
(1985) 07 GUJ CK 0023
In the Gujarat High Court
Case No : IT Reference No. 207 of 1977

B.N. Vyas

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 02-07-1985

Acts Referred:

Income Tax Act, 1961 — Section 2(14), 263, 48, 49, 49(1)

Citation : (1986) 25 TAXMAN 133

Hon'ble Judges : D.H. Shukla, J;B.K. Mehta, J

Bench : Division Bench

Advocate : K.C. Patel, D.A. Mehta and R.K. Patel, for the Appellant; S.N. Shelat and G.N. Shah, for the Respondent

Judgement

B.K. Mehta, J.—At the instance of the assessee, the following two questions are referred to us for our opinion:

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that in order to attract the provisions of section 49 of the Act, it was not necessary that the capital asset which was sold had to be capital asset as defined in section 2(14) of the income tax Act, 1961, at the time when it was acquired?
2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the cost of acquisition of the capital asset sold was not to be computed on the basis of the value of the capital asset as on the date of the gift.

A few relevant facts need to be noticed in order to appreciate the contentions urged on behalf of the assessee in support of this reference. The assessment years under reference are 1971-72 and 1972-73, the corresponding previous years being the years which ended on 31-3-1971 and 31-3-1972, respectively. The assessee had sold certain lands during the assessment years under reference and, therefore, one of the questions which arose for consideration of the ITO in the assessment proceedings for the said years was with regard to the

inclusion of capital gains in the assessee's total income. The lands which the assessee sold were acquired by him by gift from the previous owner, one Shri N.N. Vyas, who was the father of the assessee, in July 1966. These lands were converted into non-agricultural use as permitted by the Collector u/s 65 of the Bombay Land Revenue Code, 1879 on 12-3-1962. The assessee, while computing the capital gains, adopted the cost of the acquisition of the lands at Rs. 9 per sq. yard which was the market value as on the date of the gift, that is, in July 1966. The capital gains, thus, computed were to the tune of Rs. 8,876 for the assessment year 1971-72 and Rs. 28,499 for the assessment year 1972-73.

2. The ITO accepted this computation made by the assessee and, accordingly, assessed them to tax. The Commissioner, on examining the records of the assessment proceedings for the said two years was of the view that the ITO had erred in accepting the computation made by the assessee and accepting the cost of acquisition at Rs. 9 per sq. yard. Instead of adopting the actual cost of acquisition of the agricultural lands in the hands of the previous owner, i.e., the said Shri N. N. Vyas. The Commissioner had further found that there was an additional error in computation of the capital gains for the year 1972-73 since the ITO had allowed deduction u/s 80T of the income tax Act, 1961 ("the Act") at 45 per cent instead of 35 per cent of the amount by which the capital gains exceeded Rs. 5,000. The Commissioner, therefore, issued show-cause notice to the assessee, as to why the order of the ITO be not revised u/s 263 of the Act.

3. In response to the show-cause notice, the assessee's contention was that the provisions of section 49 of the Act had no application to the facts of the present case, inasmuch as when his predecessor Shri N. N. Vyas purchased the lands, they were all agricultural lands and, therefore, they could not be treated as capital assets as defined u/s 2(14) of the Act, and they could be treated as capital assets only when they were permitted to be put to non-agricultural use on 12-3-1962. It was, therefore, urged that the cost of acquisition of the asset at the time of acquisition cannot be taken into consideration for purposes of computation of the capital gains. In submission of the assessee, section 49 could be attracted only in case where the asset was the capital asset at the time of its acquisition by the previous owner. He, therefore, urged that since section 49 had no application, the cost of acquisition should be treated as the market value of the lands as on the date of the gift which the assessee had put at Rs. 9 per sq. yard, and which cost was rightly accepted by the ITO. The assessee, however, did not dispute another infirmity which was pointed out by the Commissioner, namely, the irregular deduction u/s 80T at 45 per cent instead of 35 per cent. The Commissioner, however, by his order of 25-7-1975 was not impressed by the contentions of the assessee and held that the cost of acquisition of the lands was to be deducted as provided in section 49(1) and, therefore, the ITO was clearly in error in computing the cost of the lands at Rs. 9 per sq. yard. The Commissioner further directed the ITO to allow proper deduction as admissible u/s 80T, in respect of the assessment year 1972-73.

4. The assessee being aggrieved by the said order of the Commissioner, carried the matter in appeal before the Tribunal, which by its order of 9-7-1976 held that section 49 was applicable to the facts of the case and the cost of acquisition would be the cost at which the previous owner had acquired the lands and such cost only could be deducted for computation of capital gains. The Tribunal, therefore, rejected the contention of the assessee that the cost should be taken as equivalent to the market value of the lands as on the date of the gift. The alter native contention of the assessee that the cost of acquisition should be taken as the value of the land as on the date when it was allowed to put to non-agricultural use, that is, 12-3-1962, the Tribunal found that it was prima facie supported by Instruction No. 88 dated 1-8-1969 issued by the CBDT to all the Commissioners. Even then the Tribunal did not consider it advisable to accept this alternative contention of the assessee which rested on the instructions contained in the circular. However, while dismissing the appeal of the assessee, the Tribunal directed the ITO to take the circular into consideration while considering the cost of acquisition by the previous owner.

