
(1985) 10 KAR CK 0039
In the Karnataka High Court
Case No : Income Tax R.C. No. 201 of 1978

M. Abdul Sattar

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 08-10-1985

Acts Referred:

Income Tax Act, 1961 — Section 256 (1), 45, 53, 54

Citation : (1987) 163 ITR 642 : (1986) 26 TAXMAN 760

Hon'ble Judges : S.A. Hakeem, J;K.S. Puttaswamy, J

Bench : Division Bench

Advocate : S.G. Shivaram, for the Appellant; G. Sarangan and Raghavendra Rao, for the Respondent

Judgement

Puttaswamy, J.—In this reference made u/s 256(1) of the Income Tax Act, 1961 ("the Act"), the Income Tax Appellate Tribunal, Bangalore Bench, Bangalore ("Tribunal"), at the instance of the assessee has referred the following question of law for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, the exemption claimed u/s 54 of the Income Tax Act, 1961, for the assessment year 1973-74 is permissible in law ?"

2. In order to appreciate the question referred to us, it is necessary to notice the facts that are not in dispute in the first instance.

3. On June 21, 1971, the assessee purchased a house situated on Park Road, Bangalore City, for his residence and was using the same as his residence from about that date. Some time in May, 1972, he sold 2/3rds portion of the said house for a sum of Rs. 30,000 and some time in February, 1973, he purchased another house at Miller Road, Bangalore City.

4. In his return filed for the assessment year 1973-74 relevant to the accounting year ending on March 31, 1973, before the Income Tax Officer, Assessment 2 (Additional) Circle-I, Bangalore, the assessee claimed total exemption from

capital gains tax on the said sum of Rs. 30,000 u/s 54 of the Act. On January 25, 1975, the Income Tax Officer completed the assessment rejecting the same and brought a sum of Rs. 6,667 as income from short-term capital gains and subjected that and other income to tax under the Act.

5. Aggrieved by the said order made by the Income Tax Officer, the assessee filed an appeal before the Appellate Assistant Commissioner, Bangalore Range, Bangalore who by his order dated November 22, 1976, allowed the same and accepted the said claim of the assessee.

6. Aggrieved by the order made by the Appellate Assistant Commissioner, the Revenue filed a second appeal before the Tribunal which by its order dated December 23, 1977, allowed the same, set aside the order of the Appellate Assistant Commissioner and restored the order of the Income Tax Officer. Hence, this reference.

7. Sri S. G. Shivaram, the learned advocate, appeared for the assessee. Sri G. Sarangan, learned special standing counsel for the Income Tax Department, appeared for the Revenue.

8. Sri Shivaram contends that on the facts that are not in dispute, the claim of the assessee for total exemption from capital gains tax was well-founded. In support of his contention, Sri Shivaram strongly relies on a ruling rendered by M. L. Jain J. of the High Court of S. Harnam Singh Suri Vs. Central Board of Direct Taxes, .

9. Sri Sarangan contends that since the residential house purchased and sold by the assessee had not been used by him for a continuous period of two years prior to the date of sale, the exemption claimed by him u/s 54 of the Act was unavailable. In support of his contention, Sri Sarangan strongly relies on the Division Bench rulings of the High Court of Madras in M. Viswanathan Vs. Commissioner of Income Tax, and S. Radhakrishna v. CIT [1984] 145 ITR 170.

10. That the assessee did not reside in his residential house for a continuous period of two years is not in dispute. On these very facts, the controversy really turns on the construction of section 54 of the Act which stood as hereunder :

"Where a capital gain arises from the transfer of a capital asset to which the provisions of section 53 are not applicable, being buildings or lands appurtenant thereto the income of which is chargeable under the head "Income from house property", which in the two years immediately preceding the date on which the transfer took place, was being used by the assessee or a parent of his mainly for the purposes of his own or the parent's own residence, and the assessee has within a period of one year before or after that date purchased, or has within a period of two years after that date constructed, a house property for the purposes of his own residence, then, instead of the capital gain being charged to Income Tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section,

that is to say, -

(i) if the amount of the capital gain is greater than the cost of the new asset, the difference between the amount of the capital gain and the cost of the new asset shall be charged u/s 45 as the income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil; or

(ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged u/s 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain."

11. This section employs the term "in the two years immediately preceding the date of transfer". The term "in the two years" can only mean at any time within two years. On the plain language of these words, it is not open to a court to read the same as for a continuous period of two years. The later words "was being used" on which emphasis is laid by Sri Sarangan cannot restrict or control the terms "in the two years" occurring earlier. Sri Sarangan is undoubtedly right in maintaining that the section must be read as a whole and effect given to every part of the section. But, even when we read the section as a whole and do not minimise the importance of the later words "was being used", we do not find any justification to restrict or curtail the period occurring in the earlier part of the section. Every rule of construction of statutes does not support the construction suggested for the Revenue on the term "in the two years". We are of the view that if the construction suggested for the Revenue is accepted, then that would really mean this court would be legislating in the thin guise of interpretation which is impermissible. We are, therefore, of the view that the construction placed by the Appellate Assistant Commissioner on section 54 to the effect that the user can be at any time within two years and not for a period of two years is sound.

12. In *S. Harnam Singh Suri Vs. Central Board of Direct Taxes*, Jain J., dissenting from the two rulings of the Madras High Court relied on by Sri Sarangan expressed on the scope and ambit of section 54 of the Act thus (at page 165) :

"It is urged that the words "in two years" coupled with the words "being used" means a continuous residence for not less than two years. This submission is sought to be supported by *S. Radhakrishna v. CIT* [1984] 145 ITR 170 , where these words were construed to mean "during the entire period of two years". In *M. Viswanathan Vs. Commissioner of Income Tax*, , it was held that the expression "was being used" is described in English grammar as past continuous; and, therefore, denotes a continuity which extends up to and terminates with the date of the transfer. This case was followed in *COMMISSIONER OF Income Tax, MADRAS Vs. R. MALA.*, . No doubt, if this verb is

to be classified according to grammar, then, it would fall into the category of past continuous tense. But past continuous here only means that whenever used in the preceding two years, the house should have been used as a residence; that is, the house must have been used by the assessee or a parent of his mainly for the purpose of his own or parent's own residence during the period of two years immediately preceding the date of sale; Commissioner of Income Tax, Ahmedabad Vs. Tikyomal Jasanmal, The word "mainly" makes it abundantly clear that it can be used even for other purposes and that will certainly break the continuity of residential use. I am afraid, I am not, with great respect, inclined to fall in line with the Madras decisions. It is a construction in favour of the Revenue arrived at by stretching the plain meaning. To my mind, the word "in" read with "mainly" can never mean continuously `for not less than", even if followed by "was being used".

13. We are in respectful agreement with these views of his Lordship.

14. We have carefully read the rulings of the High Court of Madras in M. Viswanathan Vs. Commissioner of Income Tax, and Radhakrishna's case [1984] 145 ITR 170 . With great respect to the learned judges who decided them, for the reasons set out by us earlier, as also for the reasons on which Jain J., dissented with them in S. Harnam Singh Suri Vs. Central Board of Direct Taxes, , we regret our inability to subscribe to the views expressed by their Lordships in those cases.

15. On the fulfilment of all other conditions stipulated in section 54 of the Act, there is no dispute between the parties. Hence, the assessee was clearly entitled to the exemption claimed by him u/s 54 of the Act.

16. On the foregoing discussion, our answer to the question referred to us must be in the affirmative. We, therefore, answer the question referred to us in the affirmative, in favour of the assessee and against the Revenue. But, in the circumstances of the case, we direct the parties to bear their own costs.