
(1993) 09 BOM CK 0076

In the Bombay High Court

Case No : Income-tax Reference No. 253 of 1982

Keshavji Karsondas

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 30-09-1993

Acts Referred:

Income Tax Act, 1961 — Section 2, 2(14), 45, 48, 49

Citation : (1994) 120 CTR 109 : (1994) 207 ITR 737

Hon'ble Judges : D.R. Dhanuka, J;B.P. Saraf, J

Bench : Division Bench

Advocate : P.J. Pardiwala, for the Appellant; V. Balasubramaniam, for the Respondent

Judgement

DR. B. P. Saraf J.

1. By this reference u/s 256(1) of the Income Tax Act, 1961, at the instance of the assessee, the Income Tax Appellate Tribunal has referred the following question of law to this court for opinion :

"Whether, on the facts and in the circumstances of the case, for the purpose of ascertaining capital gains, in law, the cost of acquisition of agricultural lands belonging to the assessee is to be taken as on January 1, 1954, as contended by the Department or as on March 1, 1970, as contended by the Assessee ?"

2. The facts of this case are in a very narrow compass, so also is the controversy. The assessee transferred agricultural land admeasuring 5,308 sq. yards during the previous year relevant to the assessment year 1972-73. The transfer took place on June 17, 1971. The admitted position is that agricultural land was not included within the definition of "capital asset" till April 1, 1970. It was only by the Finance Act, 1970, that with effect from April 1, 1970, certain agricultural lands in India specified in sub-clause (iii) of clause (14) of section 2 of the Act were included in the definition of "capital asset". There is not controversy in this case that the land sold by the assessee meets the description of "agricultural

land" which forms part of "capital asset" at the time of transfer. There is also no controversy that the sale of the said land attracts Income Tax on capital gains. The only controversy is in regard to the "cost of acquisition" of the said land. The admitted position is that the above agricultural land was acquired by the grandfather of the assessee prior to 1941 and the assessee became the owner of the said agricultural land by devolution. As such, section 48 of the Act read with section 49(1) would operate for the purpose of determining "capital gains" chargeable thereon u/s 45 of the Act. The cost in the hand of the grandfather of the assessee, in the ordinary course, would be the cost of acquisition by virtue of section 48 read with section 49(1) of the Act. The assessee, however, contends that the agricultural land in question having become a capital asset only with effect from April 1, 1970, the cost on that date has to be treated as the cost of acquisition and not the cost of acquisition of the land at any time anterior to that date when it was not a capital asset within the meaning of section 2(14) of the Act. This contention of the assessee did not find favour with any of the authorities below including the Tribunal, who were of the opinion that once a property or an asset is brought within the purview of the definition of "capital asset" and on transfer of such asset if any capital gain arises, such capital gain has to be computed in the manner laid down in sections 48 and 49 of the Act and for that purpose the date of acquisition will be the date when the asset was acquired by the assessee and not the date when the asset became taxable under the Act.

3. We have heard learned counsel for the assessee. Section 45 of the Act provides for levy of Income Tax on the profit and gains arising from the transfer of a capital asset effected by the assessee in the previous year. It is also specifically provided in the said section that the income shall be deemed to be the income in the previous year in which the transfer took place. Section 48 of the Act deals with the mode of computation of income chargeable under the head "Capital gains". Section 49 of the Act specifies the modes of determining the cost of capital asset with reference to certain modes of acquisition specified therein. Section 55(2) defines the expression "cost of acquisition" specifically for the purpose of section 48 and 49. It is in the following terms :

"(2) For the purposes of section 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....."

4. A regarding of the above provision makes it clear that once an asset becomes a "capital asset" and it is transferred thereafter, the capital gain has to be computed in the manner laid down in sections 48, 49(1) and 55(2) of the Act. What is relevant is the "cost acquisition" and not the date on which the asset became a capital asset for the purpose of levy of capital gains tax. This view of ours gets full support from the decision of the Gujarat High Court in Ranchhodbhai Bhaijibhai Patel Vs. Commissioner of Income Tax, Gujarat II, Ahmedabad, . In that case also, similar argument was sought to be advanced by the assessee. Repelling the contention of the assessee, it was observed as under (at page 458) :

