(1993) 07 BOM CK 0066

In the Bombay High Court

Case No : ITA No. 2378/Bom of 1988;

ADDITIONAL THIRD Income Tax OFFICER APPELLANT

Vs

SMT. S. S. PATIL. RESPONDENT

Date of Decision : 09-07-1993

Acts Referred:
Income Tax Act, 1961 — Section 48

Citation : (1994) 48 TTJ 286

Hon'ble Judges : O. Anandaram, A.M.

Bench : Division Bench

Judgement

O. ANANDARAM, A.M. :

The Revenue has filed this appeal contesting the appellate order dt. 31st December, 1987 passed by the CIT(A), Bombay in appeal No. CIT(A) X/CIII/64/87-88.

2. Smt. S. S. Patil, a resident individual filed return of income for the asst. yr. 1985-86 on 31st March, 1986 declaring total income of Rs. 3,32,100 along with the statement of income for the said period. Subsequently on 9th December, 1986 Smt. Patil filed a revised return declaring loss of Rs. 37,230. In the revised return she declared long term capital gains on land and building to the extent of Rs. 21,346 instead of Rs. 6,36,989 declared in the original return. Along with the revised return Smt. Patil filed a statement of capital gains and correspondence with Vakharia & Co. Solicitors, etc.

3. The assessee has sold on 16th July, 1984 a property at Dinsha Compound, Gowalia Tank Road, Bombay 400,036 to M/s. Mafatlal Sawalchand Bafna and others for a total consideration of Rs. 21,09,000. The property consisted of 5516 sq. yards of land with sheds. The assessee has claimed in the computation of capital accounts (1) an amount of Rs. 7,51,000 paid to mortgagee; stamp duty of Rs. 3,12,372, registration charges of Rs. 21,090, legal fees of Rs. 51,180, brokerage at Rs. 42,180, and (2) and deduction of Rs. 9,38,000 being the

estimated market value of the property as on 1st January, 1964 as per the valuation report of M/s. Bhavesh M. Desai dt. 16th April, 1985. The deduction of the estimated market value was in lieu of the cost of the property at Rs. 4,00,000.

4. The Assessing Officer has quoted from page 2 of the sale deed dt. 16th July, 1984 as under :

"the vendor herein (therein referred to as "the purchaser") of the third part and registered with the sub-registrar of assurances at Bombay under No. 2217 of Book No. 1 on 13th February, 1964 for the consideration of Rs. 3,50,000 paid by the vendor herein to the original owner, the original owner did thereby assign and the confirming party did thereby confirm unto the vendor herein as per purchaser ...."

This was with buildings and structure standing thereon admeasuring 5004.67 sq. yds. consisting of two portions (i) 4443.12 sq. yds. and another consisting of two plots of lands admeasuring 306 sq. yds. and 255.55 sq. yds. On page 13 of the said deed under cl. (xi) it is mentioned that, "for securing the payment of the total amount of 4 lacs borrowed by the vendor from Cawasji Pallonji Kavarana, and mortgagees was made with him of Rs. 4,05,000. Clause (xii) says that, "with a view to pay mortgage debts, the price was determined at 25 lacs. Clause (xv) says that the confirming party paid the vendor an aggregate sum of Rs. 4,25,000 in part payment of the purchase price of the land being 3 lacs by earnest money and Rs. 1,25,000 paid towards the purchase price in part payment. Clause (xvi) (c) states that the purchase price payable by the confirming party to the vendor would be Rs. 21,09,000 instead of Rs. 25,00,000 as agreed to, originally. Clause (xix) states that "By a deed of reconveyance bearing even date with these presents executed price hereto and made between the trustees of the said Cawasji Pallonji Kavaran Charity as the mortgagees of the one part and the vendor as the mortgagor of the other part of the consideration of Rs. 7,51,000 paid to the mortgagees as therein mentioned, the mortgagees granted, conveyance and released the said land, hereditaments and premises described in schedule "A" hereunder written unto and to the use of the vendor freed and discharged from the said dt. 24th December, 1960 and the herein before received deeds of first, second and third and fourth charges.".

