

(2008) 09 BOM CK 0121
In the Bombay High Court
Case No : Income Tax Appeal No. 15 of 2002

Prakash Dhanjode

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 12-09-2008

Acts Referred:

Income Tax Act, 1961 — Section 139(2), 156, 2(7), 22, 221
Transfer of Property Act, 1882 — Section 6

Citation : (2008) 220 CTR 249 : (2009) 312 ITR 40 : (2008) 173 TAXMAN 311

Hon'ble Judges : C.L. Pangarkar, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : S.N. Bhattad, for the Appellant; A.S. Jaiswal, for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.

We are disposing of these two matters as both relate to the same parties and involving the same property in question.

1. The facts are that an assessee Mr. Timaji Sakharam Dhanjode (the deceased/ assessee) who died on 09.05.1991 owned agricultural lands at Mouja Dighori, Patwai Halka No. 34, which fell within 8 Kms. Range of the Municipal corporation limit. He sold the said lands in two lots. The particulars of such sale are as follows:

(i) 2 acres of land were sold on 04.08.1982 for Rs. 40,000/-.

(ii) 16.58 acres of land were sold on 31.08.1982 for Rs. 2,90,000/-.

2. The Income Tax Officer, First Survey Circle issued a notice u/s 139(2) of the Income Tax Act (For short IT Act) calling upon the assessee to file his return of income. In response to the same, he filed his return of income declaring nil income. It was contended by him that the land in question was used for agricultural purposes and, therefore, outside the purview of the definition of the

terms "Capital Asset" within the meaning of the IT Act and, therefore, not liable to capital gain tax. It was observed that he had invested the sale proceeds in the following manner:

(a) By purchase of a vacant plot at circle No. 4, Ward No. 11/20 Ganesh Nagar, Nagpur on 02.03.1983 in the name of Shri Prakash, his only adopted son.

(b) By constructing the commercial and residential building of a value of Rs. 2,00,000/- within the prescribed period. According to the valuation report, the construction of the building was commenced in 1983 and completed in 1985. The assessee filed an affidavit wherein he has affirmed the fact that the land was purchased in his son's name and the construction was being done on the said land after due sanction. It was also stated in the said affidavit that the investment is being done in his son's name in view of his old age and counselling by others not to invest in his name.

The investment by the assessee in the name of his son Prakash does not qualify for exemption and, therefore, the assessee was liable to pay capital gain taxes.

3. The same order was challenged in an appeal to the CIT-(A) and by order dated 25.01.1989, it was held that the transaction did not involve transfer of any capital asset, therefore, the assessee was not liable to pay capital gain taxes.

4. The respondent preferred an appeal to the Income Tax Appellate Tribunal vide Income Tax Appeal No. 151/1989. By order dated 07.10.1992 the same was allowed holding that there was transfer of capital asset and the assessee was liable to pay taxes on capital gains arising out of transfer. However, remanded the matter back with direction to consider the claim of the assessee with regard to the claims for exemption. After remand, it was held that; Section 54F contemplates only investment in residential property by the assessee; it is enough if the sale proceeds are invested in the construction of a residential house. It was further held by the CIT (A) that it is not necessary that newly constructed house should be in the name of the assessee. In the eyes of law an adopted son has the same rights as a natural son. Thus, allowed the appeal of the assessee and directed the Assessing Officer to compute relief in accordance with Section 54F of the IT Act.

5. The Department, therefore, preferred appeal only with regard to whether the assessee is entitled to claim relief u/s 54F of the Act. By order dated 26.11.2001, the Tribunal quashed and set aside the order of the CIT and restored the order of the Assessing Officer, thereby allowed the respondent's appeal and also dismissed the cross objection filed by the assessee. Therefore, the present appeal by the appellant, who is only legal heir of the deceased/assessee.

6. This Court on 26.04.2002, admitted the appeal on the following substantial questions of law:

1. Whether the appeal filed before the ITAT on 1/5/98 in the name of Timaji, who

died on 9/5/91 is competently filed?....YES

2. Whether the sale proceeds of agricultural land were invested in purchasing plot and constructing residential house thereon, in the name of appellant does qualify for exemption u/s 54F of the I.T. Act particularly when the deceased Timaji who has invested in the name of appellant was in fact in the law the real owner of the property and appellant was holding the same in trust for and on behalf of the deceased Timaji?....NO

3. Whether for qualifying exemption u/s 54 of the I.T. Act is it necessary and obligatory to have investment made in residential house in the name of assessee only or investment in residential house is enough to qualify and claim the said exemption?....YES/Investment is not sufficient.

7. The petitioner/assessee being only legal heir of the deceased assessee, also filed Writ Petition No. 2197/2002 on 18.06.2002 and has challenged the recovery proceedings initiated u/s 156 of the IT Act read with penalty u/s 271(1)(a) and basically denied the tax liability of Timaji (deceased). This Court by order dated 07.10.2002 admitted the matter and granted relief in terms of prayer Clause (C) which order is still in force. Prayer Clause (c) reads as under:

During the pendency of the present petition recovery proceedings, penalty proceedings be stayed and respondent No. 3 and 4 be restrained from taking any such steps in near future and attachment of Bank Account be vacated.

8. The relevant portion of Section 54F of the IT Act is as under:

Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house.

54F.(1) [Subject to the provisions of Sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family] the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereinafter in this section referred to as the original asset), and the assessee has, within a period of one year before or [two years] after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house (hereinafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say-

(a) -----

(b) -----

Provided that nothing contained in this sub-section shall apply where-

(a) the assessee,-

(i) owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or

(ii) purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset; or

(iii) constructs any residential house, other than the one residential house owned on the date of transfer of the original asset, is chargeable under the head "Income from house property".]

