(2011) 01 KAR CK 0232

In the Karnataka High Court

Case No : IT Appeal No. 772 of 2006

Commissioner of Income Tax and Another APPELLANT

Vs

H. Anil Kumar RESPONDENT

Date of Decision : 04-01-2011

Acts Referred:

Income Tax Act, 1961 — Section 143 (1) (a), 2 (47)
Transfer of Property Act, 1882 — Section 53 A, 54, 54 B, 54 EA, 54 F

Citation : (2011) 242 CTR 537

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : M.V. Seshachala, for the Appellant; S. Parthasarathi, for the Respondent

Judgement

N. Kumar, J.—These two appeals are preferred by the Revenue challenging the order passed by the Tribunal which held that the amount received by the Assessees is a capital receipt and not a capital gain and as such not exigible to tax under the head, capital gains.

2. As the question involved in both these appeals are one and the same and Respondents are father and son, they are taken up for consideration together and disposed of by this common order.

3. The Assessee, Hasanand Shobraj, the father, filed return of income for the asst. yr. 1998-99 on 13th Aug., 1998 declaring an income of Rs. 2,74,000 and long-term capital gains of Rs. 7,820. His son, Anil Kumar, filed a return of income for the asst. yr. 1998-99 on 13th Aug., 1998 declaring the total income of Rs. 3,15,562. Their returns were processed u/s 143(1)(a) of the Income Tax Act, 1961 (for short, hereinafter referred to as the ''Act''), on 10th Jan., 1999 and 19th Jan., 1999 respectively. While processing the return, it was seen that both the father and son had received Rs. 3,75,000 from Smt. Vasundhara Filliozat and Sri Pierre Sylvain Filliozat. This amount was claimed to have been received as a settlement outside the Court, in respect of the residential property for the

purchase of which the father and son had jointly entered into an agreement with one Sri Paramananda G. Hemdev. The said property is stated to have been ultimately sold to Smt. Vasundhara Filliozat and Sri Pierre Sylvain Filliozat by the vendor, contrary to the agreement entered into with the Assessees. The total amount paid for this settlement is said to be Rs. 7,50,000, which was shared equally by both the Assessees. Each of the Assessees claimed their share of Rs. 3,75,000 as capital gain and claimed that the same is not exigible to tax. With a view to examine the taxability or otherwise of this amount, the assessment of both the Assessees was taken for scrutiny with the prior approval of the CIT. In response to the hearing notices, Sri. H.V. Prasad, ITP appeared.

4. On scrutiny of the material, it was disclosed that both the Assessees had entered into an agreement of sale by a deed dt. 14th Oct., 1992 with one Sri Paramananda G. Hemdev for the purchase of a residential property bearing No. 125, Vivekananda Road Cross, Yadavagiri, Mysore. They paid an advance of Rs. one lakh, which was equally contributed by both the Assessees. The sale deed was expected to be executed on or before 30th June, 1993. The vendor did not execute the sale deed within the time stipulated. During the subsistence of the said agreement, the vendor entered into an agreement with the aforesaid two purchasers. Therefore, the Assessees filed a civil suit for specific performance of the contract of sale before the Civil Judge, Mysore. During the pendency of the civil suit, a settlement was arrived at outside the Court. In terms of the settlement entered into, the purchasers paid a sum of Rs. 7,50,000 to the Assessees subject to the condition that the Assessees shall withdraw the suit for specific performance and hand over all the documents relating to the property to the purchasers. The said agreement came to be executed on 7th Dec, 1997. In terms of the agreement the aforesaid amount of Rs. 7,50,000 was paid to both the Assessees and in turn they withdrew the suit for specific performance. The Assessee contended that the aforesaid amount of Rs. 7,50,000 is not a capital gain, which could be taxed under the Act. There is no capital asset. There is no transfer of such a capital asset and therefore what they received is not a capital gain exigible to tax.

5. However, the AO did not accept the aforesaid contentions. He held that each of the Assessees received Rs. 3,75,000 for giving up their right in the said property. Therefore it attracts capital gain tax. To earn this amount, the Assessees had made an investment of Rs. 50,000 each, by way of advance. That is the cost of investment made in the year 1992. Therefore he proceeded to compute the long-term capital gains and imposed tax.

