

ORDER SHEET

ITA NO.438 OF 2008
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction(Income Tax)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, KOLKATA-X, KOLKATA
Versus
SMT MINA DEOGUN

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ARINDAM SINHA

Date: 20th April, 2015.

MR.M.P.AGARWAL,ADVOCATE FOR APPELLANT
MR.R.K.MURARKA, MS.SUTAPA ROYCHOWDHURY,ADVOCATES FOR RESPONDENT

The Court: The subject matter of challenge in the appeal is a judgment and order dated 3rd August, 2007 passed by the learned Income Tax Appellate Tribunal pertaining to the assessment year 2004-2005. The revenue has come up in appeal. The following questions were formulated at the time of admission of appeal:-

" (a) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is correct in adopting the value of share of the assessee in the property at 47, Archbishop Makarios Marg (Golf Links), New Delhi as on 1.4.1981 at Rs.18,40,244/- in accordance with the report of the Registered Valuer instead of Rs.15,02,907/- being the mean value between the valuations made by the Registered Approved Valuer and

Rs.11,65,570/- by the District Valuation Officer, as determined by the Commissioner of Income Tax (Appeals) ?

b) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is correct in applying the cost inflation index with effect from 1.4.1981 instead of the year 1999-2000, in which the assessee inherited the property, contrary to the provisions of Explanation (iii) to section-48 of the Income Tax Act, 1961, to the effect that it would be applied with effect from the first year in which the assessee held the property, or 1.4.1981, whichever is later, on the ground that a literal interpretation of the provisions was to be discarded ?

c) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is correct in holding that the rent from the property at Panchasheel Park, New Delhi, was to be assessed under the head "Income from House Property" and not as "Income from Other Sources" , though the land stood in the name of the assessee's husband? "

The facts and circumstances of the case are briefly stated as follows:-

A residential house situate at Premises No.47, Golf Links, New Delhi was purchased by Sardar Pratap Singh on 16th April, 1958 at a cost of Rs.34,600/-. He died on 29th June, 1968. The aforesaid property devolved on her widow Bhajan Pratap Singh. She died on 16th September, 1999. The assessee and her three sisters being the daughters of the deceased Bhajan Pratap Singh succeeded to the property in equal shares. During the financial year 2003-2004 the property was sold at a sum of Rs.12 crores. Share of the assessee in the sale

proceeds was a sum of Rs.3 crores. The question numbers 1 and 2 indicated above are with regard to computation of the capital gains payable by the assessee consequent to sale of the property situate at Golf Links.

The third question is in connection with another piece of land belonging to the husband of the assessee. A building was, however, constructed on the piece of land belonging to the husband of the assessee jointly by the wife and the husband. The cost of construction was shared in the ratio of 1/3rd and 2/3rd and the income was proportionately distributed. The third question pertains to the income arising from this property.

In so far as the first question is concerned the property was valued by the registered valuer as at 1st April, 1981 at a sum of Rs.73,60,975/-. Therefore, the share of the assessee worked out to a sum of Rs.18,40,244/-. The assessing officer, however, in exercise of power under section 55A referred the matter to the departmental valuer who valued the property at a sum of Rs.46,62,280/- and thus, the share of the assessee was worked out a sum of Rs.11,65,570/-. The competence of the assessing officer to refer the matter to the departmental valuer under section 55A was under challenge. The learned Tribunal held that the reference made under section 55A was incompetent and, therefore, the valuation provided by the assessee on the basis of the valuation made by the registered valuer valuing the share of the assessee at a sum of Rs.18,40,244/- was accepted, which is under challenge in the first question indicated above.

Mr. Agarwal, learned advocate appearing for the revenue/appellant has not disputed the fact that under Clause (a) of section 55A as it stood at the relevant point of time, the assessing officer could have made a reference provided he was of the opinion that the valuation made by the registered valuer was less than the fair market value of the property. When the valuation made by the registered valuer was on the higher side, there was no occasion for the assessing officer to refer the matter to the valuation officer under section 55A. therefore, the valuation at a sum of Rs.18,40,244/- as at 1st April, 1981 was correctly accepted by the learned Tribunal. The first question is answered in the positive and against the revenue.

Mr. Agarwal, learned advocate appearing for the revenue submitted that the computation of capital gains has to be made in accordance with section 48 and in particular explanation (iii), which provides as follows:-

" (iii) "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as the Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later "

Mr. Agarwal is correct when he submitted that the benefit of cost inflation index going by clause (iii) of the Explanation quoted above should be available to the assessee from the year 1999 when she inherited the property which was in

fact the first year of her inheritance. That can certainly be one way of looking at it.

