs.6 crores declared by the respondent for sale of New Delhi property.

(d) In appeal, the Commissioner of Income Tax (Appeals) held that the Memorandum of Understanding arrived at between the brothers is a legally binding document, which also finds mention in the sale deed dated 14/10/2005 under which New

Delhi property was sold. The Commissioner of Income Tax (Appeals) held that by virtue of Memorandum of Understanding it is clear that the income of Rs.1 crores was diverted before it reached the respondent and is thus not includable in the respondent's income.

(e) In Appeal, the Tribunal by its order dated 30/4/2010 upheld the finding of the Commissioner of Income Tax (Appeals). The Tribunal also recorded the fact that the additional amount of Rs.1 crores received by the brother of the respondent had been offered to tax by the brother and the same was duly accounted as his income under the head capital gain. The Tribunal observed that the assessment cannot be based on the perception of the Assessing officer that the assessee should have received Rs.7 crores as sale consideration. The assessment can only be on the actual amount received by the assessee, the respondent assessee has sold his share in the New Delhi property at Rs.6 crores only and that alone can be the sale consideration.

(f) We find no fault with the order of the Tribunal. Both CIT(Appeals) as well as Tribunal have on consideration of all the facts involved, concluded as a finding of fact that the appellant

had received only Rs.6 crores for the sale of his rights in the New Delhi property and the same had been offered to tax. There is no provision to tax a person on the basis of the deemed income for the purpose of capital gain tax. This finding of the Tribunal as well as CIT(Appeals) has taken into consideration the Memorandum of Understanding reached between the brothers as well as the sale document dated 14/10/2005 which not only referred the Memorandum of Understanding but also shows that Rs.6 crores is the consideration received by respondent for sale of his interest in the New Delhi property. In view of the above, we find that no substantial question of law arises with regard to question (a) above. Therefore, the appeal is dismissed with regard to question (a) above.

4) Regarding Question (b) and (c) :

(a) For the purpose of computing capital gain tax to be paid by the respondent, the costs of acquisition at fair market value as on 1/4/1981 had to be determined. During the course of the assessment proceedings, the respondent had filed a valuation report dated 29/11/2005 with regard to the inherited New Delhi

property by a registered valuer who is empaneled by the Income Tax Department. This valuation report dated 29/1/2005 showed the value of the inherited New Delhi property on 1/4/1981 at Rs.47.74 lacs. During the course of the assessment proceedings, the Assessing officer took a view that the fair market value of the property has to be arrived at as per Nabhi's Guide to House Tax in New Delhi. The Assessing officer applied the Nabhi's Guide to house tax and held that the fair market value of the property on 1/4/1981 was Rs.17.33 lacs and not Rs.47.74 lacs as arrived at by empaneled registered valuer. Thus on the above basis of the fair market value as on 1/4/1981 being Rs.17.33 lacs the capital gain was computed after indexation in the assessment order dated 22/12/2008.

(b) In appeal the Commissioner of Income Tax (Appeals) by an order dated 4/5/2009 held that while determining the fair market value as on 1/4/1981 an element of estimation would creep in as one would have to envisage the existence of a hypothetical seller and a hypothetical buyer in a hypothetical market. The Commissioner of Income Tax (Appeals) held that the registered valuer's report could not be doubted as it explained the

basis for adopting the value and the appellant had demonstrated that New Delhi property enjoyed a better value because of its location. The Commissioner of Income Tax (Appeals) held that Nabhi's Guide to House Tax was not applicable specially in view of the valuation report given by the registered valuer which has not been found to be incorrect. Consequently, the registered valuer's report valuing the New Delhi property at Rs.47.74 lacs as its fair market value on 1/4/1981 was accepted and the fair market value of Rs.17.33 as on 1/4/1981 as arrived at in the assessment order dated 22/12/2008 was not accepted.

(c) In appeal, the Tribunal by its order dated 30/4/2010 upheld the finding of the Commissioner of Income Tax (Appeals). The Tribunal held that Nabhi's Guide to House Tax cannot be substituted for the valuation of the New Delhi property done by an empaneled valuer of the Income Tax Department for the purpose of valuation of the property. The Tribunal upheld the finding of the Commissioner of Income Tax (Appeals) that the valuation of a property differs depending upon its size, location, road frontage, corner plot etc. even in respect of two properties situated in the same locality.