5. It is on the above facts and circumstances that the two questions set out above have been referred to us for our opinion.

2-7-1985.

6. On behalf of the assessee, it was urged that section 48 of the Act, which prescribed the mode of computation and deductions is not applicable since the case would be governed if at all by section 49, inasmuch as the assessee has acquired this asset in question under the gift from his father and, therefore, the cost of capital asset has to be determined in the manner provided u/s 49(1). In submission of the learned advocate for the assessee, therefore, the cost of acquisition of the capital asset in the hands of the previous owner would be the cost for purposes of the computation of the capital gains. Mr. Patel, the learned advocate for the assessee was at great pains to impress upon us that the decision of this Court in Ranchhodbhai Bhaijibhai Patel Vs. Commissioner of Income Tax, Gujarat II, Ahmedabad, would not be applicable on the facts of the present case since that decision was rendered in the context of the question of computation of capital gains in the case of subsequent conversion of the user of the agricultural land by putting it to non-agricultural purposes by the assessee himself, and was not one where computation to be made in case of special mode of acquisition. In the alternative, the learned advocate for the assessee submitted that the Tribunal could not have dismissed the appeal of the assessee which would virtually amount to affirmation of the order of the Appellate Commissioner, who had held that the cost of acquisition of the capital asset should be as on the date of the original acquisition by the previous owner of the land since the Instructions contained in the circular issued by the CBDT No. 88 of 1-8-1969 were found by the Tribunal as supporting the alternative contention urged on behalf of the assessee before the Tribunal.

7. We are afraid that the contention of the learned advocate for the assessee

that the decision of this Court in Ranchhodbhai Bhaijibhai Patel's case (supra) is not applicable to the facts of the present case is too specious a contention since the Division Bench has, though speaking in the context of the question of computation of capital gains in case of subsequent conversion of the user of the agricultural lands to non-agricultural use in the hands of the same assessee, referred to section 49 also since the provision contained therein is a part of the integrated scheme of the computation of the capital gains. It would be advisable to what the Division Bench speaking through Bhagwati, J. observed in this behalf. The Division Bench found unable to persuade itself to accept the contentions urged on behalf of the assessee in Ranchhodbhai Bhaijibhai Patel's case (supra) that in case of subsequent conversion of the agricultural land to non-agricultural use, the cost of acquisition would be equivalent to the market value as on the date of the permission to put it to non-agricultural use since that would tantamount to saying that there will be two different classes of property—one as a non-capital asset and other as a capital asset. The reason which weighed with the Division Bench in rejecting the contention urged on behalf of the assessee was that the property which is acquired by a given assessee would be only for once and its character merely changes in the sense that whereas originally it was a noncapital asset, it becomes a capital asset on permission for conversion of the use and to accept the contention urged on behalf of the assessee would be doing violence to the language of section 48, clause (ii) to read the words, "the cost of acquisition of the capital asset" in the manner suggested on behalf of the assessee and there was no conceivable reason for introducing such an unwarranted fiction. In pursuance to this reasoning, the Division Bench observed as under:

...But this is a wholly erroneous approach in construing a statutory provision. The intention of the Legislature must be gathered from the words used; it is well settled that what is unexpressed by the Legislature must be taken as unintended. We cannot presume a certain intention on the part of the Legislature and then bend the language of the section with a view to making it accord with such presumed intention. The contention of the assessee also stands refuted by the language of section 55(2), clause (i). The property which is transferred could become the property of the assessee only at one point of time. It could not become the property of the assessee as non-capital asset at one point of time and as capital asset at another point of time. The argument of the assessee would require us to introduce a legal fiction also in section 55(2), clause (i). We would have to assume that when property which was non-capital asset becomes capital asset, it is deemed to become the property of the assessee for the purpose of section 55(2), clause (i). Such a construction would do violence to the language of section 55(2), clause (i), and would be clearly impermissible on any recognised canon of construction. Then again it is apparent from sections 49, 51 and 55(3) that the words "the cost of acquisition of the capital asset", "the cost for which the asset was acquired" and "the cost for which the previous owner of the property acquired it" are variously used by the Legislature to denote the

same idea and the reference is intended to be made only to the cost of acquisition of the property regardless of the question whether it was capital asset or non-capital asset at the date of acquisition." [Emphasis supplied] (p. 458)

We do not think, therefore, that the first contention urged by Mr. Patel can be sustained.

8. As regards the alternative contention, we find ourselves unable to go into the question since no question has been referred to us though the Tribunal, while dismissing the appeal, has directed the ITO to consider the benevolent circular issued by the CBDT. The alternative contention urged before us, therefore, is not capable of being examined here. The result, therefore, is that we answer both the questions in the affirmative, that is, in favour of the revenue and against the assessee. There would be no order as to costs in this reference.