But if a harmonious construction is to be given then reference has to be made to the other provisions contained in the Act. Section 2(42A) defines short term capital asset. Clause (b) of Explanation (1) to Section 2(42A) provides as follows:-

" (b) in the case of a capital asset which becomes the property of the assessee in the circumstances mentioned in [sub-section (1)] of section 49, there shall be included the period for which the asset was held by the previous owner referred to in the said section. "

Section 49 referred to in the aforesaid clause (b) of Explanation (1) provides for various circumstances including acquisition by succession, inheritance or devolution. Therefore, the period for which the asset was held by the previous owner, namely, the mother of the assessee can also be included to the period of holding of the property by the assessee. The mother held the property since 1968 as indicated above. Here is, as such, the reason why the assessee in the case before us can be said to have held the property since 1968. In order to ascertain the cost of acquisition to the assessee reference can also be made to Section 55(2)(b)(ii) which reads as follows:-

“(ii) where the capital asset became the property of the assessee by any of the modes specified in [sub-section(1) of section 49], and the capital asset

became the property of the previous owner before the [1st day of April, [1981]], means the cost of the capital asset to the previous owner or the fair market value of the asset on the [1st day of April, [1981]], at the option of the assessee.”

Based on the aforesaid provision the cost of acquisition of capital asset at the option of the assessee is the fair market value of the asset on 1st April, 1981. When that is permissible in law, indexation on the fair market value as on 1st April, 1981 until the date of transfer has to be allowed. Any other interpretation will not only lead to absurd result but shall also cause immense prejudice to the assessee. If the previous owner that is to say the mother had not died and if she herself had sold the property in the year 2003, she would have got the benefit of indexation on the fair market value as at 1st April, 1981.

We are supported in our view by a judgment of the Gujarat High Court in the case of C.I.T- I Vs. Rajesh Vitthalbhai Patel reported in (2013) 37 Taxmann. Com 439 wherein the following views were expressed:-

" 7. Under section 48 of the Act, thus capital gain is computed by deducting from the full value of the consideration received or accruing as a result of the transfer, the amounts of expenditure incurred wholly and exclusively in connection with such transfer, the cost of acquisition of the asset and the cost of any improvement thereto. Term 'cost of acquisition of the asset' is explained in Explanation (iii) to section 48. In terms of such explanation, indexed cost of acquisition would be an

amount which bears to the cost of acquisition the same proportion as the Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later. In simple words therefore for an asset acquired prior to 1.4.1981 the indexed cost of acquisition would be the cost of acquisition multiplied by the ratio of the Cost Inflation Index in the year in which assessee's asset is transferred to the Cost of Inflation Index for the year beginning on 1.4.1981. It was therefore, that the Tribunal in our opinion correctly held that the indexed cost of acquisition shall have to be worked out with reference to 1.4.1981, since in the present case the asset was acquired by the previous owner of the property. Learned counsel for the Revenue however, submitted that such interpretation would fail to take into account the expression "Cost Inflation Index for the first year in which the asset was held by the assessee". In his opinion the "assessee" referred to under such expression would be the present assessee and not the previous owner. In our opinion, such interpretation cannot be accepted. We say so for the following reasons. Firstly, by virtue of a deeming fiction provided in sub-section (1) of section 49, cost of acquisition in hands of the assessee would be the cost for which the previous owner of the property acquired it. It is for this purpose that we need to fall back on computation provision of section 48. When we do so, we work out the cost of acquisition of the asset in the hands of previous owner. While doing so, we cannot transpose the assessee

in Explanation (iii) of section 48. Doing so, would amount to falling short of giving full effect to the deeming fiction contained in sub-section (1) of section 49. To our opinion such deeming fiction must be allowed to have its full play. As is often stated, a deeming fiction must be allowed its full application and should not be allowed to boggle.

8. Additionally we notice that in Sub-section (1) of section 49, the legislature has provided that cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by any cost of improvement of the assets incurred or borne by the previous owner or the assessee as the case may be. If the interpretation of the counsel for the Revenue was correct, this later reference to the cost of improvement borne by the assessee would not have been necessary since section 48 itself would take care of any improvement on the capital asset to be included for the cost of acquisition. It is precisely because such improvement referred to in section 48 would have reference only to that made by the previous owner that the additional provision had to be made in the deeming fiction provided in sub-section (1) of section 49. Further the interpretation sought to be given by the Revenue would be unacceptable because there is no provision under which the cost of acquisition in the hands of the assessee in cases such as gift on the date of acquisition of the property can be made and found in the Act. A Serious road-block

would be created if such property is acquired through Will and would, therefore, have no reference to its actual cost on the date of operation of the Will".

