

**(1989) 02 P&H CK 0045**

**In the Punjab And Haryana At Chandigarh**

**Case No :** Income-tax Reference No. 41 of 1982

Commissioner of Income Tax

APPELLANT

Vs

Didar Singh

RESPONDENT

**Date of Decision :** 21-02-1989

**Acts Referred:**

Income Tax Act, 1961 — Section 2(14), 256, 45, 46, 47

**Citation :** (1990) 2 ILR (P&H) 79 : (1989) 179 ITR 208

**Hon'ble Judges :** S.S. Sodhi, J; Gokal Chand Mital, J

**Bench :** Division Bench

**Advocate :** Ashok Bhan and Ajay Mital, for the Appellant; M.S. Rattan, for the Respondent

## Judgement

Gokal Chand Mital, J.—In the previous year relating to the assessment year 1975-76, Didar Singh sold ancestral agricultural land measuring 3 acres, 3 kanals and 2 marlas for a consideration of Rs. 1,76,625. In the return filed for declaring capital gains, he showed the cost of the agricultural land at Rs. 30,000 per acre as on February 28, 1970, in view of the fact that the agricultural land was brought within the definition of "capital asset" contained in Section 2(14) of the Income Tax Act, 1961 (for short "the Act"), by virtue of the amendment brought on April 1, 1970. The Income Tax Officer did not agree with the assessee and held that the cost price as on January 1, 1954, had to be considered and not as on February 28, 1970. This he did in view of Section 55(2) of the Act.

2. On appeal, the Appellate Assistant Commissioner agreed with the assessee and found the price fixed by him to be reasonable. The Income Tax Appellate Tribunal, Chandigarh, agreed with the appellate order and dismissed the appeal filed by the Revenue.

3. At the instance of the Revenue, the Tribunal has referred the following question for opinion :

"Whether the Appellate Tribunal has been right in law in holding that the cost of

acquisition or the value should be ascertained as on February 28, 1970, for the purposes of capital gains in view of the provisions of Section 2(14) of the Income Tax Act as amended with effect from April 1, 1970?"

4. By the Finance Act of 1970, which came into effect from April 1, 1970, the definition of "capital asset" contained in Section 2(14) of the Act was amended and in place of Clause (iii), a new clause was substituted as a result of which agricultural land which fell within the purview of Sub-clauses (a) and (b), came within the ambit of capital asset and became amenable to capital gains tax which hitherto were not amenable to capital gains tax. The word "transfer" in relation to a capital asset is defined in Section 2(47) and includes "sale". Section 45 of the Act defines "capital gains" and is the charging section. Section 48 of the Act provides how to compute income chargeable under the head "Capital gains". Section 49 provides for determining cost with reference to certain modes of acquisition including succession and inheritance. Section 55(2) of the Act provides for the cost of acquisition in relation to a capital asset with reference to Sections 48 and 49 of the Act. Section 55A provides for making a reference to the Valuation Officer at the instance of the Income Tax Officer if it is found necessary, subject to the circumstances mentioned in that provision. Here, reproduction of the relevant provisions of Section 55(2), as it stood at the time of the assessment year in question, has become necessary :

"Section 55(2)--For the purposes of Sections 48 and 49, "cost of acquisition", in relation to a capital asset,--

(i) where the capital asset became the property of the assessee before the 1st day of January, 1954, means the cost of acquisition of the asset to the assessee or the fair market value of the asset on the 1st day of January, 1954, at the option of the assessee ;

(ii) where the capital asset became the property of the assessee by any of the modes specified in Sub-section (1) of Section 49, and the capital asset became the property of the previous owner before the 1st day of January, 1954, means the cost of the capital asset to the previous owner or the fair market value of the asset on the 1st day of January, 1954, at the option of the assessee."

5. Admittedly, the assessee acquired the land before January 1, 1954, by inheritance and the case would fall u/s 55(2)(a)(ii) of the Act and the cost of the capital asset has to be taken as on the date of inheritance or the fair market value as on January 1, 1954, at the option of the assessee. The assessee did not opt for the value on the date of death of his father, and, therefore, the fair market value as on January 1, 1954, has to be taken. The argument raised on behalf of the assessee is that the agricultural land of the type in question became a capital asset chargeable to capital gains only because of the Finance Act of 1970, w.e.f. March 1, 1970, and, therefore, its value as on February 28, 1970, is to be considered and not as on January 1, 1954. This argument needs consideration. Section 45 of the Act is the charging section for capital gains and

this was on the statute book long before the amendment made in the definition of "capital asset" by the Finance Act of 1970. The effect of the amendment is that agricultural land which was not within the ambit of capital asset was brought within the definition of "capital asset" and was chargeable to capital gains tax on transfer with the result that all the provisions of Section 45 onwards became applicable to it. The result would have been that the transfer of agricultural land made on or before February 28, 1970, would also have been subjected to capital gains tax but by virtue of the same Finance Act, Clause (viii) was inserted in Section 47 of the Act to the following effect :

"47. Nothing contained in Section 45 shall apply to the following transfers :-- . . .

