
(2003) 05 MP CK 0064

In the Madhya Pradesh High Court

Case No : Miscellaneous (IT) Appeal No. 134 of 1999 May 2003

Avtar Singh

APPELLANT

Vs

ITO

RESPONDENT

Date of Decision : 01-05-2003

Acts Referred:

Income Tax Act, 1961 — Section 2, 260A
Transfer of Property Act, 1882 — Section 53A, 54E, 54F

Citation : (2003) 132 TAXMAN 113

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

Bench : Full Bench

Advocate : Sumeet Nema, for the Assessee and Rohit Arya, for the Revenue, for the Appellant;

Judgement

A.K. Shrivastava, J.

This appeal has been preferred u/s 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act) against the order dated 29-7-1999 passed by the Income Tax Appellate Tribunal. The following substantial questions of law arise for consideration :

"1. 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 ?

2. 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 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 A-1) 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 (Appeals) by its order dated 3-11-1995 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 (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 (Appeals) with a further direction to assessing officer to compute the capital gain correctly by allowing deduction u/s 54E and 54F of the Act. Against the said appeal 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 re-write section 2(47) of the Act, thus :

2. "Definitions. In this Act, unless the context otherwise requires,

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(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 :

ExplanationFor the purposes of sub-clauses (v) and (vi), immovable property shall have the same meaning as in clause (d) of section 269UA."

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 the 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. The learned counsel for the assessee by inviting our attention on the various conditions of the agreement dated 11-8-1990 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 the learned counsel for the assessee by placing reliance on the decision of Supreme Court rendered in the case of CIT v. Vimal Lalchand Mutha wherein their Lordships held that the interpretation of agreement is a question of law.

10. The Tribunal on the basis of general power of attorney executed by the assessee in favour of M/s. Chankdrika 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 11-8-1990 as well as the general power of attorney dated 22-10-1990 and we find that there is nothing in it so as to hold that the 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. 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 the question No. 1 in praesenti.

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.