

(1983) 01 MAD CK 0037

In the Madras High Court

Case No : Tax Case No's. 149 and 150 of 1977 (Reference No. 123 of 1977)

Commissioner of Income Tax

APPELLANT

Vs

S. Krishnamurthy

RESPONDENT

Date of Decision : 17-01-1983

Acts Referred:

Income Tax Act, 1961 — Section 49(1)

Citation : (1984) 38 CTR 71 : (1985) 152 ITR 669

Hon'ble Judges : Swamikannu, J;N.V. Balasubramanian, J

Bench : Division Bench

Advocate : J. Jayaraman, for the Appellant; V. Ramachandran, for the Respondent

Judgement

Balasubrahmanyam, J.—This is a case of capital gains assessment of a joint family of father and son. The father, by name Krishnamoorthy,

purchased a house property in court-auction and made subsequent improvements thereto from out of his own separate funds, not utilising any joint

family funds therefore. Subsequently, he threw this item of property into the joint family hotchpot. After some years, the property was sold at a

profit by the joint family. In the hands of the joint family, the capital gains realized on the sale of the property was sought to be assessed. In the

assessment, a controversy arose as to what was to be taken as the cost of acquisition of this property for the family. This cost had to be

determined because the quantum of capital gains assessable under the Act has got to be ascertained by deducting from the total value of the sale

consideration, the cost of acquisition. The ITO observed that, really speaking, there was no cost of acquisition at all for the assessee's family.

According to him, when the property was thrown into the joint family hotchpot,

the family got it for the nothing. Nevertheless, the ITO adopted Rs.

70,535 as the cost of acquisition to the family apparently because it represented the cost to Krishnamoorthy, who threw the property into the joint

family hotchpot.

2. On appeal by the assessee, the Tribunal took the view that the sum of Rs. 70,533 cannot be regarded as the cost acquisition of the property by

the family but can only be regarded as cost of acquisition to the previous owner, Krishnamoorthy. The Tribunal pointed out that this was not a case

in which under any special provisions of the statute, the cost to the previous owner could be regarded as the cost to the assessee for the purpose

of computation of capital gains.

3. According to the Tribunal, although the assessee's family got the property for a song, nevertheless its cost to the assessee's family of this

property must be regarded as represented by the real value of that property on the date when the property was thrown into the joint family

hotchpot.

4. In this references, at the instance of the Income Tax Department, the pertinent question is as follows :

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the real value of the asset on the date

on which the property was thrown into the common hotchpot of the Hindu undivided family, but not nil value, should be taken as the cost of

acquisition ?

5. The answer to this question bears on the construction of the relevant provisions relating to assessment of capital gains. There was a time when it

was sacrilegious even to contemplate charging to capital gains as part of the scheme of taxation of income. For, capital gains was only the

realisation of capital accretion. Any realisation of a capital asset which registers a surplus over its original cost was regarded by or orthodox

Income Tax law purely as capital receipts and treated as the very antithesis of taxable income. For a long time, therefore, treating capital gains as a

species of income was anathema not only to the critical economists, but also to pragmatic Finance Ministers. These attitudes, however, were in the

course of time overpowered by another doctrine at the opposite extreme which frowned against unearned increment being left untaxed. According

to this leftwing theory, where an item of investment was continued to be owned by the same person over a period of time and, in between, its value

had increased owing to the forces of economic development, accretion to the value of the capital asset cannot be attributed to any personal

exertion of the owner. It was, therefore, thought that society had every right to take away a good portion of this unearned increment by way of tax.

This was the theoretical basis for taxation of capitals gains when it was adopted in our Income Tax statute in 1948. The measure which was

adopted by the legislature, however, was not to touch unrealised capital accretion, but only to tax, for tax purposes, the amount of realisations of

capital assets on sale, transfer and the like. Even here, the intention was not tax the gross realisations, but only to bring to charge the profit element

in the proceeds of sale, transfer and the like. This meant that from the proceeds of realisation of capital assets, the cost of acquisition had to be

deducted and the surplus alone brought to tax. In other words, both for the charge to capital gains and for the quantification of the precise liability,

it was necessary to find out the cost of acquisition and evaluate it in every case. Incidentally, the important role which the element of cost of

acquisition played in the statutory scheme of charge prompted some of our courts to hold that where there is no cost of acquisition, then there can

be no capital gains tax either. This doctrine was laid down for the first time by the COMMISSIONER OF Income Tax, MADRAS Vs. K.

RATHNAM NADAR., decided by this court. After this decision came others in several other High Courts.

