

Court No. - 32

Case :- INCOME TAX APPEAL No. - 56 of 2013

Appellant :- The Commissioner Of Income Tax Alld.

Respondent :- Smt. Rama Rani Kalia

Counsel for Appellant :- Dhananjay Awasthi

Counsel for Respondent :- Shubham Agrawal

Hon'ble Sunil Ambwani,J.

Hon'ble Surendra Vikram Singh Rathore,J.

1. We have heard Sri Dhananjay Awasthi for the appellant. Sri Shubham Agrawal appears for the respondent-assessee.

2. This Income Tax Appeal under Section 260-A of the Income Tax Act 1961 (the Act) is directed against the order dated 31.10.2012, passed by the Income Tax Appellate Tribunal, Allahabad Bench, Allahabad in I.T.A. No. 95/Alld/2011, relating to Assessment Year 2004-05. The department-appellant has framed the following substantial questions of law, for consideration:-

- "1. Whether ITAT has erred in law in upholding the order of CIT (A) without taking into account the fact that after conversion to free hold superior rights accrued to the assessee?
2. Whether the ITAT was justified in law in dismissing the appeal of the revenue without taking into account the fact that, the difference of period of between date of free hold and date of sale is only three days therefore short-term capital gains are to be levied
3. Whether ITAT was justified in giving relief to the assessee without taking into account the decision of V. V. Modi Vs. CIT 281 ITR page 1
4. Whether the ITAT was justified in law in ignoring the D.V.Os report regarding the Stamp Valuation."

3. We find that only question Nos. 1 and 2 are relevant, for the purpose of consideration.

4. Brief facts of the case are that the assessee is a senior citizen. She had never filed income-tax return, as her income was below maximum exemption limit. During the year in question, the assessee sold immovable property i.e. a Shop No. 26/7 M.G. Marg, Civil Lines, Allahabad, built at Nazul Plot No. 30/4 (being a part portion of Nazul Plot No. 30, Civil Station, Allahabad). She did not file return of income on the advice of the then C.A., but filed it in compliance to the notice u/s 148 of the Income Tax 1961, declaring income of Rs.70,430/-. During the assessment proceedings, details were furnished by the assessee, including valuation report of the Government Approved Valuer to estimate the Fair Market Value, for the purpose of capital gains under the Income Tax Act. The AO proceeded to rely on the market value, for stamp duty purpose, for

assessment of capital gains since till the completion of assessment order, the report was not received from the Departmental Valuation Officer (DVO).

5. The AO found that the assessee had purchased the property on 7.7.1984, for Rs.46,000/-. A copy of agreement was filed on record. The assessee had thereafter applied for free hold rights, which was granted by the Collector, Allahabad on 29.03.2004, on payment of Rs.1,34,567/-. She sold the property on 31.03.2004, for Rs.20,00,000/- including the amount paid for free hold. Rs. 4,60,000/- was paid as stamp duty on the sale deed executed declaring the value of the property at Rs.46,05,840/-. The assessee filed a copy of certificate regarding investment of Rs.16,00,000/-, which was deposited in Long Term Capital Gain account, within six months from the date of sale i.e. 24.09.2004.

6. The AO found that since the property was acquired by converting the lease hold right into free hold right on 29.03.2004, and was sold within three days on 31.03.2004, capital gain would amount to short-term capital gain. He added the short term capital gain of Rs.17,30,866/- towards the income of the assessee. The AO worked out Capital Gain u/s 50 C of the Act at Rs.26,05,840/-, which was the difference between the total sale consideration as per stamp authority and net sale consideration of the property, and thus worked out total Capital Gain of Rs.43,36,706/-, and assessed the total income of the assessee at Rs.44,07,140/-.

7. The CIT (Appeal) allowed the appeal partly, with the findings that the assessee did not have any short- term capital gain in the property. Relying on several orders of ITAT, the CIT (A) held that the conversion of property into free hold property, is nothing but improvement of the title over the property, as the fact remains that the assessee was owner, prior to conversion. The relevant paragraphs of the order of the CIT (A) are quoted as under:-

“5.2 So far as, the sole ground of appeal is concerned, which relates to the fact of the matter that the sale made, to be considered as Long Term Capital Gain and not as Short Term Capital Gain, as stated earlier also, I am of the view and as also the appeals decided by me in the cases of -

- (1) Usha Mehta, (A.No.45/ITO/R-I(4)AII/2010-11 dated 28.9.2010).
- (2) Malini Malviya, (A.No.47/ITO/R-I(2)AII/2010-11 dated 28.9.2010)
- (3) Vinodini Mehta (A.No.46/ITO/R-I(4)AII/2010-11 dated 28.9.2010)
- (4) Tribeni Prasad Mehta, (A.No.47/ITO/R-I(4)AII/2010-11 dated 28.9.2010)
- (5) Seema Segal, (A.No.67/ACIT/R-I/AII/08-09 dated 12.11.2010)