(d) No fault can be found with the order of the Tribunal upholding the order of the Commissioner of Income Tax (Appeals) that the valuation done by an empaneled registered valuer of the Income Tax Department would certainly take precedence over Nabhi's Guide to House Tax. The valuation done by the registered valuer is with regard to the specific property and takes into account its various advantages and disadvantages all of which influence the valuation of the property. As against the above, the Nabhi's Guide to House Tax is generalized guide and does not take into account the peculiar features of the property being valued. Moreover, the determination of the fair market value as on 1/4/1991 is a question of fact which has been examined by both the Commissioner of Income Tax (Appeals) as well as the Tribunal and both have concluded that the fair market value as estimated by the registered valuer at Rs.47.74 lacs as on 1/4/1981 is acceptable. This finding of the authorities is neither perverse nor arbitrary so as to raise a substantial question of law. In view of the above, no substantial question of law arises with regard to question (b) and (c) above. Therefore, the appeal is

dismissed with regard to question (b) and (c) above.

5) Regarding question (d) :-

(a) It is an admitted position between the Advocates that Question (d) is covered in favour of the respondent -assessee and against the revenue by the decision of this Court in the matter of **Commissioner of Income Tax -12 v. Manjula J. Shah reported in (2012) 204 Taxman 691.**

(b) In view of the above, question (d) does not give rise to any substantial question of law and the same is dismissed.

6) Regarding question (e) and (f):-

(a) The respondent in his return of income for the assessment year 2006-07 had claimed a deduction of Rs.3 crores under Section 54 of the Act being the investment made for purchase of flat Nos. 416A and 516A at Mittal Park, Juhu, Mumbai. The Assessing officer in his assessment order dated 22/12/2008 restricted the exemption under Section 54 to only Rs.1.34 crores on the ground that the exemption is allowable only in respect of investment in one residential house only. Further the fact that two flats had been joined and made into one flat would

not be considered to be purchase of one flat but would be purchase of two separate flats. Consequently, the Assessing officer restricted the exemption to only Rs.1.45 crores as according to him Section 54 of the Act exempts investment in a residential house i.e. one residential house only.

(b) In appeal, the Commissioner of Income Tax (Appeals) by his order dated 4/5/2009 held that the respondent herein is entitled to the benefit of exemption under Section 54 of the Act to the extent of Rs.3 crores as claimed in the return of income. This was on the basis that the respondent herein had produced a Certificate of Co-operative Society that two flats were inter connected by internal stair case. The site plan was also submitted inter alia showing only one entrance gate and one kitchen. The duplex flat Nos. 416A and 516A was purchased on as is and where is basis and the assessee had not joined the said two flat internally after acquiring the flats. The flats were inter connected by the previous owner only and therefore, the fact that there were two different flats was immaterial as Section 54 grants exemption to a residential house and unit. The Commissioner of Income Tax (Appeals) had reached a finding of fact was that two flats were

joined into one single flat before the respondent became its owner and was one residential house.

(c) On an appeal filed by the revenue, the Tribunal by its order dated 30/4/2010 upheld the findings of Commissioner of Income Tax (Appeals) dated 4/5/2009. The Tribunal also followed the Special Bench decision of the Tribunal in the matter of **Mrs. Sushila M. Jhaveri 292 ITR (AT) 1** to hold that where two flats bearing Nos. 416A and 516A had only one entrance, one kitchen and common passage it has to be considered as one residential house and the respondent was entitled to exemption for the aggregate consideration of Rs.3 crores under Section 54 of the Act.

(d) We find no fault with the order of the Tribunal which has upheld the finding of fact of the Commissioner of Income Tax (Appeals) to the effect though the respondent-assessee had purchased flat Nos. 416A and 516A it was only purchase of one residential house. Further, the Tribunal held that two flats were joined together before the respondent assessee became the owner of the two flats. The Certificate from the society also established the fact that two flat Nos. 416A and 516A were joined

together and were considered as one residential house. These concurrent findings of fact by the Commissioner of Income Tax (Appeals) and the Tribunal have not been shown to be perverse or arbitrary. Further, Section 54 of the Act exempts capital gain to the extent the consideration is paid for the purpose of a residential house. Consequently, where respondent-assessee has acquired one residential house consisting of two flats, it cannot be said the respondent assessee had purchased two residential houses. In view of the above, we find that question (e) and (f) also do not raise any substantial question of law. Therefore, the appeal is dismissed with regard to question (e) and (f) above.

7) In view of the above, the appeal is dismissed with no order as to costs.

(M.S.SANKLECHA, J.) **(J.P. DEVADHAR, J.)**