
(1979) 06 MAD CK 0024

In the Madras High Court

Case No : Tax Case No. 174 of 1975 (Reference No. 157 of 1975)

Additional Commissioner of Income Tax

APPELLANT

Vs

Govindoss Purushothamdoss

RESPONDENT

Date of Decision : 18-06-1979

Acts Referred:

Income Tax Act, 1961 — Section 49, 55, 55(2)

Citation : (1980) 18 CTR 16 : (1980) ILR (Mad) 406 : (1980) 124 ITR 319

Hon'ble Judges : Sethuraman, J; Balasubrahmanyam, J

Bench : Division Bench

Advocate : J. Jayaraman and Nalini Chidambaram, for the Appellant; V. Ramachandran, for the Respondent

Judgement

Sethuraman, J.—At the instance of the Addl. CIT, the following question has been referred to us u/s 256(1) of the I.T. Act, 1961

(hereinafter referred to as "" the Act""):

Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that in computing the capital gains arising to the

assessee by the sale of the property in question, its cost of acquisition should be taken as its market value as on April 1, 1964?

2. There was an HUF which owned a property known as ""Gokulbagh"" measuring 29 acres, having purchased it in 1919. The family was a trading

family carrying on business of money-lending and this property was shown as a business asset. On March 27, 1922, a partnership deed came into

existence between two members of the said family, viz., Purushothamdoss Gokuldoss and Jumnadoss Dwarakadoss. It is not clear as to whether

this property was treated as the said firm's property. However, on 6th November, 1953, the money-lending business carried on by the said family

was divided between the members thereof and the divided members executed a partnership deed for carrying on the business under the name and style of M/s. Gokuldoss Jumnadoss and Co. In this partnership deed, Purushothamdoss Gokuldoss, Jumnadoss Dwarakadoss and the major sons of Purushothamdoss Gokuldoss were shown as partners. The property ""Gokulbagh"" was transferred to this firm and it was being shown as an asset of the firm in the firm's books and its balance-sheets right up to 1st April, 1963, at the value of Rs. 94,000.

3. Jumnadoss Dwarakadoss, one of the partners, was the karta of a family consisting of himself and his brother, Amichand Doss Dwarakadoss.

There was a partition between these two persons and as a result of this partition, a fresh partnership deed came into existence on 14th November,

1959, between Purushothamdoss Gokuldoss and his sons on the one hand and the aforesaid Jumnadoss Dwarakadoss and Ms divided brother on

the other. Under the said partnership deed, the assessee, whose name is Govindoss Purushothamdoss, was entitled to a one-tenth share in the

profits and assets of the firm. On the 1st April, 1964, the property was taken out of the said firm and divided between the partners under a

partition deed of the same date. The assessee was allotted two plots of land measuring 53,922 sq.ft. and 48,208 sq.ft. being portions of R,S, No.

169 in Arumbakkam village on the Poonamallee High Road, Madras. The total extent of the said property was 42 1/4 grounds and the assessee's

share, as mentioned already, was one-tenth. At the time of the property being taken out of the firm, the assessee's account was debited with the

sum of Rs. 9,400. Similarly, the accounts of the other partners also were debited with the corresponding value of the portions allotted to them and

the property account was closed with the debits totalling Rs. 94,000.

4. The assessee sold 50,000 sq.ft. to M/s. Dasaprakash Bottling Company for a sum of Rs. 90,000 under a registered sale deed dated 15th

October, 1966.

5. We are now concerned with the assessment year 1967-68 for which the relevant previous year ended on 12th November, 1966, which is the

last date of the ""Samvat"" or Deepavali year. In the return submitted for this year, the assessee did not admit any capital gain as having arisen out of

the aforesaid sale. The contention of the assessee was that he had acquired the

land in question only on April 1, 1964, and that its market value as on that date should be taken as the cost of acquisition. According to him, the market value as on that date was worked out to Rs. 4,000 per ground and since he had sold the land to the purchaser at the same value, there was no capital gain.