On the same issue and in particular after considering the orders of the

Hon'ble ITAT, Allahabad in Dhiraj Shyamji Chauhan, Allahabad Vs. CIT Allahabad in ITA No. 134(Alld)/2007- Asst. Year 1999-2000 dated Nov 22, 2007, wherein it was held that the conversion of the property from leasehold to freehold is nothing but the improvement of the title of the property, but the fact remains that assessee was the owner even prior to the said conversion, the plea of the appellant is acceptable. As also submitted by the appellant, in the cases of Sri D.N. Chadha & T.N. Chadha [ITA No. 38 & 45 (Alld)/2008 dated February 28, 2008, the Hon'ble ITAT, Allahabad has reiterated the same point of view. In the case of CIT Vs. Sujatha Jewellers [2007] 290 ITR 631 (Mad) also, the assessee took an immovable property in lease and sub leased the same to another company. The AO held that the transfer of lease by the assessee would amount to transfer of capital asset viz. Lease rights. It was held that the assessee had acquired interest in the property by having a lease in its favour and by sub leasing the property, it had transferred, the interest in property in favour of a third party which is liable to be taxed under the head 'Capital Gains'. By sub leasing of property, the interest of the transferor i.e. lessor is extinguished and this extinguishment of right is covered u/s 2(47) of the Act. Therefore, it was held that the transaction of sub-lease constitutes transfer and the gains arising there from were assessable as Capital Gains. While deciding this case, the decisions rendered in A.R. Krishnamurty & A.R. Raja Goptal Vs. CIT [1982] 133 ITR 922 (Mad) and R.K. Palshikar (HUF) Vs. CIT [1988] 172 ITR 311(SC) were followed by the Hon'ble Court. Even before the insertion of clause (v) to section 2(47) of the I.T. Act, by the Finance Act, 1987, w.e.f. 01.04.1988, it was held in the case of A.R. Krishnamurthy and A.R. Raja Gopal Vs. CIT [1982] 133 ITR 922 (Mad) that the word 'transfer' u/s 2(47) gave a restricted meaning and it includes grant of lease rights. It was held by the Hon'ble Apex Court regards Section 2(47) that this clause contains an 'inclusive' definition of transfer. Therefore, other modes of 'transfer' are also liable to Capital Gain subject to fulfilment of other conditions regarding taxability under the head 'Capital Gain' (C.I.T. Vs. Narang Dairy Products (1996 219 ITR 478 (SC). As also decided by Hon'ble ITAT, Allahabad, in the case of Dhiraj Shyamji Chauhan Vs. CIT Allahabad that it was evident that the assessee was holding the property since 1922 on lease basis. Thus, the assessee was having right may be restricted, on the property. The right of the holder of the lease hold property is almost actually as the owner of the property, that for example entire DDA property is sold on lease hold basis. The assessee got the conversion of the property into freehold property, that may be considered as improvement in the title, but the fact remains that the assessee was the owner since 1922 on lease basis.”

8. The CIT (A) relied on the definition of 'long term capital gain' which contains an 'inclusive' definition of transfer, and does not rule out other mode of transfer subject to fulfilment of conditions regarding taxability under the head 'Capital Gain' vide **CIT Vs. Narang Dairy Products** [(1996) 219 ITR 478 (SC). He also relied on **CIT Vs. Dr. V.V. Modi** [218 ITR (1996) Kar.] where the assessee was allotted a site by the Bangalore Development Authority in 1972. He secured a conveyance on payment of entire sale consideration at the end of 10th year, and a sale deed was executed in his favour by the Development Authority registered on 13.5.1982. Thereafter on 27.11.1982, the assessee sold the site to a third person. In the said case, the Tribunal found that in such

case 50 % should be considered as short-term gain and 50 % as long term capital gain. On a reference it was held by the Karnataka High Court that from the date of sale in favour of the assessee, the assessee had only one capacity of being the absolute owner of the site in question, and it was in that capacity alone, the assessee transferred his title over the site in question in favour of the purchaser.

9. In the appeal filed by the revenue, the Income Tax Appellate Tribunal held that it was a case of long term capital gain, as the assessee was owner of the property, even prior to conversion.

10. The terms 'short-term capital asset' & short-term capital gain' and 'long-term capital asset' & long-term capital gain' have been defined in the Act as follows.

"Section 2 (42-A) "Short-term capital asset" means a capital asset held by an assessee for not more than thirty six months immediately preceding the date of its transfer;

2 (42-B) "short term capital gain means capital gain arising from transfer of a short-term capital asset;

2 (29-A) "long term capital asset" means a capital asset which is not a short-term capital asset;

2 (29-B) "long term capital gain" means capital gain arising from the transfer of a long-term capital asset."

11. The difference between the 'short-term capital' asset and 'long-term capital asset' is the period over which the property has been held by the assessee and not the nature of title over the property. The lessee of the property has rights as owner of the property subject to covenants of the lease, for all purposes. He may, subject to covenants of the lease deed, transfer the lease hold rights of the property with the consent of the lessor. The conversion of the rights of the lessee in the property from having lease hold right into free hold is only by way of improvement of her rights over the property, which she enjoyed. It would not have any effect on the taxability of gain from such property, which is related to the period over which the property is held. If the period is less than 36 months, the gain arising from such transfer would be of short-term capital gain.

12. In the present case, the property was held by the assessee as a lessee since 1984, and the same was transferred on 31.03.2004, after the lease hold rights were converted into free hold rights on the same property which was in her possession, in her favour on 29.03.2004. The conversion was by way of improvement of title, which would not have any effect on the taxability of profits

as short term capital gain.

13. There is no error of law in the order of the Tribunal. The question Nos. 1 and 2, framed in the appeal, are thus decided in favour of the assessee and against the department.

14. The Income Tax Appeal is **dismissed**.

Order Date :- 7.8.2013

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