
(2003) 05 MP CK 0013

In the Madhya Pradesh High Court

Case No : Miscellaneous (IT) Appeal No. 134 of 1999

Avtar Singh

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 07-05-2003

Acts Referred:

Income Tax Act, 1961 — Section 2(47), 45

Citation : (2004) 270 ITR 92

Hon'ble Judges : Dipak Misra, J;A.K. Shrivastava, J

Bench : Division Bench

Advocate : Sumeet Nema, for the Appellant; Rohit Arya, for the Respondent

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.—This appeal has been preferred u/s 260A of the Income Tax Act, 1961 (in short "the Act"), against the order dated July 29, 1999, passed by the Income Tax Appellate Tribunal. The following substantial questions of law arise for consideration :

"(i) Whether, on the facts and circumstances of the case, the Tribunal was justified in concluding that the appellant had transferred the property in dispute within the meaning of Section 2(47) of the Act during the assessment year 1991-92 ?

(ii) Whether the order of the Tribunal is perverse and is based on the material not on record ?"

2. According to the appellant, in the return he showed a loss of Rs. 26,800 in the business and income from property at Rs. 13,060 together with the income of Rs. 48,010 from interest. According to him, the net taxable income was Rs. 29,270.

3. The Assessing Officer assessed the appellant on an income of Rs. 18,49,835 and an agricultural income of Rs. 30,000. In assessing the income, the capital

gain on the sale of plot was assessed at Rs. 18,28,565. The case of the assessee is that he is not liable to be assessed on the alleged sale of plot as there was no transfer to the purchaser in terms of Section 2(47) of the Act. According to the assessee, the conditions embodied in the agreement do not come within the ambit of Section 2(47) of the Act as there was no transfer of the plot in favour of the purchasers. In the agreement (annexure A1) there is no stipulation that the possession of the property has been handed over to the purchasers.

4. The Assessing Officer held that the transaction was a transfer within the meaning of Section 2(47) of the Act and accordingly he assessed the assessee on the capital gain amounting to Rs. 37,14,800.

5. On an appeal being preferred, the Commissioner of Income Tax (Appeals) by his order dated November 3, 1995, held that the transfer did not take place during the assessment year since the possession of the property was not handed over. According to the Commissioner of Income Tax (Appeals), the Assessing Officer rested the case on the power of attorney but it was neither irrevocable and, therefore, according to the Commissioner, it could not be said that there had been a transfer in terms of Section 2(47) of the Act. The Commissioner, as such, deleted the addition made by the Assessing Officer at Rs. 18,28,565.

6. Being dissatisfied with the aforesaid order, an appeal was filed before the Tribunal by the Revenue which has been allowed by the impugned order setting aside the order of the Commissioner of Income Tax (Appeals) with a further direction to the Assessing Officer to compute the capital gain correctly by allowing deduction under Sections 54E and 54F of the Act. Against the said order of the Tribunal, this appeal has been preferred before us.

7. We have heard Mr. Sumit Nema, learned counsel for the assessee, and Mr. Rohit Arya, learned counsel for the Revenue.

8. Before we proceed further, it is appropriate to rewrite Section 2(47) of the Act, thus :

"2. In this Act, unless the context otherwise requires,--... (47) "transfer", in relation to a capital asset, includes,--(i) the sale, exchange or relinquishment of the asset; or (ii) the extinguishment of any rights therein ; or (iii) the compulsory acquisition thereof under any law ; or (iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ; or

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company, or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any

immovable property :

Explanation. --For the purposes of Sub-clauses (v) and (vi), "immovable 269UAproperty" shall have the same meaning as in Clause (d) of Section ."

9. It has been submitted by Shri Nema that there is no justification in holding that there was a transfer of plot within the meaning of Section 2(47) of the Act during the relevant assessment year. It has been vehemently contended by him that possession was not delivered to the purchaser and, therefore, the transaction was not a transfer within the meaning of Section 2(47) of the Act. Learned counsel for the assessee by inviting our attention on the various conditions of the agreement dated August 11, 1990, has contended that there is no stipulation in the agreement that the possession has been handed over to the purchaser, therefore, the transaction cannot be said to be a transfer within the meaning of Section 2(47) of the Act during the relevant assessment year. To bolster his contention, he has placed heavy reliance on the case of Chaturbhuj Dwarkadas Kapadia Vs. Commissioner of Income Tax, . It has also been put forth by learned counsel for the assessee by placing reliance on the decision of the Supreme Court rendered in the case of CIT v. Vimal Lalchand Mutha , wherein their Lordships held that the interpretation of the agreement is a question of law.

10. The Tribunal on the basis of the general power of attorney executed by the assessee in favour of M/s. Chandrika Apartment has held that the transaction between the parties is nothing but a transfer as contemplated u/s 2(47) of the Act.

11. We have given our anxious consideration to the agreement dated August 11, 1990, as well as the general power of attorney dated October 22, 1990, and we find that there is nothing in it so as to hold that possession was delivered to the purchaser. Indeed, the Tribunal has not considered this material aspect of the case and, therefore, it will be appropriate to send back the case to the Tribunal.

12. As we are remitting the matter to the Tribunal for fresh adjudication with regard to the factum of delivery of possession or enjoyment of property by the purchaser by any other means, it is not necessary to deal with question No. (i) in praesenti.

13. In the result, the appeal is allowed to the extent indicated hereinabove, the order passed by the Tribunal is set aside and the matter is remanded to the Tribunal for fresh adjudication. There shall be no order as to costs.