The ITO asked the assessee and got the clarifications that the mortgage amount was Rs. 4 lakhs and together with accrued interest the payment done to the mortgagee was Rs. 7,51,000. The contention of the assessee before the Assessing Officer, as per the assessment order was that the mortgagee had prior charge on the property sold and unless the mortgage amount and interest was cleared he could not have sold the property and, therefore, from the gross consideration he is entitled to deduction of Rs. 7,51,000 for arriving at the net consideration. However, this plea did not find favour with the Assessing Officer. The assessees reliance on the decision of the Tribunal in (1986) 16 ITD 35 was not accepted by the Assessing Officer on the ground that the payment made to the mortgagee was only an application of income after the receipt of the sale proceeds to discharge the assessees debits and it cannot be said that the redemption to the mortgage and the capital gains go hand in hand. Payment of mortgage and interest, according to the assessment order, is a payment de hors sale. The assessment order also stated that all the deductions allowable in respect of capital gains are mentioned in s. 48 of the IT Act and such a deduction as is claimed by the assessee is not mentioned therein. Further, the ITO also relied on the decision in

(i) (1985) 22 TTJ 23

(ii) Ambat Echukutty Menon Vs. Commissioner of Income Tax, Kerala,

(iii) M.K. Brothers (P) Ltd. Vs. Commissioner of Income Tax, Kanpur,

to support his view that the assessee is not entitled to the said claim.

5. In so far as the value of the property as on 1st January, 1964 is concerned the assessment order stated that the assessee has declared in the WT returns the value of the entire property at Rs. 3,50,000 as on 31st March, 1963, at Rs. 3,75,000 as on 31st March, 1965, at Rs. 4 lakhs in subsequent years. The cost of acquisition was explained by the assessee as Rs. 3,00,000 being the purchase price paid when the property was purchased on 24th December, 1960. The assessee claimed that Rs. 1 lakh was spent as development charges for the property. She did not have any evidence in her possession to explain the cost of development charges and the year in which Rs. 1 lakh was spent. It was also stated by the assessee before the ITO that though she bought the property on 24th December, 1960, the registration of the transfer was carried out on 13th January, 1964 and as such the assessee is entitled to substitute the value as on 1st January, 1964 for computing the capital gains. This contention was not accepted by the ITO who relied upon the cost of the acquisition as per the documents and the value declared at Rs. 3,75,000 as per the wealth-tax records. The assessment order also mentioned the fact that though the assessee originally had an agreement to sell the land admeasuring 7597 sq. yds. according to the latest agreement the portion of the land to the extent to 5516 sq. yards only was sold. On this basis the Assessing Officer worked out the proportionate cost of acquisition of property sold, at Rs. 2,72,278 and computed the capital gains as under :

Rs.

Rs.

Cost of land as per sale consideration of 5516 sq. yds.

21,09,000

Less : Expenditure incurred as declared by the assessee :

(a) Stamp duty

3,12,372

(b) Registration charges

21,090

(c) Advertisement

3,320

(d) Legal fees paid

51,180

(e) Brokerage

42,180

4,30,142

16,78,858

Less : Cost of acquisition as discussed above

2,72,278

14,06,580

Less : Cost of acquisition as discussed above

3,21,000

Capital Bonds Taxable capital gains

10,85,580

6. The assessee appealed to the CIT(A) against the assessment. The learned CIT(A) held that where the title is defective, incomplete or imperfect the cost of making the title complete and perfect can be treated as the cost of acquisition by relying on

(a) S. Valliammai and Another Vs. Commissioner of Income Tax, Madras,

(b) Sajjan Bagaria Vs. Commissioner of Income Tax, Assam,

(c) Commissioner of Income Tax Vs. Bengal Assam Investors Ltd.,

(d) Mathuradas Mangaldas Parekh vs. CIT (1980) 126 ITR 669

Thus the claim of the assessee was upheld by the CIT(A) on this issue.

7. The CIT(A) also considered the plea of the assessee that the fair market value of the property as on 1st January, 1964 under s. 55(2) of the IT Act has to be as per the choice of the assessee. Merely because while filing the WT returns, the cost of improvement and the factors causing increase in the value in the cost of the property were not taken into consideration the opinion of the valuer should

not be ignored. The learned CIT(A) stated that since the registered valuer is also a technician and actuary his opinion should not be disregarded without valid reason and the ITOs order did not show any infirmity in the valuers opinion. Smt. S. S. Patils contention on this point is accepted. Of course the learned CIT(A) stated in passing that the valuation report merely construed an evidence and it does not bind either the Revenue or the taxpayer by referring to Commissioner of Income Tax, Bombay Vs. Ganesh Builders, but nevertheless upheld the assessees contention.