6. Aggrieved by the said order of the AO, both the Assessees preferred an appeal before the CIT(A) Mysore. The appellate authority on reappreciation of the entire material on record and after taking into consideration the judgments of the various High Courts, held that the sum of Rs. 3,75,000 received by each of the Assessees is a capital gain and is exigible to levy of long-term capital gains tax and dismissed the appeals.

7. Aggrieved by the said order, both the Assessees preferred appeals before the Tribunal. The Tribunal held that, it is an settled law that the contract of purchase of property does not create an interest in immovable property. In the case of a breach of contract, the Assessee is entitled to damages. The Assessee had a mere right to sue for damages. u/s 6(e) of the Transfer of Property Act, a mere right to sue cannot be transferred. Therefore it cannot be said to be a capital asset u/s 2(47) of the Income Tax Act, for the purpose of transfer. Therefore the Tribunal held, that as the Assessee had a mere right to sue, which cannot be transferred, the amount received for relinquishment of the right under the contract of sale, cannot be construed as a capital asset and the difference in the amount realized by them does not constitute capital gains and therefore it is not exigible to tax, Therefore they set aside the order passed by the AO as well as the appellate authority and allowed the appeal.

8. Aggrieved by this order of the Tribunal the "Revenue is under appeal.

9. This Court at the time of admission of this appeal on 22nd June, 2010, framed the following two substantial questions of law, which read as under:

(i) Whether the Tribunal was correct in holding that the amount of compensation received for giving up the right to specific performance of an agreement to sell dt. 14th Oct., 1992 for a purchase of a property by paying an advance of Rs. 50,000 cannot be treated as a transfer and brought to capital gains tax.

(ii) Whether the Tribunal was correct in holding that when there are two views possible one favourable to the Assessee should be adopted.

10. The Learned Counsel appearing for the Revenue assailing the impugned order passed by the Tribunal contended that, admittedly the Assessees had entered into a contract for the purchase of the immovable property and had paid an advance of Rs. 50,000 each. When in violation of the terms of the agreement, the vendor sold the property to the purchasers, the Assessees filed a suit for specific performance for the enforcement of the contract of sale. Though under the contract of sale, no right or interest in the property is transferred to the Assessees, the Assessees had a right to enforce the contract of sale in respect of the immovable property. It is for giving up that right that, after filing of the suit by way of out of Court settlement, the purchasers paid the Assessees, a sum of Rs. 7,50,000. The said consideration received, is a consideration which falls under the expression, ''property of any kind'' used in Section 2(14) of the Act. Therefore, it constitutes capital gain. The AO as well as the appellate authority were justified in holding that the said amount is exigible to tax and the Tribunal was in total error in interfering with the order which was strictly in accordance with law.

11. Per contra, the Learned Counsel appearing for the Assessees though did not dispute the facts, contended that the cost of the right which was given up by the Assessees is not determinable. In the absence of such determination, it is incorrect to say that what is paid is a compensation for giving up the right as a

capital asset and consequently, the difference in the amount is a capital gain exigible to tax.

12. Both the Learned Counsel have relied on the judgments of various High Courts on the point.

13. Before we answer these substantial questions of law, it is necessary to look into the views expressed by the various High Courts in this country, which will be helpful in answering the aforesaid substantial questions of law.

14. Before referring to the aforesaid decisions, it is necessary to look into a few definitions which would be helpful in answering the substantial questions of law.

15. Section 2(14) of the Act defines what a ''capital asset'' means. It reads thus:

''capital asset'' means property of any kind held by an Assessee, whether or not connected with his business or profession, but does not include-

(i) any stock-in-trade, consumable stores or raw materials held for the purposes of his business or profession;

(ii) personal effects, that is to say, movable property (including wearing apparel and furniture) held for personal use by the Assessee or any member of his family dependent on him, but excludes

(a) jewellery;

(b) archaeological collections;

(c) drawings;

(d) paintings;

(e) sculptures; or

(f) any work of Article

Section 2(47) defines what ''transfer'' means in relation to a capital asset, as under:

''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

(iv) the maturity or redemption of a zero coupon bond; 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 AOP 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.

Though the words ''capital gain'' as such is not defined under the Act. Section 45(1) of the Act deals with capital gains, which reads as under:

45(1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in Sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H be chargeable to income tax under the head ''Capital gains'', and shall be deemed to be the income of the previous year in which the transfer took place.

