

(2011) 06 KAR CK 0089

In the Karnataka High Court

Case No : IT Appeal No. 3209 of 2005 (A.Y. 1996-97)

CIT and Another

APPELLANT

Vs

Dr. T.K. Dayalu

RESPONDENT

Date of Decision : 20-06-2011

Acts Referred:

Income Tax Act, 1961 — Section 143 (1), 143 (2), 2 (47)
Transfer of Property Act, 1882 — Section 53 A

Citation : (2011) 06 KAR CK 0089

Hon'ble Judges : V.G. Sabhahit, J;Ravi Malimath, J

Bench : Division Bench

Advocate : C. Shyamala and Smt. Veena Jadhav, for the Appellant; K.R. Prasad and Ashok Kulkarni, for the Respondent

Final Decision : Allowed

Judgement

V.G. Sabhahit, J.—IT Appeal No. 3209 of 2005 is filed by the Revenue which has been admitted" on" 26th" Sept.," 2006" for" consideration" of" the" following substantial questions of law :

(1) Whether the Tribunal was correct in holding that the assessee was not liable to pay capital gains tax despite the assessee declaring taxable income under this head by filing a return of income ?

(2) Whether the Tribunal was correct in proceeding to decide the issue regarding the chargeability of capital gains for the first time before it, without properly affording opportunity to the AO to rebut this contention or remitting the matter back for fresh consideration ?

(3) Whether the Tribunal was correct in holding that there was no transfer during the current assessment year despite the assessee handing over the possession of the immovable property to the builder who had in turn handed over the part of the consideration amount which would amount to transfer attracting capital gains tax ?

(4) Whether the Tribunal was correct in holding that the capital gains tax should be levied only on completion of the entire transaction when the super built-up area is handed over to the assessee as per the agreement ?

2." IT Appeal No. 3165 of 2005 is filed by the assessee which has been admitted on 21st Jan., 2006 for consideration of the following substantial questions of law :

(1) Whether on the facts and circumstances of the case the capital gains in respect of the property in question was liable under the Act for the asst. yr. 1996-97 ?

(2) Whether on the facts and circumstances of the case the amounts aggregating to Rs. 26,50,000 as allowed by the CIT(A) were permissible deductions in computing capital gains ?

3. The material facts giving rise to the above-said questions of law are as follows :

The assessee--medical practitioner by profession filed his return of income on 18th Sept., 1997 which was processed u/s 143(1) of the IT Act, 1961 (hereinafter called the Act). According to him, total income was computed at Rs. 38,57,990. A notice was issued to the assessee u/s 143(2) of the Act and in response to the same, assessee's representative appeared before the assessee. It was contended that assessee was an owner of an immovable property at No. 15, I Main Road, Gandhinagar, Bangalore. On 26th Jan., 1996, the assessee entered into a joint venture agreement with M/s Venus Udyog Ltd. for developing the property. The agreement provides that a sum of Rs. 45 lakhs to be paid to the assessee as a non-refundable advance and in addition to the same, he was also entitled to total built-up area of 5,500 sq. ft. to be constructed by the developers which will be made available to the assessee free of cost. On the basis of the said agreement, assessee returned a long-term capital gain of Rs. 29,19,570. The AO by order dt. 30th March, 2000 imposed tax on the capital gain as per the terms of the agreement after giving proper deductions. Being aggrieved by the same the assessee preferred an appeal before the CIT(A)-V, Bangalore, and the first appellate authority by order dt. 14th Feb., 2001 holding that it cannot be stated that there is no transfer of the immovable property in the year ending 31st March, 1997 in terms of section 2(47) of the Act and there has been transfer of land in consideration of having received Rs. 45 lakhs from the owner and also having handed over the possession of land to the developer for construction and therefore, there has been a transfer within the meaning of section 2(47) between the owner i.e., the appellant and the developer for the year ended 31st March, 1997 is correct and the capital gains thereon is taxable for the year 1997-98. Being aggrieved by the said order, an appeal was filed before the income tax Appellate Tribunal, Bangalore (hereinafter called the Tribunal) by the Revenue. The assessee filed cross-objection regarding assessment year during which capital year is to be taxed. The Tribunal, by order dt. 23rd June, 2005 dismissed the appeal filed by the Revenue and allowed the cross-objection partly by holding

that assessee is not liable to capital gain for the asst. yr. 1997-98 and the contention of the assessee that the capital gain was assessable for the year 2003 was accepted. Being aggrieved by the same, these two appeals are filed for consideration of the aforesaid substantial questions of law.

