
(2014) 01 P&H CK 0230
In the Punjab And Haryana At Chandigarh
Case No : Income Tax Appeal No. 89 of 1999

Mrs. Madhu Kaul	Vs	APPELLANT
Commissioner of Income Tax and Another		RESPONDENT

Date of Decision : 17-01-2014

Acts Referred:

Income Tax Act, 1961 — Section 2(14), 2(29A), 2(29B), 2(42A), 2(42B)

Citation : (2014) 271 CTR 107 : (2014) 363 ITR 54 : (2014) 225 TAXMAN 86

Hon'ble Judges : Rajive Bhalla, J; Bharat Bhushan Parsoon, J

Bench : Division Bench

Advocate : Alok Mittal, Advocate for the Appellant; Urvashi Dhugga, Advocate for the Respondent

Judgement

Rajive Bhalla, J.—The appellant challenges correctness of the order dated March 15, 1999 (annexure P-3), passed by the income tax Appellate Tribunal Chandigarh Bench, Chandigarh. The substantial questions of law that arise for adjudication are as follows:

- (i) Whether, in the facts and in the circumstances of the case, the orders, annexures P-1, P-2 and P-3, are legally sustainable?
- (ii) Whether, in the facts and in the circumstances of the case, the capital gains arising in the instant case is long-term capital gains or short-term capital gains?
- (v) Whether, in view of the correct interpretation of the provisions of section 2(29A); section 2(29B); section 2(42A); section 2(42B) and section 2(47)(ii) of the income tax Act, 1961, the capital gains arising in the present case can be termed as long-term capital gains?

The appellant filed a return of income declaring a net taxable income at Rs. 60,830. The return was selected for scrutiny. The assessee's claim for treating Rs. 2,38,609 received from sale of flat No. 421, Sector 44A, Chandigarh, as a long-term capital gain was rejected by treating it as a short-term capital gains. The assessee filed an appeal before the Commissioner of income tax (Appeals),

which was dismissed on August 6, 1991. An appeal filed before the income tax Appellate Tribunal was dismissed on March 15, 1999.

2. Counsel for the assessee submits that the flat was allotted on June 7, 1986, vide letter, conveyed on June 30, 1986. The first installment was paid on July 4, 1986. The flat was sold on July 5, 1989, i.e., after 36 months. The sale, therefore, results in long-term capital gains. It is further contended that right to hold flat came to vest in the assessee upon allotment and at the latest upon payment of Rs. 7,500 on July 4, 1986. The sale of the said flat on July 5, 1989, reveals that the assessee held the capital asset for a period exceeding 36 months. It is further submitted that identification of the flat or physical delivery of possession is irrelevant as right to hold property stands crystallized upon allotment and payment of the first installment. The allotment of a particular flat and delivery of its possession would relate back to the allotment and payment of the first installment. The appellant having held the flat from July 4, 1986, the date of payment of first installment to July 5, 1989, fulfils the parameters of a long-term capital gain, thereby rendering the impugned orders illegal and void. It is further contended that the question of law framed in the present appeal has been answered in favour of the assessee in *Vinod Kumar Jain Vs. Commissioner of Income Tax and Others*, .

3. Counsel for the Revenue per contra submits that mere allotment and or payment of the first installment without identification of the flat or delivery of possession has been rightly held not to confer any right vis-?-vis flat No. 421, Sector 44A, Chandigarh, which was allotted to the assessee, on November 30, 1988. It is further submitted that the allotment letter could be cancelled at any time and it does not confer any right in any specific unit but merely confers a right to be allotted a unit. The definition of transfer contained in section 2(47) of the income tax Act, 1961, has to be read against the assessee and, therefore, the appeal may be dismissed.