(1A) Notwithstanding anything contained in Sub-section (1), where any person receives at any time during any previous year any money or other assets under an insurance from an insurer on account of damage to or destruction of, any capital asset, as a result of

(i) flood, typhoon, hurricane, cyclone, earthquake or other convulsion of nature: or

(ii) riot or civil disturbance; or

(iii) accidental fire or explosion: or

(iv) action by an enemy or action taken in combating an enemy (whether with or without a declaration of war),then, any profits or gains arising from receipt of such money or other assets shall be chargeable to income tax under the head "Capital gains" and shall be deemed to be the income of such person of the previous year in which such money or other asset was received and for the purposes of Section 48, value of any money or the fair market value of other assets on the date of such receipt shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of such capital asset.

Explanation: For the purposes of this Sub-section, the expression ''insurer'' shall have the meaning assigned to it in Clause (9) of Section 2 of the Insurance Act, 1938 (4 of 1938).

However, Sections 2(29A) and 2(29B) defines what a ''long-term capital asset'' and ''long-term capital gain'' means, which reads thus:

2(29A) ''long-term capital asset'' means a capital asset which is not a short-term capital asset;

2(29B) ''long-term capital gain'' means capital gain arising from the transfer of a long-term capital asset;

Similarly, Sections 2(42A) and 2(42B) defines what ''short-term capital asset'' and ''short-term capital gain'' means. It reads as under:

(42A) ''short-term capital asset'' means a capital asset held by an Assessee for not more than (thirty-six) months immediately preceding the date of its transfer:

(42B) ''short-term capital gain'' means capital gain arising from the transfer of a short-term capital asset.

16. When once the Act defines the aforesaid terms, in deciding the section or the provisions in the Act. we have to go by the aforesaid definitions. Therefore, when once the word ''transfer'' in relation to a capital asset is defined under the Income Tax Act, we cannot import the meaning assigned to them under the provisions of the Transfer of Property Act. The word ''capital asset'' means property of any kind held by the Assessee which does not necessarily be confined to an immovable property. Similarly, when the word ''transfer'' in relation to a capital asset though includes sale, exchange or relinquishment of the asset, the said asset need not necessarily be an immovable property. It is in this background, we have to consider the judgments of the various High Courts, where these words have been the subject-matter of interpretation.

17. In the case of Commissioner of Income Tax, Bombay City I Vs. Tata Services Ltd., , the Division Bench of the Bombay High Court dealing with the transaction of an assignment of a right to obtain conveyance which was assigned under the tripartite agreement on receipt of Rs. 5 lakhs as consideration for assigning the right in the contract, held as under:

It is no doubt true that as provided for in Section 54 of the Transfer of Property Act, a contract for sale of immovable property does not by itself create any interest in or charge on such property. It is, however, difficult to see how the provisions of Section 54 of the Transfer of Property Act at all become relevant for the purposes of the present case. The word ''property'', used in Section 2(14), is a word of the widest amplitude and the definition has re-emphasised this by use of the words ''of any kind''. Thus, any right which can be called property will be included in the definition of ''capital asset''. A contract for sale of land is capable of specific performance. It is also assignable. Therefore, a right to obtain conveyance of immovable property, was clearly ''property'' as contemplated by Section 2(14). The mere fact that ultimately the earnest money was to be treated as a part of the purchase price, the balance of which was to be paid on the completion of sale, did not detract from the fact that the immediate consideration for the execution of the agreement of sale was the payment of earnest money. Therefore, this was clearly a case which squarely fell within Section 45 and the Assessee had made a profit or gain arising from the transfer of the capital asset which was the right to obtain a sale deed in respect of immovable property. Therefore, the entire amount of Rs. 5,00,000, being the difference between the amount of Rs. 5,90,000 received by the Assessee and Rs. 90,000 originally paid by the Assessee as earnest money, would be capital gain in the hands of the Assessee. Therefore, it is liable to capital gain tax. The Assessee would, however, be entitled to a deduction of Rs. 14,115 on account of legal and other expenses transferred to by the ITO.

