(2007) 11 AHC CK 0034

In the Allahabad High Court

Commissioner of Income Tax APPELLANT

Vs

Prem Kumar RESPONDENT

Date of Decision : 20-11-2007

Acts Referred:
Land Acquisition Act, 1894 — Section 17(4)

Citation : (2008) 214 CTR 452

Hon'ble Judges : Sushil Harkauli, J;K.N. Ojha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. By this application u/s 256(2) of the IT Act 1961, the Department seeks calling of a reference on the following question of law, which is alleged to arise out of Tribunal''s order dt. 30th June, 1997:

Whether on the facts and circumstances of the case, Hon''ble Tribunal was justified in holding that no capital gain is exigible to tax in asst. yr. 1984-85 ?

We have heard learned Counsel for the IT Department.

2. The essential facts in this case are that the land of the respondent was acquired under the Land Acquisition Act, 1894. The land acquisition notification was issued on 15th Nov., 1975. Section 17(4) of the Land Acquisition Act, 1894 had been applied. Possession of the land was taken on 23rd Dec, 1983 (i.e. during asst. yr. 1984-85). A small part of the compensation that is Rs. 25,000 was received by the respondent on 11th July, 1984 (i.e. during asst. yr. 1985-86). The compensation award was given by the Collector/Land Acquisition Officer on 18th Sept., 1986. The remaining compensation amounting to Rs. 1,77,708 pursuant to the said award was received by the respondent on 3rd Sept., 1987 (i.e. during asst. yr. 1988-89).

3. The precise question to be considered is whether the capital gain arising as a result of the said acquisition of land is or is not to be taxed in the asst. yr.

1984-85 (i.e. when possession was taken).

4. The learned Counsel for the Department has relied upon a large number of authorities referred below:

(1) Commissioner of Income Tax Vs. Mahmood Jung Bahadur,

(2) Syed Abdul Basir Vs. Commissioner of Income Tax,

(3) Commissioner of Income Tax Vs. Shiv Chand Satnam Paul,

(4) G.M. Omer Khan Vs. The Additional Commissioner of Income Tax, A.P., Hyderabad,

(5) Commissioner of Income Tax Vs. Smt. Sheggy Abdulla,

(6) Smt. Jeejeebai Shinde Vs. Commissioner of Income Tax,

(7) M.B. Karmarkar and D.L. Gokhale (Executors to the Estate of Late Shrimant Sraswatibai Patwardhan) Vs. Commissioner of Income Tax,

(8) Harish Chandra and Ors. v. CIT (1985) 45 CTR 329 : (1985) 154 CTR 478;

(9) Buddaiah Vs. Commissioner of Income Tax, Karnataka-2,

(10) Commissioner of Income Tax, Gujarat-II Vs. Purshottambhai Maganbhai Hatheesing (Huf),

(11) S. Appala Narasamma Vs. Commissioner of Income Tax,

(12) Commissioner of Income Tax Vs. Subodh Kumar Jain,

In substance relying upon the aforesaid authorities and also relying upon the definition given in Section 2(47) of the IT Act, 1961, the contention of the Department is that for determining the assessment year in which capital gain should be taxed, it is the date of transfer which has to be considered and because u/s 16 of the Land Acquisition Act, 1894, the title passes to the Government upon taking of possession, therefore, the date of transfer in matters of compulsory land acquisition would be the date on which possession is taken.

5. For ready reference Section 16 of the Land Acquisition Act, 1894, is quoted below:

16. Power to take possession-when the Collector has made an award u/s 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all encumbrances.

Incidently, u/s 2(47) of the IT Act, 1961, ''transfer'' in relation to a capital asset includes the compulsory acquisition thereof under any law.

6. We have considered the matter and we are of the opinion that the contention of the Department in respect of the asst. yr. 1984-85 overlooks the vital facts namely that where Section 17 of the Land Acquisition Act, 1894, has been

invoked for the purposes of acquisition of land, possession can be taken even where no award of compensation has been given.

7. For ready reference, the provisions of Section 17(1) is reproduced below:

17. Special powers in cases of urgency.--(1) In cases of urgency, whenever the appropriate Government so directs, the Collector, though no such award has been made, may on the expiration of fifteen days from the publication of the notice mentioned in Section 9, Sub-section (1), take possession of any land needed for a public purpose. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.

8. If we accept the contention of the Department, it would mean that the assessee whose land has been acquired will have to file a return disclosing the amount of capital gain arising to him without even knowing what the amount of that capital gain would be because that amount can become known to him only after the award has been given.

"Lex non cogit ad impossibilia" is an age old maxim meaning that the law does not compel a man to do which he cannot possibly perform. Requiring the assessee to file a proper and complete return by including the income under the head ''Capital gain'' would be impossible for the assessee, in cases of the nature referred above.

9. More importantly, in the asst. yr. 1984-85, Section 54H had not been added. That section has been inserted by Finance Act (No. 2) of 1991 w.e.f. 1st Oct., 1991. For ready reference, the said provision is quoted below:

54H. Notwithstanding anything contained in Sections 54, 54B, 54D of compulsory acquisition under any law and the amount of compensation awarded for such acquisition is not received by the assessee on the date of such transfer, the period for acquiring the new asset by the assessee referred to in those sections or, as the case may be, the period available to the assessee under those sections for depositing or investing the amount of capital gain in relation to such compensation as is not received on the date of the transfer, shall be reckoned from the. date of receipt of such compensation:

Provided that where the compensation in respect of transfer of the original asset by way of compulsory acquisition under any law is received before the 1st day of April, 1991, the aforesaid period or periods, if expired, shall extend upto the 31st Dec, 1991.

Thus, till the asst. yr. 1984-85, the assessee was required to invest the capital gain in the specified securities, like capital gain bonds issued from time to time or in a residential house under the various provisions of the IT Act, 1961, from Section 54 onwards within the time specified therein as computed from the date of transfer. It is obvious that in order to invest the money in the specified items, the assessee must first receive the money. Therefore, accepting the contention of the Department would mean depriving the assessee of those benefits or tax relief in all cases where Section 17 of the Land Acquisition Act, 1894, has been applied.

10. We have examined the case law relied upon by the learned Counsel for the IT Department. None of those cases except the one mentioned below deal with situations where Section 17 has been applied. The only case which deals with the situation where Section 17 of the Land Acquisition Act, 1894, has been invoked is CIT v. Nawab Mahmood Jang Bahadur (supra). Apparently, in that case, the possession of the land was taken on dt. 12th Jan., 1967 and because Section 17 had been invoked, therefore, the award was given on 2nd Nov., 1970. The Revenue wanted to tax the capital gain in the asst. yr. 1973-74. This plea was turned down and the questions were answered in favour of the assessee. The said decision does not take into account the aforementioned consequences. Therefore, we are unable to agree with the view taken by the Andhra Pradesh High Court.

11. We, therefore, hold that for the asst. yr. 1984-85, that is before the 1991 amendment was made, the Tribunal was justified in holding that no capital gain is exigible to tax in asst. yr. 1984-85 on the facts and circumstances of the case. The application of the Department u/s 256(2) is accordingly dismissed.