Mr. Murarka has also relied upon a judgment of C.I.T Vs. Manjula J. Shah reported in (2013) 355 ITR 474 (Bom) and referred to paragraphs 21 to 24 of the judgement which are as under:-

" 21) To accept the contention of the Revenue that the words used in clause (iii) of the Explanation to section 48 of the Act has to be read by ignoring the provisions contained in section 2 of the Act runs counter to the entire scheme of the Act. Section 2 of the Act expressly provides that unless the context otherwise requires, the provisions of the Act have to be construed as provided under section 2 of the Act. In section 48 of the Act, the expression "asset held by the assessee" is not defined and, therefore, in the absence of any intention to the contrary the expression "asset held by the assessee" in clause (iii) of the Explanation to section 48 of the Act has to be construed in consonance with the meaning given in section 2(42A) of the Act. If the meaning given in section 2(42A) is not adopted in construing the words used in section 48 of the Act, then the gains arising on transfer of a capital asset acquired under a gift or will be outside the purview of the capital gains tax which is not intended by the Legislature. Therefore, the argument of the Revenue which runs counter to the legislative intent cannot be accepted.

22. Apart from the above, section 55(1)(b)(2)(ii) of the Act provides that where the capital asset became the property of the

assessee by any of the modes specified under section 49(1) of the Act, not only the cost of improvement incurred by the assessee but also the cost of improvement incurred by the previous owner shall be deducted from the total consideration received by the assessee while computing the capital gains under section 48 of the Act. The question of deducting the cost of improvement incurred by the previous owner in the case of an assessee covered under section 49(1) of the Act would arise only if the period for which the asset was held by the previous owner is included in determining the period for which the asset was held by the assessee. Therefore, it is reasonable to hold that in the case of an assessee covered under section 49(1) of the Act, the capital gains liability has to be computed by considering that the assessee held the said asset from the date it was held by the previous owner and the same analogy has also to be applied in determining the indexed cost of acquisition.

23. The object of giving relief to an assessee by allowing indexation is with a view to offset the effect of inflation. As per CBDT Circular No.636, dated August 31, 1992 (see [1992] 198 ITR (St.) 1) a fair method of allowing relief by way of indexation is to link it to the period of holding the asset. The said circular further provides that the cost of acquisition and the cost of improvement have to be inflated to arrive at the indexed cost of acquisition and the indexed cost of improvement and then deduct the same from the sale consideration to arrive at the long-term capital gains. If indexation is linked to the period of holding the asset and in the case of an assessee covered under

section 49(1) of the Act, the period of holding the asset has to be determined by including the period for which the said asset was held by the previous owner, then obviously in arriving at the indexation, the first year in which the said asset was held by the previous owner would be the first year for which the said asset was held by the assessee.

24. Since the assessee, in the present case, is held liable for long-term capital gains tax by treating the period for which the capital asset in question was held by the previous owner as the period for which the said asset was held by the assessee, the indexed cost of acquisition has also to be determined on the very same basis."

For the aforesaid reasons, the second question is answered in the affirmative and against the revenue.

In so far as the third question is concerned, Mr. Agarwal was not in a position to draw our attention to any definition of the expression "owner". Section 27 provides an inclusive definition of the expression "owner". An inclusive definition is not an exhaustive definition in law. We can imagine a situation where a person can be the owner of the land and another can be the owner of the structure. This is permissible in law because in joint ownership unity of title is not required. In the case before us the land admittedly belonged to the husband. He has raised the building with the joint funds belonging to himself and his wife. Therefore, one inference which can be drawn is that the land belonging to the husband has been thrown into the common stock of joint property between the

husband and the wife. Both of them thus became the joint owners by operation of the doctrine of blending. They admittedly have borne the cost of construction in the ratio of 1/3rd and 2/3rd. Therefore, the income arising out of the property is in fact an income arising out of house property which has to be taxed under Section 22 rather than as an income arising out of other sources under Section 56. Therefore, the third question is answered in the affirmative and against the revenue.

The appeal is for the aforesaid reasons dismissed.

(GIRISH CHANDRA GUPTA, J.)

(ARINDAM SINHA, J.)

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