18. Again the Bombay High Court in the case of Commissioner of Income Tax Vs. Vijay Flexible Containers, dealing with the case of a suit for specific performance of the agreement where a consent decree was passed in favour of the Assessee for a certain sum, where he gave up his right to claim specific performance, held as under:

Having regard to the statutory provisions and the authorities cited above, it cannot be said that the right acquired under an agreement to purchase immovable property is a mere right to sue. The Assessee acquired under the said agreement for sale the right to have the immovable property conveyed to him. He was, under the law, entitled to exercise that right not only against his vendors but also against a transferee with notice or a gratuitous transferee. He could assign the right. What he acquired under the said agreement for sale was. therefore, property within the meaning of the Income Tax Act, and consequently, a capital asset. When he filed the suit in the Court against the vendors he claimed specific performance of the said agreement for sale by conveyance to him of the immovable property and, only in the alternative, damages for breach of the agreement. A settlement was arrived at when the suit reached hearing, at which point of time the Assessee gave up his right to claim specific performance and took only damages. His giving up of the right to claim specific performance by conveyance to him of the immovable property was relinquishment of the capital asset. There was, therefore, a transfer of a capital asset within the meaning of the Income Tax Act. The payment of earnest money under the agreement for sale was the cost of the acquisition of the capital asset.

Right to obtain a conveyance of immovable property falls within the expression ''property of any kind'' used in Section 2(14) and amount received in connection therewith is liable to capital gains tax.

19. However, in the case of Commissioner of Income Tax Vs. Abbasbhoy A. Dehgamwalla and others, the Bombay High Court dealing with the case of a right to sue for damages for breach of a contract of lease, held as under:

''There is no difficulty in holding that the right to lease constituted ''capital asset''. Such a right got extinguished at least on 20th Sept., 1961, when this Court refused to grant specific performance of the agreement, if not earlier on 7th Jan., 1958, i.e., the date of breach of contract mentioned by the Court in its decree. Unlike compensation payable by the State when it acquires a citizen''s land under the Acts such as the Land Acquisition Act where the right to receive compensation is statutory right, the right that a person acquires on the establishment of a breach of contract is at best a mere right to sue. Despite, the definition of the expression ''capital asset'' in the widest possible terms in Section 2(14), a right to a capital asset must fall within the expression ''property of any kind'' and, must not fall within the exceptions. Section 6 of the Transfer of Property Act which uses the same expression ''property of any kind'' in the context of transferability makes an exception in the case of a mere right to sue. The decisions thereunder make it abundantly clear that the right to sue for damages is not an actionable claim. It cannot be assigned. Transfer of such a right is as much opposed to public policy as is gambling in litigation. As such, it will not be quite correct to say that such a right constituted a ''capital asset'' which in turn has to be ''an interest in property of any kind''. The question of the Assessee''s right under the agreement of 1945 being converted or substituted by another right which can be said to be a ''capital asset'' does not therefore, arise. In the next place, the right to sue for damages for breach of contract no doubt is capable of maturing into a right to receive damages for breach of contract. But that happens only when the damages claimed for breach of contract are either admitted or decreed and not before.

20. The Gujarat High Court in the case of Rustom Spinners Ltd. Vs. Commissioner of Income Tax, dealing with a case of an assignment of a right in immovable property acquired under a purchase agreement, held as under:

Contention that the Assessee had not incurred any cost in respect of the agreement of purchase in view of the fact that the cheque for the earnest amount of Rs. 5 lakhs was not encashed by the vendor and was returned to the Assessee cannot be accepted because admittedly the Assessee had incurred an expenditure of Rs. 2,05,768 as claimed by him by way of service charge expenses, legal and professional charges and miscellaneous expenses for acquiring the rights under the agreement and for their assignment. It may also be noticed that the amount of Rs. 5 lakhs which was given by way of deposit or earnest money under the cheque issued by the Assessee to the vendor was to be adjusted towards the total amount of Rs. 2.75 crores being the price of the textile mill, as recorded in the agreement. There is no dispute about the fact that, under the assignment deed, the assignee was required to pay the full amount of Rs. 2.75 crores to the vendor. In view of this arrangement between the parties, it is clear that the liability of the assignor, that is the Assessee, to pay the total consideration of Rs. 2.75 crores was also assigned to the assignee and that is why the cheque of Rs. 5 lakhs was returned to the assignor (Assessee) by the vendor who was a confirming party to this arrangement. In other words, though a sum of Rs. 9 lakhs was paid under the deed of assignment to the assignor, the assignee paid Rs. 5 lakhs directly to the vendor in view of the cheque of the earnest amount of Rs. 5 lakhs having been returned to the Assessee-assignor. If the amount of Rs. 5 lakhs were retained by the vendor, then an amount of Rs. 5 lakhs would have been paid by the assignee to the assignor in view of the assignee having undertaken the liability to pay the entire amount of consideration under the deed of assignment. Therefore, it cannot be said that the Assessee had acquired rights under the agreement of sale without having had to incur any cost simply because the cheque for Rs. 5 lakhs was returned to it unencashed by the vendor. The amount of Rs. 5 lakhs it received less from the assignee because instead of being paid to it, it was directly paid to the vendor by the assignee in view of the assignor having been returned the earnest amount by the vendor. Thus, the Tribunal was right in holding that the claim of the Assessee that it did not incur any cost in acquiring the rights under the said agreement was not acceptable. It is a settled legal position that the Court can give relief on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract has frustrated by the inclusion or occurrence of an unexpected event or change of circumstances which were not contemplated by the parties on the date of the contract. In the instant case, it is evident that the Assessee not only did not rescind the contract but proceeded to assign its benefits and liabilities which it had incurred under the contract in favour of the assignee by a deed of assignment. Under the agreement the ''purchaser'' was defined to mean as the Assessee or his successors and assigns and, therefore, under the original agreement itself it was envisaged that the purchaser could assign his rights and liabilities in favour of an assignee. Neither the vendor nor the- Assessee ever treated the contract as having been frustrated by virtue of the interim orders which were operative on the date on which the deed of assignment was executed. It is clear that this is not a case where the parties had not foreseen the fact that interim relief would be granted in the winding up petition, nor is it a case where mere grant of a temporary injunction resulted in any fundamental or radical change in respect of the obligations originally undertaken under the agreement. The fact that the same rights and liabilities were assigned in favour of the assignee, under the deed of assignment to which the vendor was a confirming party, clearly shows that no such fundamental or radical change was brought about merely by virtue of the temporary injunction and that it is not as if any situation which was not foreseen by the parties had arisen. Therefore, there was no frustration of the contract as is sought to be contended on behalf of the Assessee. It is also clear that time was not treated to be of the essence of the contract. From the agreement, it is clear that it was specifically agreed that the purchaser may, instead of rescinding the contract extend from time to time the time for completing the sale and if the time for completion as stipulated in Clause 21, namely, a period, of two weeks of the receipt of the necessary permission from the Urban Land Ceiling authorities expired, the vendor would have the option of rescinding the agreement notwithstanding that the purchaser extended time for the same. It was further stipulated that, if the purchaser did not comply with its obligations under the agreement within the time fixed for completion, the vendor would be entitled to cancel the agreement and would return the earnest amount. This arrangement which is reflected in the latter part of the Clause 32 of the agreement clearly shows that, though the parties indicated the time of performance of the contract in Clause 21 of the agreement and described it as of essence, in reality, it never treated the time to be the essence of the contract. It is a settled legal position that in the case of sale of immovable property, there is a presumption against time being of the essence of the contract and mere fixation of the period within which the contract has to be performed, does not make the time the essence of the contract. Therefore, it cannot be said that there was no assignment made by the Assessee. Once it is held that there is no frustration of the contract and that there was cost of acquisition of the rights of the contract, the Assessee would be liable for tax on capital gains in respect of sum received by it in consideration of the assignment of the contract.

21. Similarly, the Indore Bench of the Madhya Pradesh High Court in the case of Commissioner of Income Tax Vs. Smt. Laxmidevi Ratani and Others, dealing with a case of giving up a right to claim specific performance of a contract in lieu of consideration received in terms of the compromise between the parties, held as under:

The expression ''property of any kind'' used in Section 2(14) is of wide import. When this expression is read along with expression defined in Section 2(47)(ii), i.e., extinguishment of any rights therein, there is no hesitation in holding that giving up of right to claim specific performance by the Assessee to get conveyance of immovable property in lieu of receiving consideration resulted in extinguishment of right in property thereby attracting the rigour of Section 2(14) r/w Section 2(47). In other words, the action on the part of Assessee in giving up her right to claim the property and instead accepting the money compensation was a clear case of relinquishment of a right in the property resulting in transfer as defined in Section 2(47). When the legislature in its wisdom defines a particular type of transaction to be in the nature of transfer for taxing purpose, then the effect has to be given to such transaction to be in the nature of transfer as defined. The reading of definition of transfer u/s 2(47) clearly indicates that the intention of legislature is to include several kinds of transactions to be falling in the category of transfer for the purpose of bringing them in income tax net under the Income Tax Act. Amount of Rs. 7,34,000 is a capital receipt exigible to capital gains tax as it involved transfer of property within the meaning of Section 2(47).