8. Aggrieved by the order of the CIT(A) the Revenue presently dispute it before the Tribunal. Three grounds of appeal have been filed. Grounds 1 and 2 question the decision of the CIT(A) in directing the ITO to allow deduction in respect of mortgage charges paid at Rs. 7,51,000. In the ground of appeal itself reliance is placed on the following decisions in support of Revenues claim for reversing the decision of the CIT(A).

(i) Kerala High Court decision in the case of Ambat Echukutty Menon vs. CIT (supra)

(ii) ITAT decision in K. U. Idiculla vs. ITO (supra)

(iii) Supreme Court decision in the case of M. K. Bros. Pvt. Ltd. vs. CIT (supra)

9. Shri A. K. Gautam the learned Sr. Authorised Representative argued on behalf of the Department in the following manner :

Property was purchased on 24th December, 1960 for a consideration of Rs. 3 lakhs. Subsequently the purchaser of the property created mortgages of the property on 3rd April, 1961, 24th July, 1961, 8th March, 1963, 15th March, 1963 and 29th April, 1965, for total amount of Rs. 4 lakhs. The principal mortgage amount of Rs. 4 lakhs had accumulated interest of Rs. 3 lakhs and thus Smt. S. S. Patil had total liability of Rs. 7 lakhs. This amount of Rs. 7 lakhs only constituted a loan and the payment done by Smt. Patil for redeeming the mortgage is only for payment for redeeming the loan. But for the purpose of computing the capital gains the Assessing Officer is to apply only s. 48 in which as per s. 48(i)(a) there is reference to full value of the consideration received or accruing as a result of the transfer of the capital asset. From such value of consideration an assessee can deduct only expenditure incurred wholly and exclusively in connection with the transfer, the cost of acquisition of the asset and the cost of any improvement thereto. In the absence of any specific provisions redeeming of the loan cannot be allowed as a deduction from the full value of the consideration. Following cases support his arguments.

(i) Ambat Echukutty Menon vs. CIT (supra)

(ii) Commissioner of Income Tax Vs. V. Indira,

(iii) Vashist Bhargava Vs. Income Tax Officer, Salary Circle,

10. On the other hand the learned Authorised Representative Shri V. H. Patil,

Advocate argued as under :

Transfer by the owner can be only to the property possessed by the transferor. If the title to the property is imperfect the transferor can improve upon the title to the property and the expenditure incurred on such improvements is the cost of improvement allowable as deduction under s. 48. As the property was subject to a mortgage redeeming the property on the mortgage by paying the aggregate amount and the accrued interest constitutes improvements to the property. There are two types of properties : General property and each and every right in property. If X - Y is equal to property any expenditure to improve the property by making it X constitute cost of improvement. Support for such a view can be derived from Attilinarayana Rao vs. ITO (supra), (1992) 41 ITD 246 , Commissioner of Income Tax Vs. Shakuntala Kantilal, , Commissioner of Income Tax Vs. Daksha Ramanlal, . When the transferor agreed to sell the property free of encumbrances the expenditure incurred on removing the encumbrances is cost of improvement. Even when interest is paid to the bank in respect of liability relating to the property that constitutes improvement as per Commissioner of Income Tax, Delhi-VIII Vs. Shakuntala Rajeshwar, , where the amounts paid for the purpose of freeing the property from tenancy rights were allowed as a deduction.

11. For a proper appreciation of the issues involved before proceeding to consider the applicability of the cited cases it is essential to be clear about the facts. According to the documents filed before the Tribunal the agreement between Smt. Sridevi Shripal Patil called vendor of the one part and Shri Mafatlal Sawalchand Bafna and three others collectively called the purchasers was made and entered into on 11th May, 1982. In the said agreement it was stated that by as assignment and conveyance dt. 24th December, 1960 between Lt. Gen. S. H. Shivajirao Scindia, Maharaja of Gwalior called the vendor and Sridevi Sripal Patil, called the purchaser registered with Sub-Registrar of Assurances at Bombay on 13th February, 1964 an assignment and conveyance was made subject to certain indentures on lease which were already there. The vendor conveyed to the purchaser land, her diamantes and premises admeasuring about 7957 sq. yards described in sch. B. The vendor borrowed Rs. 4 lakhs from Cawasji Pallonji Kavaran of Bombay and entered into deeds of mortgage dt. 24th December, 1960 for Rs. 2 lakhs; 21st April, 1961 for first further charge of Rs. 20,000; 8th March, 1963 for second further charge of Rs. 75,000; on 15th March, 1963 for Rs. 75,000 as further third charge and for 4th further charge of Rs. 30,000 by deed of 29th April, 1965. Thus the land and premises were charged for repayment of the principal amounts lent and advanced to the vendor under the above four charges and interest thereon at the rates mentioned in the deeds and the principal amount of Rs. 4 lakhs and interest amount of Rs. 3,38,500 upto 28th February, 1982 was still outstanding and unpaid.