(viii) any transfer of agricultural land in India effected before the 1st day of March, 1970."

6. That is why all transfers made of agricultural land of the kind which come within the ambit of capital asset, if made on or after March 1, 1970, would attract the provisions of Section 45 of the Act, the charging section, and for working out the capital gains, provisions of Sections 46 to 55A of the Act would become applicable. Therefore, in calculating capital gains, reference will have to be made to Section 55 of the Act and by virtue of Sub-section (2) thereof, the cost of the land as on January 1, 1954, has to be taken. The capital gains would be the difference between that value and the sale proceeds. In this context, the amendments made by the Finance Act of 1970 do not militate against determining the cost of acquisition of the land in accordance with Section 55(2) of the Act as on January 1, 1954. The Finance Act of 1970 brought certain types of agricultural land within the definition of "capital asset" for being subjected to capital gains on transfer. The aforesaid view of ours finds support from the following decisions :

Ranchhodbhai Bhaijibhai Patel Vs. Commissioner of Income Tax, Gujarat II, Ahmedabad, , M. Venkatesan Vs. Commissioner of Income Tax, Tamil Nadu-V, , Commissioner of Income Tax Vs. M. Ramaiah Reddy, and Commissioner of Income Tax Vs. Smt. M. Subaida Beevi, . Accordingly, we hold that the value of the land as on January 1, 1954, has to be considered and not as on February 28, 1970.

7. Faced with this situation, learned counsel for the assessee raised an argument that the levy of Income Tax on agricultural income derived from sale of agricultural land would be ultra vires the legislative powers of Parliament, as this matter falls within the State list and, therefore, the question of imposing tax on capital gains of sale of agricultural land under a Central Act would not arise, and, on this argument, the matter be decided in favour of the assessee. In support of the argument, reliance is placed on the following decisions :

Manubhai A. Sheth and others Vs. N.D. Nirgudkar, 2nd Income Tax Officer, A-II Ward, Bombay and another, and J. Raghottama Reddy, S. Mutyam Reddy, Anam Venkata Subba Reddy and K. Thulasamma Vs. Income Tax Officer, .

8. Counsel for the Revenue in reply submitted that the question of legislative competence, that is, of the vires of the statute, cannot be gone into in reference proceedings and, for that matter, the assessee, has to challenge the provisions under article 226 of the Constitution of India and for this he has relied upon our decision in Income Tax Reference No. 31 of 1981 ( Commissioner of Income Tax Vs. Ved Parkash, ). In the alternative, it is argued that the three High Courts in the following judgments have dissented from the decision of the Bombay High Court in Manubhai A. Sheth and others Vs. N.D. Nirgudkar, 2nd Income Tax Officer, A-II Ward, Bombay and another, , which has been followed by the Andhra Pradesh High Court in J. Raghottama Reddy, S. Mutyam Reddy, Anam Venkata Subba Reddy and K. Thulasamma Vs. Income Tax Officer, , and have held that the imposition of capital gains tax on agricultural land is within the legislative competence of Parliament and is intra vires :

Ambalal Maganlal Vs. Union of India and Another, , B.S. Jayachandra Vs. Income Tax Officer and Another, and CIT v. T. K. Sarala Devi [1987] 167 ITR 136 .

9. In view of our decision in Commissioner of Income Tax Vs. Ved Parkash, , counsel for the assessee cannot be permitted to raise the question of vires in reference proceedings, as we have no jurisdiction to go into the question of legislative competence, and we have to decide the question referred, considering the provisions as applicable to the case and if the assessee is keen to challenge the legislative competence, that he can do only in a writ petition under Article 226 of the Constitution of India and not in a reference.

10. For the reasons recorded above, we answer the question in favour of the Revenue, that is, in the negative, and hold that the value of the land as on January 1, 1954, has to be taken into consideration for computing the capital gains. However, there will be no order as to costs.