"....These words [the cost of acquisition of the capital asset] emphasise two aspects : one is "acquisition" and the other is "cost". The reference clearly is to the point of time when the capital asset is acquired and the cost of such acquisition is required to be deducted from the full value of the consideration. Where the property transferred was not capital asset at the date of acquisition but subsequently became a capital asset as in the present case, it is difficult to see how it can be said that the property as a capital asset was acquired by the assessee when it was converted into a capital asset and how it would be possible in such a case to determine the cost of acquisition. There are no two different acquisitions of property, one as a non-capital asset and the other as a capital asset. The property is acquired by the assessee only once and merely its character changes in the sense that, whereas, originally it was non-capital asset, it now becomes capital asset. It would indeed be doing violence to the language of section 48, clause (ii), to read the words "the cost of acquisition of the capital asset" in the manner suggested on behalf of the assessee. We would have to introduce an unwarranted fiction, namely, that when the property, which at the date of acquisition was non-capital asset, becomes a capital asset, it is deemed to be acquired by the assessee as a capital asset on that date and, furthermore, though there can be no cost of such to be the cost of such acquisition. There is no warrant for imposing such legal fiction on the plain language of section 48, clause (ii).....

The contention of the assessee also stands refuted by the language of section 55(2), clause (i). The property which is transferred could become the property of the assessee only at one point of time. It would not become the property of the assessee as a non-capital asset at one point of time and as a capital assets at another point of time. The argument of the assessee would require us to introduce a legal fiction also in section 55(2), clause (i) We would have to assume that when a property which was a non-capital asset becomes a capital asset, it is deemed to become the property of the assessee for the purpose of section 55(2), clause (i). Such a construction would do violence to the language of section 55(2), clause (i) and would be clearly impermissible on any recognised canon of construction. Then again it is apparent from sections 49, 51 and 55(3) that the words "the cost of acquisition of the capital asset", the cost for which the asset was acquired" and the cost for which the previous owner of the

property acquired it" are variously used by the Legislature to denote the same idea and the reference is intended to be made only to the cost of acquisition of the property regardless of the question whether it was a capital asset or a non-capital asset at the date of acquisition.

It is, therefore, clear that the words "the capital asset" in section 48, clause (ii) are identifiatory and demonstrative and they are intended to refer to the property which is the subject of levy of charge of capital gains u/s 45."

5. The date of acquisition of the land in the instant case, for the purpose of section 48 read with section 49(2) of the Act, was the date when the land in question was acquired by the grandfather of the assessee prior to 1941. The assessee, therefore, had the option, either to take the original cost of acquisition or its fair market value as on January 1, 1954. In view of the foregoing discussion, we do not find any merit in the contention of the assessee that the cost of acquisition should be fixed with reference to the date when it became the capital asset by virtue of the amendment made to the Act, i.e., April 1, 1970. We are of the clear opinion that the cost of acquisition does not change. It is the cost on the date when the asset was actually acquired by the assessee or his grandfather, as in this case, and the said date cannot change.

6. Learned counsel for the assessee referred to the decisions of the Supreme Court in Commissioner of Income Tax, Bombay City I, Bombay Vs. Bai Shirinbai K. Kooka, and Miss Dhun Dadabhoy Kapadia Vs. Commissioner of Income Tax, Bombay, in support of his contention that commercial principles should be followed by the courts in determining the capital gains for the purpose of taxation. We do not think that the above decisions are of any relevance in deciding the question at issue before us. The provisions in the Act as to the mode of computation of capital gains, the cost of acquisition thereof, etc., being clear, it is not open to us to ignore the said provisions and take resort to some general principles. This view of ours gets full support from the decision of the Supreme Court in State Bank of Travancore Vs. Commissioner of Income Tax, Kerala, , wherein Sabyasachi Mukharji J., (as he then was) dealing with the concept of "real profits" observed as under (at page 152) :

"The concept of reality of the income and the actuality of the situation are relevant factors which go to the making up of accrual of income but once accrual takes place and income accrues, the same cannot be defeated by any theory of real income."

7. We are informed at the Bar that a similar view has been taken by the High Courts of Madras, Karnataka, Kerala and Punjab and Haryana.

8. In view of the foregoing discussion, we hold that in the instant case, for the purpose of determining "capital gains", the "cost of acquisition of the agricultural land belonging to the assessee" has to be taken as on January 1, 1954, and not as on April 1, 1970. The question is answered accordingly, i.e., in favour the Revenue and against the assessee.