6. The ITO did not accept this submission of the assessee and he held that the property in question never became the property of the firm but

continued to be that of the original HUF and that since the assessee acquired portions thereof, under the partition deed dated 1st April, 1964, he

should be considered to have acquired the said property on distribution on division of the HUF and that Section 49(I)(i) of the Act would apply. In

other words, the conclusion of the ITO was that the cost of acquisition of the property should be taken as the cost of acquisition of the previous

owner, viz., the HUF, in accordance with the provisions of Section 55(2) of the Act. As the assessee had not exercised the option for taking the

value of the land as on 1st January, 1954, the ITO proceeded to compute the capital gain on the basis of the cost of the property at the time of its

acquisition. The result was that the ITO brought to tax the capital gain on the basis that the actual cost to the assessee would work out at the rate

of Rs. 400 per ground and he took the difference between the amount calculated at this cost and the actual sale proceeds as the capital gains.

7. The assessee appealed and in the grounds of appeal filed before the AAC the assessee pointed out that the ITO ought to have appreciated that,

on the facts and in the circumstances of the case, the property in question was the property of the firm which was acquired by the appellant

(assessee) in a mode other than that mentioned in Section 49(iii)(b) and his cost is the market value as on that date January 1, 1964. The assessee

contended that the market value as on January 1, 1964, should have been taken. The AAC held that the records disclosed that the entire property

had been treated as an asset of the firm and that, therefore, the partners of the firm could be said to be co-owners thereof, and that the cost of the

portions of the property allotted to the assessee would be the same amount as recorded in the books of the firm. He, however, held that the

assessee was entitled to opt for the value as on April 1, 1954, and fixed the market value on that day at Rs. 800 per ground. He modified the

assessment accordingly.

8. The assessee thereafter appealed to the Tribunal and the Tribunal rejected the department's view that the property in question had not been transferred by the HUF to the firm when the property was brought in as an asset of the firm. The Tribunal, however, held that this property was taken out of the firm on April 1, 1964, and divided between the partners and that, consequently, Sections 49 and 55 of the Act were not applicable. It was further held that the consideration paid by the assessee for acquiring absolute title to the portions of this property allotted to him under the partition was the giving up by him of the undivided right to the other properties and that, therefore, the cost of acquisition of the property in question was its market value as on April 1, 1964, which could not have been taken at Rs. 9,400 since that was not the true value of the property. In the view of the Tribunal, the sum of Rs. 9,400 accounted for by the firm and shown also in the accounts of the assessee was only a notional value. It accordingly directed the ITO to compute the capital gain arising to the assessee by the sale of the property in question by taking the cost of acquisition as its market value as on April 1, 1964. It is this order of the Tribunal that is now challenged by the Addl. CIT by raising the question set out already.

9. The facts as mentioned above would clearly go to show, and there is also a finding of the Tribunal to the effect, that the property ceased to belong to the joint family and that it belonged to the firm when the firm came into existence under the partnership deed dated 6th November, 1953. The Tribunal accepted the well known legal principle that for bringing the property into the firm as an asset it is not necessary to have a written or registered document. This finding has not been challenged and, therefore, we proceed on the basis that the property became the asset of the firm in 1953 and that it was taken out of the firm in the year 1964. The only question that arises for consideration is as to what is the cost of the property to the assessee.

10. The property having been taken out of the assets of the firm at a particular value and the property having been taken over by the assessee to the extent of his share at a fraction of the sale value, it should ordinarily be held that the assessee has taken over the asset at the value as shown in

the books of the firm as well as in his own books. In the books of the firm, he was debited with Rs. 9,400 and in his own books the assessee had

taken over this property at the sum of Rs. 9,400. The way in which the partnership has dealt with the asset has been described by the Tribunal in

para. 2 of its order as follows ;

The appellant's account was debited with Rs. 9,400 since the entire property had been valued at Rs. 94,000 in the books of the firm. Similarly,

the account of the other partners were also debited with the corresponding value of the portions allotted to them and the property account was

closed.

11. The learned counsel for the assessee contended that what was done by the partners was merely to take out the asset from the firm, as a result

of which the property became that of the co-owners, each having a distinct share in the said asset. The way in which the transaction was reflected

in the books of the firm shows that even at the stage of taking out, the asset was parcelled out in accordance with the share of each individual

partner and each one of them was debited with a particular amount representing his share. This is consistent with the view that with reference to the

fraction of the particular partner's share, the property has been parted with by the firm at a proportionate valuation. So, this is a case where the

property has been transferred to a partner by the firm at a particular valuation. The question is whether this valuation would not bind the partner.