12. According to the agreement dt. 11th May, 1982 the purchasers Shri Mafatlal Sawalchand Bafna and others approached the vendor Smt. S. S. Patil for sale

and assignment of the said property free from encumbrances. Mortgage and charges but subject to Government and municipal preservations as existed and on as it is where it is basis.

13. The purchasers, according to the agreement, paid to the vendor rupees three lakhs by way of earnest money which was agreed to be kept deposited with the vendors advocates M/s. Vakharia & Co. without interest subject to the terms of the agreement till the completion of the sale. The balance amount was to be paid by the purchasers to the Vendor on completion of the sale by execution of proper agreement and/or conveyance, etc. The Vendor agreed to deliver within a week from the execution of the agreement to the purchasers advocate all the title deeds relating to the property agreed to be sold for the purpose of investigating the Vendors title to the said property. Para 4 of the agreement states that the vendor declares that the property agreed to be sold to the purchasers is subject to the recited mortgages dt. 24th December, 1960, and further first, second, third and fourth charges dt. 21st April, 1961, 8th March, 1963, 15th March, 1963 and 29th April, 1965 respectively and that the principal amount of rupees four lakhs and interest amounting to Rs. 3,38,500 upto 28th February, 1992 and further interest till payment of mortgage amount as outstanding and the vendor has agreed to pay to the said mortgage claim on or before the completion of sale hereunder on getting necessary amount from the purchaser for such payment out of the purchase price payable to the vendor and to obtain conveyance of the said property.

14. The facts narrated above indicate that the mortgage money and the principal amount were due from the vendor to the mortgage as on the date of sale agreement entered into on 11th May, 1982. However, the money was to be received from the purchaser by the vendor and in turn thereto pay to the mortgagees, obtain the title deeds and deliver them to the purchasers. The case of the appellant is that the amount paid to redeem the mortgage does not fall under s. 48(1)(a)(i) and (ii). More precisely redeeming of mortgage loan is stated not to be converted by expression "the cost of any improvement of the capital asset." As already stated, the learned Departmental Representative and prior to that the Assessing Officer relied on Vashist Bhargava Vs. Income Tax Officer, Salary Circle, . In the first case the Delhi High Court dismissed a writ petition filed by the parishioner Shri Vashist Bhargava. In that the writ petition against the reopening notice under s. 147(b) was dismissed. As per facts the assessee got a loan from the provident fund to acquire and reconstruct the house, but sold the house without permission of the Government. The Delhi High Court considered the question whether the payment of interest to the PF means a payment to the petitioner himself or to the Government because on sale of the property the loan from the Government becomes repayable together with interest. It was held by the Delhi High Court that the payment of interest to the fund means payment to the parishioner himself because the interest remain the property of the petitioner even after the payment to the fund. This is because the petitioner continued to be owner of the interest paid by him on the amount

withdrawn from the provident fund. It was because the advance was not an ordinary advance but a non-refundable advance or loan. The money paid by the petitioner by way of interest went into his own account in the provident fund and remained his money. The finding of law by the Delhi High Court was that the payment into the pensioner account in the PF does not amount to a payment to the Government and is not an expenditure incurred in connection with the transfer of his house within the meaning of s. 48 of the IT Act.

In the second case reported in Ambat Echukutty Menon Vs. Commissioner of Income Tax, Kerala, , the Kerala High Court held that where an assessee acquired properties by inheritance, property which was encumbered by the previous owner and the assessee cleared the mortgage so created, it cannot be said that they incurred any expenditure by way of effecting any improvements to the capital asset that was originally purchased by the previous owner. The Kerala High Court also pointed out that having regard with the definition of "cost of improvement" contained in s. 55(1)(b) in order to entitle the assessee to claim a deduction in respect of the cost of any improvement, the expenditure should have been incurred in making any additions or alterations to the capital asset that was originally acquired by the previous owner.