6. It was not as though Parliament was Unaware of situations in which a person might become the owner of a capital asset without having to pay

anything for it. Illustrations of acquisition of a capital asset at no cost to the acquirer can be found in cases where a person obtains a gift of a capital

asset, or inherits a capital asset, or gets a capital asset by way of allotment under a family partition. In all these cases, the person who acquires the

capital asset, gets it gratis, without having to pay anything for acquiring it. If he were to dispose of the property subsequently and realise the profits,

the question may arise whether capital gains arose at all to the person concerned because there was no cost of acquisition for him with respect to

the capital asset concerned. To meet an objection of this kind, Parliament has made special provision to the effect that in all these peculiar

situations, the previous owner's cost of acquisition shall be deemed to be the cost of acquisition to the assessee and deducted from the ultimate sale proceeds in order to arrive at the taxable capital gains.

7. In the present case, although Krishnamoorthy, who was original owner of the property, did have a cost of acquisition of the property, in that he spent his own money for purchasing the property as well as for improving it, so far as the assessee family was concerned, it acquired the property for nothing when it was thrown into the joint family hotchpot. The question is, how to reckon the cost of acquisition of this house property in the hands of the assessee's family ?

8. Section 55(2)(ii) of the I.T. Act lays down that the previous owner's cost of acquisition must be taken to be the assessee's cost of acquisition, in cases falling under s. 49(1) of the Act. We have earlier mentioned that in the order of assessment, the ITO took the assessee's cost of acquisition of the house property at Rs. 70,535 which represented the cost of acquisition plus the cost improvements which were incurred by the previous owner, namely, Krishnamoorthy. The endeavour of Mr. Jayaraman, the learned counsel for the Revenue before us, was that the ITO's determination was justified under s. 55(2) read with s. 49(1) of the Act. Learned counsel particularly referred to s. 49(1)(iii)(a) of the Act. The provision relied on by the Department's counsel reads as under :

49. (1) Where the capital asset became the property of the assessee -
(iii)(a) by succession, inheritance or devolution,

the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be.

9. Mr. Jayaraman laid particular stress on the expression ""where the capital asset became the property of the assessee by devolution"". According to the learned counsel, the term ""devolution"" is apt to fit in which the manner in which the assessee's family in this case acquired the house property as its capital asset.

10. We think there is considerable force in this argument of the Department's learned counsel. The manner by which the separate property of

Krishnamoorthy became the property of the assessee family may be described in various ways. We may say that Krishnamoorthy threw his

separate property into the joint family hotchpot. Or, we may say that he converted his separate property into joint family property. Or, we may say

that he blended his separate property with the joint family property. Or, we may say that he impressed his separate property with the character of

joint family property. Whichever way we describe the process, it would seem that we can hardly avoid the use of metaphors. This is a branch of

Hindu law in which academicians as well as practising lawyers and courts have to make dos with metaphors, and not with precise legal

expressions. There is no use blaming them. The process is a unique one. It is not a gift. It is not a settlement. It is not an arrangement, much less an

agreement. It does require the coparcener concerned abandoning his separate dominion over his separate property. But that is all. The moment he

expressed a clear intention not to exercise his separate dominion over his separate property, from that moment onwards it indubitably becomes the

property of the joint family. Hindu law does not require any formalities for this process. It does not require that there must be an actual giving by

the coparcener concerned to the family, or an act or ceremony of taking by the family. It does not require any piece of writing. It is not a bilateral

transaction by any means. It is true that property does not of its own motion change its character from being separate property into becoming joint

family property. It does require some initiative from the coparcener concerned. But when once he makes clear his intention that henceforth the

property shall not be his separate property, but shall be dealt with as the property of the joint family, the rest is taken care of by the rules of Hindu

Law. From one point of view, the process looks like a disposition. But, from another point of view, it is only a change of ownership by the

operation of law. It is, however, best to describe the process as *sui generis*.

11. Having regard to these characteristics of the process by which the separate property of a coparcener becomes the property of the joint family

can there be any objection to the process being regarded as a "devolution" within the meaning of the expression in s. 49(1) of the I.T. Act ? In our

considered opinion, there cannot be any objection.

12. Section 49(1)(iii)(a) speaks of succession, inheritance or devolution. The

expression "inheritance" only denotes property passing on death from the deceased to his heirs. But the expression "succession" might denote not only succession on the death of a person either by testate succession or by intestate succession, but also other modes of change of ownership inter vivos, as when we say that there is succession to a business when there is a mere transfer of the business as a going concern from one living proprietor to another. The expression "devolution", however, is a term of widest import. It certainly includes a devolution or passing of property on the death of a person. But devolution of interest is not confined merely to testamentary or intestate succession. Any process recognized by the law under which property changes hands from one owner to another ever inter vivos, if it cannot altogether be regarded as a disposition, transfer or conveyance or succession or inheritance, must be regarded as a devolution. As an illustration of the wide use of the expression "devolution" may be cited the provisions of O. 22, r. 10 of the Code of Civil Procedure. Order 22, inter alia, deals with the consequences to a pending suit on the death of a party thereto. Rule 10 of O. 22 speaks about other case of an assignment, creation of "devolution" of any any interest during the pendency of a suit. The expression "devolution" is employed in that the rule in its widest sense.