12. The Supreme Court in *Kalooram Govindram Vs. Commissioner of Incometax, Madhya Pradesh, Nagpur*, dealt with a similar problem relating

to an HUF. There were two members of the family by name Govindram and Bachhulal. There was a suit for partition between those two

individuals who were entitled to ten-sixteenths and six-sixteenths shares. One of the items belonging to the family was a sugar factory. This sugar

factory was auctioned between the two members of the family in the course of the suit for partition. It was knocked down in favour of Govindram

for a sum of Rs. 34 lakhs. All the other items of the properties were also allotted to one or the other at some valuation and final adjustment was

made by cash payment. Govindram ran the factory and, in the course of his assessment, he wanted the actual cost of the sugar factory to be taken

as Rs. 34 lakhs at which he took over the property, for the purposes of allowance

of depreciation. The question before the Supreme Court was whether the sum of Rs. 34 lakhs was to be taken as the actual cost of this property to Govindram. Though there was a difference of opinion on a different issue, all their Lordships who constituted the Bench were of the view that the sum of Rs. 34 lakhs would represent the actual cost. The finding of the Supreme Court was that, as a result of the transfer, Govindram began to own the property and that for this transfer the consideration was Rs. 34 lakhs. At page 341 of the report, it was observed:

It may be that in strict legal theory partition may not involve $\frac{1}{2}$ transfer, but the substance of the transaction is that an erstwhile member of a joint

Hindu family, who has only an interest in the entire joint family property acquires an absolute title to a specific property. The cost of the property to

the member at the date of partition would be the value given to it for purpose of allotment, provided it was real, or the price at which he purchased

it in auction or the value of it ascertained otherwise.

13. At page 340, the Supreme Court pointed out :

Take another illustration : Instead of partitioning the properties by evaluation thereof, the houses (taken as an example) were sold to a third party.

So far as the third party was concerned, the cost price would be the price at which he purchased them. If instead, the properties were sold by

auction between the brothers and the difference in prices was adjusted by cash payment, it would be incongruous to say that in the former the cost

of the houses would be the cost actually paid by the third party purchaser and in the latter the cost of the houses would not be the price for which

they were auctioned but the nominal price they bore in a remote past. Other illustrations may be visualised. Barring the cases of fraud, collusion

and inflation and deflation of values for ulterior purposes, cost of an asset to a divided member must necessarily be its cost to him at the time of

partition, whether mentioned in the partition deed or ascertained aliunde.

14. "Capital gains" have to be ascertained in the light of the provisions of the I.T. Act. In the present case, there can be no dispute about the fact

that some capital gains arose, as the assessee has not contended at any earlier stage that the transaction was not liable to give rise to any capital

gains at all. Section 48 provides that 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, viz., (i) expenditure incurred wholly or exclusively in connection with such transfer and (ii) the cost of acquisition of the capital asset and the cost of any improvements thereto. As far as the present case is concerned, we have not to consider any expenditure incurred wholly or exclusively in connection with such transfer. We have only to find out the cost of acquisition of the capital asset. Section 55(2) provides that for the purposes of Sections 48 and 49, "cost of acquisition", in relation to a capital asset, would have to be ascertained in the manner provided therein. The learned counsel for the assessee contended that none of the sub-clauses of Section 55(2) would apply to this case as, according to him, each sub-clause contemplated a distinct condition to be fulfilled before it could be applied. Section 55(1) refers to cases where the capital asset became the property of the assessee before the 1st day of January, 1954. According to the learned counsel for the assessee, this clause cannot apply because it became the asset of the assessee only in 1964. We may agree with him that this is the position and, that therefore, Sub-clause (i) cannot be applied. Sub-clause (ii) of Section 55(2) relates to cases where the capital asset became the property of the assessee by any of the modes specified in Section 49(1) and the capital asset became the property of the previous owner before the 1st day of January, 1954. In the submission of the assessee, this is not a case where the capital asset became the property of the assessee by any of the modes specified in Section 55(2)(ii). We agree with him on this aspect also. Sub-clause (iii) of Section 55(2) relates to cases where the capital asset became the property of the assessee on the distribution of the capital asset of a company on its liquidation. This is not such a case as there is no company here. Sub-clause (iv) was omitted with effect from April 1, 1966, and Sub-clause (v) relates to cases where the capital asset, being a share or stock of a company, became the property of the assessee under certain circumstances. This is not also such a case. Therefore, it is clear that none of the sub-clauses of Section 55(2) would apply here. Section 55(3) refers to cases where the cost for which the previous owner acquired the property could not be ascertained. The previous owner in this case will be the firm, and the cost for which the firm acquired the property could be ascertained, viz., at Rs. 94,000 as found by the Tribunal.