4. We have heard the learned counsel appearing for the appellants and learned counsel appearing for the respondents.

5. The learned counsel appearing for the appellants--Revenue submitted that on the date of original agreement dt. 26th Jan., 1996 the clause in the agreement shows that possession has been handed over and a sum of Rs. 45 crores is to be paid in addition to the structure which the assessee was entitled at free of cost. The learned counsel further submitted that as per the agreement, actual possession of the property was handed over on 30th May, 1996 and affidavit is also filed to that effect by the assessee and despite the same, the Tribunal has held that assessment of capital gain cannot be done in the year 1997-98 and is liable to be taxed in the year 2003-04 when the entire construction was completed. Therefore, finding of the Tribunal is erroneous and substantial questions of law may be answered in favour of the Revenue.

6. It may be noted at the outset that so far as question of substantial question of law No. 2 in IT Appeal No. 3209 of 2005 is concerned, a rectification order has been passed by the Tribunal in Misc. Petn. No. 145/Bang/2005 by order dt. 24th Aug., 2005 wherein the fact that the said issue regarding chargeability of the capital gain was raised for the first time has been modified and therefore, the said question of law does not survive for consideration.

7. So far as other substantial questions of law are concerned, it is clear that the finding of fact arrived at by the Tribunal is based upon the material on record. The contents of the agreement dt. 26th Jan., 1996, the second supplementary agreement dt. 14th Oct., 1998, the third supplementary agreement dt. 26th Nov., 1999 and also the affidavit filed by the assessee stating that the actual possession of the schedule property was handed over on 30th May, 1996 the said finding on the question of fact that the possession was handed over on 30th May, 1996 is based upon the material on record and cannot be said to be perverse or illegal. The question to be decided is the year in which Rs. 45 lakhs received by the assessee under the agreement dt. 26th Jan., 2006 (sic-1996) as modified by the subsequent agreements is to be taxed. It is not disputed that the assessee had received capital gain in the year 1997-98 and having regard to the finding of fact that the possession of the property has been handed over on 30th May, 1996, we hold that appropriate assessment year in which the capital gain is to be taxed is 1997-98. There is no merit in the contention of learned counsel appearing for the assessee that since the entire project has been completed in the year 2003-04, the tax on capital gain has to be made in that year. It is now well-settled that the date on which possession was handed over to the developer is relevant and in the present case, it is not disputed that assessee has already received a sum of Rs. 45 lakhs in addition to the structures which would enable

to put up construction.

8. The Honble Supreme Court (sic-Bombay High Court) in Chaturbhuj Dwarkadas Kapadia Vs. Commissioner of Income Tax, held that the date relevant for attracting capital gain having regard to the definition u/s 2(47) of the Act is the date on which possession is handed over by the developer and has observed as follows :

Under section 2(47)(v), any transaction involving allowing of possession to be taken over or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act would come within the ambit of section 2(47)(v). That, in order to attract section 53A, the following conditions need to be fulfilled. There should be a contract for consideration. It should be in writing; it should be signed by the transferor; it should pertain to transfer of immovable property; the transferee should have taken possession of the property; lastly, the transferee should be ready and willing to perform his part of the contract. That even arrangements confirming privileges of ownership without transfer of title could fall u/s 2(47)(v). section 2(47)(v) was introduced in the Act from the asst. yr. 1988-89 because prior thereto, in most cases, it was argued on behalf of the assessee that no transfer took place till execution of the conveyance. Consequently, the assessee used to enter into agreements for developing properties with the builders and under the agreement with the builders, they used to confer privileges of ownership without executing conveyance and to plug that loophole, section 2(47)(v) came to be introduced in the Act.

The Honble Supreme Court (sic) has referred to the contention of the assessee and the earlier judgments of the Supreme Court cited by him and held that those judgments were prior to introduction of the concept of deemed transfer u/s 2(47)(v) if the Act and if the contract, read as a whole, indicates passing of or transferring of complete control over the property in favour of the developer, then the date of the contract would be relevant to decide the year of chargeability. Therefore, in these appeals, we hold that capital gain is to be taxed in the year 1997-98 and not in the year 2003-04 as contended by the assessee. Accordingly, we answer the substantial questions of law framed in IT Appeal No. 3209 of 2005 in favour of the Revenue and substantial questions of law framed in IT Appeal No. 3165 of 2005 against the assessee and pass the following order :

IT Appeal No. 3209 of 2005 is allowed. IT Appeal No. 3165 of 2005 is dismissed.