4. We have heard counsel for the parties and perused the impugned order.

5. The income tax Appellate Tribunal has held that as a specific flat was allotted to the assessee, on November 30, 1988, the allotment letter or payment of the first installment does not entitle the appellant to claim a long-term capital gain. A similar controversy came up for adjudication in *Vinod Kumar Jain Vs. Commissioner of Income Tax and Others*, . The point for consideration in the aforesaid case was whether capital gains arising from the allotment of flat on February 27, 1982, under a scheme framed by the DDA, though, the actual flat was allotted and possession was delivered on May 15, 1986, was a long-term capital gain as the flat was sold on January 6, 1989. After considering sections 2(29A), (42A) read with section 54 of the income tax Act, 1961, as well as Circular No. 471, dated October 15, 1986 ([1986] 162 ITR (St.)41), it was held as follows (page 504):

Section 2(14) defines capital asset. u/s 2(29A), long-term capital asset is one

which is not a short-term capital asset. According to section 2(42A) short-term capital asset, at the relevant time meant, a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer. A conjoint reading of the aforesaid provisions leads to one conclusion that a capital asset which is held by the assessee for 36 months would be termed as a long-term capital asset and any gain arising on account of sale thereof would constitute a long-term capital gain.

It would also be advantageous to refer to Circular No. 471, dated October 15, 1986 (162 ITR (St.) 41) issued by the CBDT on which heavy reliance has been placed by the assessee whereby instructions have been issued regarding treatment of capital gains tax in case of a flat purchased under self-financing scheme. It reads thus:

"Circular No. 471, dated 15-10-1986

Capital gains tax--Whether investment in a flat under the self-financing scheme of the Delhi Development Authority would be construction for the purpose of sections 54 and 54F of the income tax Act, 1961.

Sections 54 and 54F of the income tax Act, 1961, provide that capital gains arising on transfer of a long-term capital asset shall not be charged to tax to the extent specified therein, where the amount of capital gain is invested in a residential house. In the case of purchase of a house, the benefit is available if the investment is made within a period of one year before or after the date on which the transfer took place and in case of construction of a house, the benefit is available if the investment is made within three years from the date of transfer.

2. The Board had occasion to examine as to whether the acquisition of a flat by an allottee under the self-financing scheme of the Delhi Development Authority amounts to purchase or its construction by the Delhi Development Authority on behalf of the allottee. Under the self-financing scheme of the Delhi Development Authority, the allotment letter is issued on payment of the first installment of the cost of construction. The allotment is final unless it is cancelled or the allottee withdraws from the scheme. The allotment is cancelled only under exceptional circumstances. The allottee gets title to the property on the issuance of the allotment letter and the payment of installments is only a follow-up action and taking the delivery of possession is only a formality. If there is a failure on the part of the Delhi Development Authority to deliver the possession of the flat after completing the construction, the remedy for the allottee is to file a suit for recovery of possession.

3. The Board have been advised that under the above circumstances, the inference that can be drawn is that the Delhi Development Authority takes up the construction work on behalf of the allottee and that the transaction involved is not a sale. Under the scheme, the tentative cost of construction is already determined and the Delhi Development Authority facilitates the payment of the cost of construction in installments subject to the conditions that the allottee has

to bear the increase, if any, in the cost of the construction. Therefore, for the purpose of capital gains tax, the cost of the new asset is tentative cost of construction and the fact that the amount was allowed to be paid in installments does not affect the legal position stated above. In view of these facts, it has been decided that cases of allotment of flats under the self-financing scheme of the Delhi Development Authority shall be treated as cases of construction for the purpose of capital gains."

On a careful reading of the circular issued by the Board, paragraph 2 thereof describes the nature of right that an allottee acquires on allotment of flat under the self-financing scheme. According to it, the allottee gets title to the property on the issuance of an allotment letter and the payment of installments is only a consequential action upon which the delivery of possession flows.

6. We find no distinction between the opinion recorded in the aforesaid judgment and the controversy in the present case. Admittedly, the flat was allotted to the appellant on June 7, 1986, vide letter conveyed to the assessee on June 30, 1986. The assessee paid the first installment on July 4, 1986, thereby conferring a right upon the appellant to hold a flat, which was later identified and possession delivered on a later date. The mere fact that possession was delivered later does not detract from the fact that the allottee was conferred a right to hold property on issuance of an allotment letter. The payment of balance installments, identification of a particular flat and delivery of possession are consequential acts, that relate back to and arise from the rights conferred by the allotment letter. In view of what has been recorded hereinabove, we have no hesitation in holding that the income tax Appellate Tribunal has erred in holding that the transaction does not envisage a long-term capital gain. Consequently, we allow the appeal, set aside order dated February 15, 1999, and answer the substantial questions of law in favour of the assessee.