Therefore, as Section 55(3) also cannot apply here, we may exclude from consideration the entire provisions of Section 55 of the Act.

15. Even then, we are left with the question as to what is the cost of acquisition of the capital asset. It is in this context that the decision of the

Supreme Court in *Kalooram Govindram Vs. Commissioner of Incometax, Madhya Pradesh, Nagpur*, which has subsequently been followed or

approved in *Guzdar Kajora Coal Mines Ltd., Calcutta Vs. The Commissioner of Income Tax, Calcutta*, appears to be relevant. That decision has

laid down the principle that where the property was taken over at a particular valuation by a member of the family, then that valuation will have to

be applied as the cost of the asset. The fact that in the present case the asset has been taken over from the firm and not from a family cannot affect

the principle laid down by the Supreme Court. The assessee has only adopted a procedure for the partition of the particular property, by going

through the transaction in the form described above. Therefore, the principle of the Supreme Court's decision would squarely apply here and the

assessee would be bound by the cost as shown in the books of the firm as well as in his own books.

16. It is in this context the learned counsel for the assessee sought to contend that this is a case which comes within the scope of the exception

contemplated by the Supreme Court. We have already extracted the observations at page 340 of the report referred to, i.e., *Kalooram Govindram*

Vs. Commissioner of Incometax, Madhya Pradesh, Nagpur, in which their Lordships observed that barring cases of fraud, collusion, inflation and

deflation of values for ulterior purposes, the cost of an asset to a divided member must necessarily be its cost to him at the time of partition,

whether mentioned in the partition deed or ascertained aliunde. The learned counsel's submission was that this is a case of valuation being adopted

for ulterior purposes at Rs. 94,000 and that this did not represent the correct market value. According to the learned counsel, the property had

been taken over by the firm at a value of Rs. 94,000 in 1953, and in the context of the increase in prices of the properties, the valuation could not

have stood still at Rs. 94,000 as on April 1, 1964. The attempt suggested was to save stamp duty. It is his submission that the Tribunal, therefore,

correctly described the valuation as only notional.

17. We do not consider that the Tribunal was justified in describing the valuation put by the parties as on April 1, 1964, as a notional valuation.

There was nothing notional about it, because the accounts of the parties were adjusted with reference to these amounts totalling Rs. 94,000. It may

be that the prices of properties went up in this period and that the property would have fetched a higher price if sold to a third-party on April 1,

1964. But nothing prevented the partnership from parting with its property at a particular price agreed to between its own partners, especially

when the transfer was in favour of the partner. As credits and debits were made in the firm's books there was nothing notional about the sum of

Rs. 94,000 in the present case. An estimated value taken by the partners for adjustment of their rights inter se cannot be taken as a notional value.

The value is real and not notional.

18. Learned counsel for the assessee next contended, as a general proposition of law, that wherever the market value was higher than the value as

shown by any arrangement between the parties, it is the market value that should be taken into account as the actual value. There is absolutely no

warrant in any statutory provision or any decided case in support of this proposition. In the circumstances, we are unable to accept this proposition

put forward by the learned counsel for the assessee.

19. There is one further aspect that requires to be clarified at this stage. Though the ITO proceeded on the basis that the cost to the assessee was

only Rs. 400 per ground, the AAC took the value at Rs. 800 per ground which, according to him, was the value as on January 1, 1954. In the

view of the AAC, it is a case in which the assessee should be understood to have exercised the option available to him u/s 55(2)(i). This order of

the AAC was not challenged by the department by filing any appeal.

20. Therefore, the order of the AAC with reference to this aspect has become final and, therefore, nothing said in our judgment should be

construed as disturbing the computation emerging from the order of the AAC. It is also interesting to notice that even the value fixed by the ITO is

in excess of Rs. 9,400 as shown by the books of the firm as well as the books of the assessee. But, we do not express any opinion on the

correctness of the ITO's orders on this aspect.

21. One other aspect remains to be clarified. Though the ITO brought to tax the

capital gains in respect of another transaction of March 10, 1967,

the Tribunal deleted the capital gains with reference to that property as it fell in the previous year relating to "the succeeding assessment year.

Nothing said in this order will be taken as affecting the capital gains, if any, relating to the said transaction.

22. The result is that the question referred to us is answered in the negative and in favour of the revenue.

23. The revenue will be entitled to its costs. Counsel's fee, Rs. 500.