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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 09th February, 2015

\+ ITA 70/2015

COMMISSIONER OF INCOME TAX DELHI –XVI ..... Appellant

Through: Mr.Rohit Madan, Adv.

versus

RAM GOPAL ..... Respondent

Through: Ms. Poonam Ahuja with Mr. Mukul Mathur, Advs.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The Revenue is aggrieved by the order of Income Tax Appellate Tribunal (ITAT) in respect of its appeal ITA No. 5910/Del./2012. The impugned common order also allows the cross-objections preferred by the assessee in C.O.No.479/Del./2012. The Revenue complains that the ITAT fell into error in misappreciating that the amounts spent by the assessee were towards acquisition of a capital asset, during the relevant year, and that the amount spent towards improvements was deductible.

2. The assessee, in the return for the Assessment Year (AY) 2009-10 reported sales of two capital assets in the form of half shares in a residential property in Marine Drive, Mumbai and half share in a Kashmere Gate, property. The assessee claimed that a sum of ₹73,27,000/- (hereinafter

called as "Acquisition Cost") was used to acquire another property within a period stipulated in Section 54, i.e. MC 1-901 Moon Court Apartment, Jay Pee Green, Greater Noida (UP). It also claimed, *inter alia*, that a sum of ₹25,14,700/- (hereinafter referred as "improvement expenses") was spent towards cost of improvement. The Assessing Officer (AO), in framing the assessment order, rejected the assessee's contention and held that in the absence of an agreement to sell, the rights acquired by the provisional booking of the property did not meet with the requirements spelt out under Section 64, i.e. acquisition of new capital asset. The AO also held that the improved cost was not deductible. The CIT (Appeals) accepted the assessee's contention and directed the deletion of both amounts. The Revenue unsuccessfully appealed to the ITAT.

3. It is argued by Mr.Rohit Madan, learned counsel on behalf of the Revenue that the AO's position with respect to acquisition of a new capital asset was correct. He said that the ITAT's reliance on *CIT vs. R.L. Sood* (2000) 245 ITR 727 and the ruling in *Suraj Lamps and Industries Pvt. Ltd. vs. State of Haryana and Anr.* 340 ITR 1, has arisen the issue of acquisition as follows:-

> *"7. . We have heard rival contentions and perused the material available on record. Reliance placed on the case law by ld. DR does not support the cause of the revenue. Hon'ble Delhi High Court judgment in the case of R.L. Sood (supra), wherein the investment in flat irrespective of the delivery of possession by builder has been held to be investment in purchase or construction of new flat is applicable to assessee's case. In view of CBDT Circulars (supra), clarifying the proposition, also ground no. 1 taken by the revenue is dismissed."*

4. With respect to the second ground, it is urged that the ITAT fell into error since the cost of improvement was incorrectly allowed. The ITAT held on this issue as follows:

> *"7.1. Apropos ground no. 2 also the case law cited by ld. DR in the case of Kiran Bansal (supra) does not support the case of revenue and we find merit in the contention of ld. Counsel for the assessee and respectfully following the ratio of decisions in the cases of B.B. Sarkar and Saleem Fazelbhoy (supra), we are of the view that the investment incurred towards improvement of the new house purchased by the assessee to make it habitable would go towards amount invested for purchase of new asset. In view thereof, this ground of revenue is also dismissed."*

5. This Court, in the decision reported as *Sh.Gulshan Malik vs. Commissioner of Income Tax* (ITA No.55/2014, decided on 14.03.2014) had the occasion to, *inter alia*, consider what amounted to acquisition of a capital asset – though in the context of a claim that capital gains had accrued due to the sale of the property. The facts in that case were that the assessee had booked a flat, and was recipient of a provisional allotment letter. Subsequently, the transaction was converted into a written agreement to sell. The Court, noting the contentions of the parties and also, significantly, taking note of the definition of "transfer" and "capital asset", was of the opinion that "capital asset" has been defined in extremely wide terms - A reference to Section 2(47), which defines "transfer", and particularly its second Explanation to Clauses (v) and (vi) made it clear that possession, enjoyment of property as well any interest in any of transferrable capital

asset was included within the ambit of "capital asset". The Court held importantly that even booking rights or rights to purchase the apartment or to obtain its letter was also capital asset and has categorised the same as under:

> *"7. It is clear that a "capital asset" under the Act is property of "any kind" that is "held" by the assessee. Necessarily, a capital asset must be transferable. Thus, to understand what kind of property can be considered a capital asset, it would be apposite to refer to the definition of transfer in Section 2(47) of the Act. Section 2(47)(v) and (vi), and Explanation 2 make it adequately clear that possession, enjoyment of immovable property, as well as an interest in any asset are all transferable "capital assets". The reference to acquisition "by way of any agreement or any arrangement or in any other manner whatsoever" establishes that it is not conveyance of property or the doctrine of part performance (enacted through Section 53A of the Transfer of Property Act) which result in enforceable rights, for the purposes of the Income Tax. The scheme of the Act puts it beyond doubt that even rights or interests in a property are kinds of property that are transferable capital assets. Thus, there is no doubt that booking rights or rights to purchase the apartment or rights to obtain title to the apartment are also capital assets that can be transferable."*

6. In the present case the question is not whether the assessee sold the booking rights and was, therefore, entitled to benefit of capital gains. It is, rather, whether his entering into the transaction and acquiring a property for ₹73,27,000/- (acquisition cost) amounted to his acquiring a capital asset. In the light of the definitions of "capital asset" under Section 2(14) and "transfer" under Section 2(47) as discussed in *Gulshan* (supra), this Court

has no doubt that the assessee's contentions were merited. The reference to *Suraj Lamps* (*supra*), in the Court's opinion, is of no consequence because the Supreme Court, on that occasion had to deal with a property transaction and whether a sale transfer, based upon confirming a GPA, amounted to sale or conveyance. That decision did not consider – rather had no occasion to deal with Sections 2(14) and 2(47) in the context of a claim of acquisition of rights of property and interest in a capital asset, for the purpose of income tax.

7. So far as the second issue is concerned, i.e. whether improved cost was deducted, this Court has no manner of doubt that the Revenue does not dispute the acquisition of second property at Model Town. Given that the Revenue does not dispute that the second transaction of purchase took place, it has to necessarily follow that the cost of improvement was deductible. No substantial question of law arises on that score too.

8. For the above reason, this court is of the opinion that there is no merit in the appeal, the same is consequently dismissed.

S. RAVINDRA BHAT, J

R.K.GAUBA, J

FEBRUARY 09, 2015
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