
(1995) 08 AP CK 0063

In the Andhra Pradesh High Court

Case No : Case Referred No. 103 of 1987

Commissioner of Income Tax

APPELLANT

Vs

D. Rani

RESPONDENT

Date of Decision : 09-08-1995

Acts Referred:

Income Tax Act, 1961 — Section 256, 263, 45, 53, 54

Citation : (1996) 218 ITR 724

Hon'ble Judges : S.S. Mohammed Quadri, J;G. Bikshapathy, J

Bench : Division Bench

Advocate : P.V.R. Sarma, for the Appellant; S.R. Ashok, for the Respondent

Judgement

Syed Shah Mohd. Quadri, J.—In this reference, at the instance of the Revenue, u/s 256(1) of the Income Tax Act, 1961, the following question is referred for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in holding that the short-term capital gains of Rs. 48,700 was not assessable u/s 54 in the hands of the assessee even though the assessee resided for a period of seven months in the property which was the subject-matter of capital gains tax ?"

2. In the accounting period relating to the assessment year 1982-83, the assessee occupied a house constructed for the purposes of her residence in April, 1981, but she sold the same on November 3, 1981. The cost of construction was Rs. 2,01,300 and the consideration for which the house was sold was Rs. 2,50,000. Thus, there was a net capital gain of Rs. 48,700. In her return, the assessee claimed exemption u/s 54 of the Income Tax Act, 1961 (for short, "the Act"). The Income Tax Officer upheld the claim but the Commissioner of Income Tax, in exercise of the power u/s 263, opined that the order of assessment was erroneous and prejudicial to the interests of the Revenue as exemption u/s 54 of the Act was wrongly allowed and after giving an opportunity of being heard to

the assessee, set aside the order of the assessment with a direction to the Income Tax Officer to redo the assessment of January 15, 1985. The said amount of capital gains was assessed to tax holding that section 54 of the Act had no application. The assessee carried the matter in appeal before the Appellate Assistant Commissioner. By his order dated September 17, 1985, the Appellate Assistant Commissioner dismissed the appeal confirming the order of assessment. Aggrieved by that order, the assessee went in second appeal before the Income Tax Appellate Tribunal. The Tribunal allowed the appeal on September 26, 1986. It is from that order the aforesaid question of law arises.

3. Learned standing counsel for Income Tax contends that for application of section 54 of the Act use of the house by the assessee for a period of two years before the date of transfer is a must and as this requirement is absent, the assessee cannot get the benefit of section 54 of the Act. He submits that the Income Tax Officer and the Appellate Assistant Commissioner had rightly interpreted the section and held that the assessee was not entitled to exemption u/s 54 and that the view taken by the Tribunal is not sustainable in view of the judgment of the Madras High Court in *M. Viswanathan Vs. Commissioner of Income Tax*, which is being consistently followed by that court.

4. The answer to the question referred to above depends upon the true interpretation of section 54 of the Act. Section 54 of the Act was inserted in the Income Tax Act by the Finance Act, 1978, with effect from April 1, 1974, and it remained in the statute book till it was amended by the Finance Act, 1982, with effect from April 1, 1983. As the question relates to the assessment year 1982-83, we shall refer to the unamended provision as it stood in the relevant assessment year, in so far as it is relevant for our purpose, which reads as follows :

"Where a capital gain arises from the transfer of a capital asset to which the provisions of section 53 are not applicable, being buildings or lands appurtenant thereto the income of which is chargeable under the head "Income from house property", which in the two years immediately preceding the date on which in the two years immediately preceding the date on which the transfer took place, was being used by the assessee or a parent of his mainly for the purposes of his own or the parent's own residence (hereafter in this section referred to as "original asset"), and the assessee has within a period of one year before or after that date purchased, or has within a period of two years after that date constructed, a house property for the purposes of his own residence, then, instead of the capital gain being charged to Income Tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,...."

5. The analysis of the provision extracted above would show that to claim benefit of exemption granted under the said provision, the following requirement should be fulfilled :

1. The capital gain should arise from a transfer of a house property of building or land appurtenant thereto, the income of which is chargeable under the income from house property;

2. Such a gain is not governed by the provisions of section 53 of the Income Tax Act;

3. That the property was being used in the two years immediately preceding the date on which the transfer took place;

4. The property should have been used mainly for the purpose of residence;

5. (a) The assessee has purchased a house property within a period of one year before or after the date of transfer; or

(b) constructed a house for the purpose of his own residence within a period of two years after the date of the transfer.

