(2009) 01 DEL CK 0131

In the Delhi High Court

Case No : Income Tax A. No. 47 of 2003

Dev Kumar Jain — APPELLANT

Vs

Income Tax Officer and Another — RESPONDENT

Date of Decision : 19-01-2009

Acts Referred:

Citation : (2009) 309 ITR 240 : (2009) 180 TAXMAN 110

Hon'ble Judges : Vikramajit Sen, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Piyush Kaushik, for the Appellant; Prem Lata Bansal, for the Respondent

Final Decision : Allowed

Judgement

C.M. No. 17845/2008 (for early hearing) in I.T.A. No. 47/2003

1. In this application the appellant/applicant has stated that on account of old age and health issues he is not in a position to actively monitor the pending litigation and in order to bring the matter to a closure he prays that the appeal be taken up for hearing.

2. We find that the application for early hearing is accompanied by an affidavit which discloses that the appellant is more than 77 years of age. Given the fact he has averred that he is not keeping well and wants to bring the litigation to a final closure, we allow the application. The application is accordingly disposed of.

I.T.A. No. 47/2003

3. By an order dated October 14, 2003, a Division Bench of this Court admitted the appeal and framed the following question of law:

Whether the Tribunal was correct in law in holding that the actual sale consideration recorded in the agreement to sell of the asset and received by the assessee could be substituted by the value as adopted by the District Valuation Officer u/s 55A of the Act for the purpose of computing the capital gains chargeable to tax?

4. In order to decide the aforesaid question of law the following facts for disposal of the appeal need to be noted. The appellant had filed a return declaring his total income as Rs. 2,30,930. In the return the assessee apart from other sources had declared income by way of capital gains arising from sale of property situated at plot No. 99, Dera Gaziklour Distt. Refugee House Building Co-operative Society Ltd. known as, Tarun Enclave, Pitam Pura, Delhi (hereinafter referred to in short as "the property") ; admeasuring 173.33 sq. yards. The consideration disclosed in the agreement to sell in respect of the said property was a sum of Rs. 4,02,000. The said property was sold to Shri Chanan Dass, s/o. Rewal Dass, r/o AG-26, Shalimar Bagh, Delhi -110 052. After indexing, the cost of the said property was pegged at Rs. 1,87,570.

5. It seems that the Assessing Officer considered the sale price disclosed from the agreement to sell as being low. The Assessing Officer, accordingly, made a reference to the District Valuation Officer (hereinafter referred to in short as "the DVO"), Income Tax Department u/s 55A of the Income Tax Act, 1961 (in short "the Act") for the purpose of determining the "fair market value" of the property in issue, on the date of the sale, i.e., June 6, 1997. The DVO determined the value of the plot on the date of the sale as Rs. 24,10,621. After making suitable adjustments on account of situation and location of the said property the "fair market: value" communicated to the assessee, was Rs. 22,83,662. It seems that the assessee had filed his reply to the said communication vide letter dated March 5, 2001.

6. The stand of the Revenue is that the assessee was given several opportunities to produce the original allotment letters or any other evidence to establish the purchase of the said property, however, the assessee submitted nothing except the agreement to sell. The learned Counsel for the Revenue also submitted that the assessee was given full opportunity to file his objections to the valuation arrived at by the DVO.

7. We find that a Division Bench of this Court in the case Commissioner of Income Tax Vs. Smt. Nilofer I. Singh, has held that the provisions of Section 55A of the Act apply only where the Assessing Officer is required to ascertain the "fair market value" of a capital asset. In a case where capital gains have to be brought to tax the provisions of Sections 45 and 48 of the Act come into play. Section 45(1A) of the Act provides that any profit or gains arising from the transfer of asset effected in the previous year shall be chargeable to Income Tax under the head "Capital gains". It stipulates that capital gains shall be computed by deducting from the "full value of consideration" received or accruing as a result of the transfer of the capital asset, the amount of expenditure incurred wholly and exclusively in connection with such transfer as also the cost of acquisition of the asset and the cost of any improvement thereto. The Division Bench went on to hold that a combined reading of Section 45(1A) and Section 48 of the Act would show that it is apparent that when a sale of property takes

place, the "capital gains" arising out of such a transfer has to be computed by looking at the "full value of the consideration" received or accruing as a result of such transfer. It went on to hold that the expression "full value of sale consideration" is not the same as "fair market value" as appearing in Section 55A of the Act. In coming to this conclusion the Division Bench of this Court relied upon the Supreme Court judgment in the case of Commissioner of Income Tax, West Bengal and Another Vs. George Henderson and Co. Ltd., as also the judgment of the Supreme Court in the case of The Commissioner of Income Tax, Calcutta Vs. Gillanders Arbuthnot and Co., wherein the expression "full value of consideration" was interpreted in the context of pari materia provisions found in the Income Tax Act, 1922. Based on these decisions the Division Bench concluded that for the purpose of computing "capital gains" there is no necessity for computing the "fair market value" and, therefore the Assessing Officer could not have referred the matter to the Valuation Officer.

8. Before us the learned Counsel for the Revenue submitted that this was a case where the assessee had not supplied documents, therefore, the ratio of the judgment in the case of the Commissioner of Income Tax Vs. Smt. Nilofer I. Singh, was not applicable.

9. We are not in agreement with the submission made by the learned Counsel for the Revenue for the reasons that there is nothing on record to show that the assessee received a consideration for the sale of the said property in excess of that which was shown in the agreement to sell. That being the case the decision in the case of Commissioner of Income Tax Vs. Smt. Nilofer I. Singh, would bind the Revenue. The Tribunal, in our view erred in accepting the stand of the Revenue that actual sale consideration recorded in the agreement to sell would be substituted by the value arrived at by the DVO u/s 55A of the Act. The question of law as framed is answered in favour of the assessee and against the Revenue.

10. In the result the appeal is allowed and the judgment of the Tribunal A dated November 14, 2002, is set aside.