13. It may be of interest to note that one of the special meanings given by the dictionary to the expression "devolution", and, particularly to the cognate expression "devolve" is to "throw". It may be quite a reflection that "throwing into the family hotchpot" is devolution not only in the wide sense of the term, but also in the special dictionary sense of "throw".

14. We may contrast the expression "devolution" with "disposition". "Disposition" implies that there must be a transfer of a property by one person to another either by way of conveyance or otherwise, either inter vivos or by testamentary disposition. "Devolution", on the other hand, would comprise not only a disposition by a party's overt act, but also a transfer of ownership by the operation of law, the operation of law being dependent on the occurrence of a particular event or circumstances and not involving a fullfledged overt act of transfer or conveyance or disposition. We do not think that the term "devolution", occurring as it does in s. 49(1), must be limited to a devolution of interest by way of

intestate succession alone. For intestate succession is taken care of by the presence of the expression ""succession"" if not of the expression

inheritance"" itself under the same clause in s. 49(1)(iii)(a). Besides, s. 49(1)(iii) deals with various other legal process by which property changes

hands, such for instance, as distribution of assets on the dissolution of a firm, distribution of assets on the liquidation of a company, the creation of a

trust, and the like. We are, therefore, inclined to give a wide meaning to the expression ""devolution"" to denote not merely succession on death, but

also a change of ownership from one living being or body, whether incorporated or not, to another living being or body, whether incorporated or

not.

15. During the course of argument, a number of reported cases were cited. Surprisingly, however, there was no direct case on the point. In Goli

Eswariah Vs. Commissioner of Gift Tax, Andhra Pradesh, , the question arose whether a gift took place when a coparcener threw this separate

into the joint family hotchpot. The Supreme Court held that in such a situation there was no gift as defined in the G.T. Act, 1958. They further held

that the act of throwing separate property into the family hotchpot cannot be regarded either as a transfer or as a disposition or even as a

transaction within the meaning of s. 2(xxiv) of the G.T. Act. The Supreme Court in that case did not have to deal with the concept of devolution

which occurs in s. 49(1)(iii)(a) of the I.T. Act. which we have endeavoured to construe in the foregoing paragraphs.

16. In the result, we must uphold the action of the ITO in treating the sum of Rs. 25,000 which was the cost of acquisition to Krishnamoorthy, as

the cost of acquisition to the assessee family, since Krishnamoorthy was the previous owner. Likewise, we must regard the cost of improvement

effect by Krishnamoorthy while the property remained as his separate property, as the cost of improvement which the assessee family is entitled to

add to the cost of acquisition, in the computation of its taxable capital gains. As we earlier indicated, the officer's action must be upheld on the

basis of s. 49 of the Act under which, because the property is derived by the assessee by devolution, its cost of acquisition must be deemed to be

the cost for which the previous owner of the property acquired the property, as increased by the cost of any improvement of the property incurred

by the previous owner. It follows that we must reject the Tribunal's view that the cost of acquisition to the assessee family must be based on which

the Tribunal described as the "real value" of the property as on the date when Krishnamoorthy threw the property into the joint family hotchpot.

17. Apparently, by "real value of the property" the Tribunal meant the market value of the property as on the date when the property was

converted from being the separate property of Krishnamoorthy into property of the joint family. However, there is no scope for introducing any a

priori theory of costing when a pertinent statutory provisions squarely applies to a transaction. Since we have held that the cost of acquisition must

be determined in this case in accordance with the provisions of s. 49(1)(iii)(a) of the Act, the question hardly of treating, as cost, the market value

of the property on the date when it became the property of the joint family.

18. The question of law as framed seems to require an answer from this court on another aspect also, namely, as to whether "nil" value can be

taken for the purpose of computation of capital gains. In the view we have expressed that s. 49(1)(iii)(a) applies, this aspect of the question does

not require any exertion on our part, as the answer to it would be purely academic. From a realistic point of view, when a coparcener throws his

separate property into the joint family hotchpot, the joint family receives the property for nothing. The family does not part with any cash. It is not

subjected to any liability either when the separate property of a coparceners becomes joint family property in this process. In this sense, therefore,

the cost might be regarded as "nil cost". But it is precisely for cases of this kind, Parliament has specifically legislated in s. 49(1)(iii)(a) and other

clauses. Saying that the property is acquired by the assessee family at nil value does not, therefore, lead us astray into the wilderness when the

provisions of s. 49(1)(iii)(a) clearly apply and are meant to apply.

19. For all the reasons stated above, we hold that the Appellate Tribunal was wrong in treating the so-called real value of the property on the date

when the property was thrown into the hotchpot as the cost of acquisition to the family. In view of this answer, we direct the assessee to pay the

Department costs. Counsel's fee Rs. 500 (one set).