In the third case reported in Commissioner of Income Tax Vs. V. Indira, , the Madras High Court held in the case where the assessee acquired property as a result of gift of the property by her father and as a result of suit by a third party claiming title to the property there was a compromise resulting in payment of money by the assessee to the third party, that the amount paid is not cost of acquisition to the pervious owner and it is not cost of improvement of asset and the improvement of title to the asset is different from improvement to asset itself. In this case also reference was made to s. 49(8)(ii) and s. 55(1)(b) containing the definition of the Expression "cost of any improvement". The Madras High Court reiterated the cost of any improvement, in relation to a capital asset amounts to expenditure of a capital nature incurred in making any additions or alterations to the capital asset on or after the date on which the capital asset became the property of the previous owner of the assessee.

15. On behalf of the assessee the contrary view in support of the claim that expenditure incurred in removing encumbrances to the transfer is deduction is canvassed. For this view support is found in CIT vs. Shakuntala Kantilal (supra). In this case it was held that were there were disputes relating to certain properties and compensation was paid by the vendor to the other party, the amount is deductible from the sale consideration because the sale transaction could not have been materialised without settling the dispute between the vendor and the third party. It was also held that s. 48(i) contains the expression "the expenditure incurred wholly and exclusively in connection with such transfer" which is wider than the expression "for the transfer" and any amount the payment of which is absolutely necessary to effect the transaction will be expenditure by this clause. In other words, according to the Bombay High Court,

without removing any encumbrance a sale or a transfer could not be effected, the amount paid for removing that encumbrance will fall under s. 48(i).

16. Judicial discipline requires the Tribunal to follow the ratio decidendi given in the judgment of the Bombay High Court, the jurisdictional High Court. In view of the clear decision of the Bombay High Court about the interpretation of s. 48(i) and the meaning of "expenditure incurred in connection with such transfer" so as to cover amounts paid to remove encumbrances, we uphold the order of the CIT(A) on this issue and dismiss the relevant ground of appeal by the Revenue, as the decisions of other High Courts do not have binding effect as against a direct decision of the Bombay High Court on the same issue. It may be mentioned that the neighbouring Gujarat High Court also took a similar view in CIT vs. Daksha Ramanlal (supra). We uphold the arguments of the learned counsel for the assessee and affirm the order of the CIT(A) on this issue. The Revenue fails in this regard.

17. In so far as the second issue is concerned the Revenue claims that the cost as on 1st January, 1964 should be taken into consideration and the assessees declaration for wealth-tax purposes should be the basis. The learned counsel for the assessee contended that the declaration in the WT returns is not binding on her, in so far as the computation of capital gains is concerned. Reliance is placed on Mrs. Indira Bai vs. ITO (1992) 42 ITD 397. In that decision the Tribunal held that there is no estoppel in law against parties in taxation matters and what determination of the value for wealth-tax purposes was made is a matter of routing and when evidence is available regarding sale of adjacent property in April, 1964, that can be taken into consideration and the value of the property as on 1st January, 1964 should be estimated on that basis.

18. In the instant appeal before the Tribunal the facts are different. The assessee has filed a valuation report which is more than 20 years later, i.e., on 16th April, 1985 and claimed that the value as on 1st January, 1964 is Rs. 9,38,000. Assuming that there is no estoppel in tax matters the assessee is not free from the obligation to establish the correctness of the value claimed by her to the value as on 1st January, 1964. In the absence of details one cannot go back to 20 years in time, rely on a valuation report dt. 16th April, 1985 and uphold the assessees contention. The value declared in the WT returns is a contemporaneous document. The fact that the assessee revised the declared values in the WT returns from year to year shows that as on 31st March, 1963 she took the value at Rs. 3,50,000 and as on 31st March, 1964 at Rs. 3,75,000. The purchase price itself was Rs. 3 lakhs. The purchase price is indicative of the fair market value as on 1st January, 1964. The purchase price and the value declared in the return of net wealth which constitute a contemporaneous document are relied upon in the assessment order for computing the capital gains. As against this one cannot substitute a valuation report prepared 20 years later and adopt the values mentioned therein. The CIT(A) was clearly in error in stating that the valuation report is not binding either on the tax payer or on the

Assessing Officer but still directing the ITO to adopt the value as per the valuation report of the registered valuer. All the available material indicate the fairness of the value as on 1st January, 1964 adopted in the assessment order. We, therefore, uphold the Revenues claim relating to this issue, reverse the order of the CIT(A) and allow the claim of the Revenue.

19. In the result the appeal by the Revenue is allowed in part.