6. It is only if the aforementioned requirements are satisfied that the capital gain has to be dealt with as provided u/s 54 of the Act, viz., if the capital gain is greater than the value of the house property purchased or constructed, the difference between the amount of capital gain and the cost of new asset shall have to be charged u/s 45 of the Act as the income of the previous year but if the amount of capital gain is equal to or less than the cost of new asset, the capital gain shall not be charged u/s 45 of the Act. Section 45 reads as follows :

"Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 53, 54, 54B, 54D and 54E 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."

7. In the instant case, it is a common case that if the requirement of the residence under condition No. 3 mentioned above, i.e., that the property was being used in the two years immediately preceding the date on which the transfer took place, is satisfied, the capital gain would be exempted from tax. The dispute centres round the interpretation of the clause "which in the two years immediately preceding the date on which the transfer took place, was being used by the assessee or a parent of his...." In our view, the said clause means that the assessee or his parent should have used the property for residence in two years immediately preceding the date of transfer. The words "in two years" do not connote continuous and uninterrupted use for the whole period of two years. It only indicates or connotes use in the period of two years immediately preceding the date of transfer. But then, what meaning should be given to "was being used" in the later part of that clause. There is no doubt that the words grammatically indicate a continuous state of affairs in the past. But that does not mean that continuity should commence at the point when "two years preceding the date of transfer" commences and should end with the "date of transfer". Will the absence of the assessee during the period of holidays from the house destroy the continuity ? Or will his non-occupation of the property due

to absence from station for reasons of service or otherwise have the effect of breaking the continuity ? We think not. In our view those words are used to indicate continuous residence, not necessarily for two years, in contradistinction to mere casual stay or occasional stay for a short period without there being an intention to stay permanently. In the instant case, the assessee constructed the house in question and occupied the same which indicate the intention to stay in the house with some degree of permanency. It was not a casual stay or temporary visit to the house. The fact that it was sold subsequently would not destroy that intention. Therefore, it follows that the stay of seven months would fulfill requirement No. 3 indicated above. Thus, the provision of section 54 is attracted and the assessee is entitled to exemption.

8. We shall now refer to the cases cited by learned standing counsel. In *M. Viswanathan Vs. Commissioner of Income Tax*, , the question of applicability of section 54 was referred to by the Madras High Court. The assessee therein resided for one year and five months, before he sold the house property. On the ground that the use was for a period less than two years, it was contended by the Revenue that the provisions of section 54 of the Act would not be attracted. The learned Chief Justice speaking for the Bench observed that the words "two years immediately preceding the date of sale" and "was being used" were important and that if the words "in the two years immediately preceding" were stood by themselves, some ambiguity would have arisen. But those words are coupled with the words "was being used" which in English language extended to the date of transfer as the expression in the English language was described as past continuance, a continuity which extended up to the termination date which is clearly stated as the date of transfer. For the reasons, we have already indicated above, with great respect, we are unable to accept the interpretation placed by the Division Bench of the Madras High Court. The view in *M. Viswanathan Vs. Commissioner of Income Tax*, by the Madras High Court, was followed by that court in *COMMISSIONER OF Income Tax, MADRAS Vs. R. MALA.*, and *Commissioner of Income Tax Vs. K.N. Srinivasan*, .

9. Section 54 of the Act came up for consideration before a learned single judge of the Delhi High Court in *S. Harnam Singh Suri Vs. Central Board of Direct Taxes*, . There the question was raised by the assessee in a writ petition and not by way of reference u/s 256 of the Act. The learned single judge having referred to the earlier view taken by the Madras High Court expressed the view that past continuous tense used in section 54 only meant that whenever used in the preceding two years, the house should have been used by the assessee as a residence for himself or his parent and that the word "in" read with "mainly" could never mean "continuously". So, the house need not have been continuously used for a period of two years for the purpose of residence by the assessee or his parent prior to its sale so as to claim exemption u/s 54 of the Act. The same view was expressed by the Karnataka High Court in *M. Abdul Sattar Vs. Commissioner of Income Tax*, , wherein it was held that the words "in the two years immediately preceding the date of transfer" could only mean at

any time within two years and that the words "was being used" cannot restrict or control "in the two years" occurring earlier and that they do not restrict or curtail the period occurred in the earlier part of the section. For the reasons we have already mentioned above, we are in respectful agreement with the reasoning and conclusions of the Delhi High Court and the Karnataka High Court in the cases cited supra.

10. In the result, we do not find any illegality in the order of the Tribunal. We answer the question in the affirmative, i.e., in favour of the assessee and against the Revenue.