22. The Delhi High Court in the case of Commissioner of Income Tax, Delhi (Central) Vs. J. Dalmia, , dealing with the case of a nominee of the Assessee giving up a right to specific performance but retaining his right to claim damages held as under:

The relevant question is not whether the Assessee acquired any interest in the immovable property by virtue of the contract for sale. u/s 54 of the Transfer of Property Act, a contract for sale of immovable property does not by itself create any interest in or charge on such property. It is to be determined whether damages received by the Assessee were in respect of transfer of a ''capital asset''. There was a breach of contract and the Assessee received damages in satisfaction thereof. He had a mere right to sue for damages. Assuming the same to be ''property'' this could not be transferred u/s 6(e) of the Transfer of Property Act which read that ''a mere right to sue cannot be ''transferred''. No exception is found under the Income Tax Act though the word ''transfer'' in relation to capital asset has been defined in Section 2(47) which includes ''sale, exchange or relinquishment of the asset or the extinguishment of any right therein''. The damages which were received by the Assessee cannot be said to be on account of relinquishment of any of his assets or on account of extinguishment of his right of specific performance under the contract for sale. u/s 5 of the Transfer of Property Act, transfer of property means an act by which a person conveys property to another and ''to transfer property'' is to perform such act. A mere right to sue may or may not be property but it certainly cannot be transferred. There cannot be any dispute with the proposition that in order that receipt or accrual of income may attract the charge of tax on capital gains the sine qua non is that the receipt or accrual must have originated in a ''transfer within the meaning of Section 45 r/w Section 2(47). Since there could not be any transfer in the instant case, it has to be held that the amount of Rs. 1,02,500 received by the Assessee as damages was not assessable as capital gains.

23. From the aforesaid judgments it is clear that the right to obtain a conveyance of immovable property falls within the expression ''property of any kind'' used in Section 2(14) of the Act and consequently it is a capital asset. It is because the expression ''property of any kind'' is of wide import. When this expression is read along with the expression defined in Section 2(47)(ii) i.e., ''extinguishment of any rights therein'', the giving up of a right of specific performance by the Assessee to get conveyance of immovable property in lieu of receiving consideration, results in the extinguishment of the right in property, thereby attracting the rigor of Section 2(14) r/w Section 2(47). Giving up of a right to claim specific performance by conveyance in respect to an immovable property, amounts to relinquishment of the capital asset. Therefore, there was a transfer of capital asset within the meaning of the Act. The payment of consideration under the agreement of sale, for transfer of a capital asset is the cost of acquisition of the capital asset. Therefore, in lieu of giving up the said right, any amount received, constitutes capital gain and it is exigible to tax. However, as is clear from Section 48, before the income chargeable under the head capital gains is computed, the deductions set out in Section 48 has to be given to the Assessee. It is only the amount thus arrived at, after such deductions u/s 48, would be the income chargeable under the heading capital gains.

24. In the instant case both the Assessees entered into an agreement to purchase the immovable property and paid Rs. 1,00,000 as advance amount. It is the cost of acquisition. They filed a suit for specific performance of the agreement of sale. It is thereafter under an agreement entered into between them and the purchasers, they gave up their right to sue for specific performance in lieu of a payment of Rs. 7,50,000. Therefore, the amount received by them for giving up the right of specific performance i.e., to give up their right in a capital asset constitutes capital gains. However, they are entitled to deductions as per Section 48, both regarding the investment made as well as the expenditure incurred and only after such deduction the amount arrived at would be exigible to capital gains tax.

25. Therefore, the Tribunal was not justified in interfering with the orders passed by the assessment officer as well as the appellate authority. However, both the authorities have not given deductions u/s 48 to which the Assessee is legitimately entitled to. Therefore, the computation of capital gains is not strictly in accordance with law. It has to be reworked in the light of the observations made above, keeping in mind Section 48 of the Act. To that extent, the said orders also requires to be interfered with and cannot be sustained.

26. Accordingly, the substantial questions of law raised in this case, are answered in favour of the Revenue and against the Assessee. Hence, we pass the following order:

(i) Appeals are allowed.

(ii) The impugned orders dt. 25th Nov., 2005 and 9th Jan., 2005 passed by the Tribunal, Bangalore, in respect of both the Assessees are hereby set aside.

(iii) The entire matter is remitted back to the assessment officer to compute the capital gains in accordance with law and in the light of the observations made above keeping in mind Section 48 of the Act.

Parties to bear their own costs.