Explanation,- For the purpose of this section,-

[***]

[***] "net consideration", in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

(2) -----

(3) Where the new asset is transferred within a period of three years from the date of its purchase or, as the case may be, its consideration, the amount of capital gain arising from the transfer of the original asset not charged u/s 45 on the basis of the cost of such new asset as provided in Clause (a) or, as the case may be, Clause (b), of Sub-section (1) shall be deemed to be income chargeable under the head "Capital gains" relating to long-term capital assets of the previous year in which such new asset is transferred.]

9. The term "Assessee" is defined in Section 2(7) of the Income Tax Act, which is as under:

"assessee" means a person by whom [any tax] or any other sum of money is payable under this Act, and includes-

(a) every person in respect of whom any proceeding under this Act has been taken for the assessment of his income [or assessment of fringe benefits] or of the income of any other person in respect of which he is assessable, or of the loss sustained by him or by such other person, or of the amount of refund due to him or to such other person;

(b) every person who is deemed to be an assessee under any provision of this Act;

(c) every person who is deemed to be an assessee in default under any provision of this Act;

10. Section 54 refers to the assessee being an individual or a Hindu undivided family. Importantly, both are different legal entities. As per the scheme of these sections of the IT Act, the assessee, who is the owner of the original asset, need to, within a period of one year before or two years after the date on which the transfer took place, purchased or within a period of three years after that date construct a residential house (new asset). The capital gain shall be dealt with in accordance with the other parts of the section.

11. The concepts of the "assessee", "own", "owned" "owner", "ownership", "co-owner", "owner of house property" or "ownership of property" as elaborated in Sections 22 to 27 and 32 of the IT Act, are very much inter-linked and connected for granting the benefit under the IT Act. The word and phrase "owner" in the context of Section 22 of the Income Tax Act has been elaborated in Commissioner of Income Tax, Bombay etc. Vs. M/s. Podar Cement Pvt. Ltd. etc., ; and M/s Mysore Minerals Limited, M.G. Road, Bangalore Vs. The Commissioners of Income Tax, Karnataka, Bangalore, . An assessee must have valid title legally conveyed to him after complying with the requirement of law or at least entitled to receive income from the property in his own right and have control and domain over the said property for all the legal purposes, which basically excluding a third person of any right over the said property. Therefore, all these concepts are inter-linked. The scheme and purpose of Section 54F, which was inserted by the Finance Act, 1982 with effect from 01.04.1983 i.e. from the Assessment Year 1983-84 is with a view to encourage house construction. The object, therefore, is to give all benefits under this Section to the assessee on conditions as elaborated in the section. No such benefit is available to a person other than the assessee. It also means the assessee must comply with the conditions strictly as per this provision in all respects. As noted, this exemption will not be available in case where the assessee owns, on the date of transfer of the original asset, any residential house or purchased within the period of one year, after such date or constructs within a period of three years after such date any other residential house. Where an assessee purchases or constructs any other residential house within the period of the aforesaid exemption under the proposed provision, if allowed, shall stand forfeited. The amount of capital gain arising from the transfer of the original asset which was not charged to taxes shall be allowed to be income chargeable under the head "capital gain" relating to long term capital assets of the previous year in which such residential house is so purchased or constructed. Furthermore, if an assessee transfers newly acquired residential house within three years of its purchase or construction, then the amount of capital gain arising from the transfer of original asset, which was not charged to tax, shall be deemed to be the income of the year in which the new asset is transferred and the said income shall be charged to tax under the head of capital gains relating to the long term capital assets. (1982) 138 ITR 10 (Departmental Circular No. 346 dated June 30, 1982)

12. It is, therefore, clear that the purpose is to give this benefit on the ownership of one residential house only by the assessee and to encourage to have one residential house of the assessee. Therefore, right from the sale of original asset till the purchase and/or construction of the residential house i.e. the "new asset", the ownership and domain over the new asset is a must. The new property must be owned by the assessee and/or having legal title over the same. The others may use and occupy the same along with the assessee but the ownership should be of the assessee of the residential house so purchased from

the net consideration/sale proceeds of the sale of original asset by the assessee.

13. Having observed above and in view of the undisputed position on the record that the deceased assessee, admittedly, though sold the property owned by him yet purchased the new property in the name of adopted son and paid consideration out of the sale proceeds in question, with clear intention to transfer the property to the adopted son. He, therefore, utilised the sale proceeds to construct a house by transferring the property and submitting plan in the name of the son only. The intention was very clear from the day one to transfer the property even before the construction of residential house to the adopted son. He transferred the property before the prescribed period, as per the scheme of Section, and the son becomes the owner of the property for all the purposes. The deceased/assessee, admittedly, had no domain and/or right whatsoever on the said property. This fact itself, therefore, disentitled him to claim any exemption as there were various non compliances of the conditions as per the scheme of Section 54 and 54F of the IT Act as mentioned above.

14. The strong reliance was placed on the following decisions by the appellant. In *Late Mir Gulam Ali Khan (By legal representative Mrs. Noor Begum) v. Commissioner of Income Tax 228 Income Tax Reports 165 (A.P.)* the Andhra Pradesh High Court has granted exemption u/s 54 of the Income Tax Act and observed as under:

Relying upon the expression "assessee" occurring in Section 54 of the Act, it is contended for the Department that in order to claim the exemption, the person who sold the house must be the same as the person who purchased the house, that is, the assessee must be one and the same person. The identity must be the same. We are unable to accept this contention. The object of granting exemption u/s 54 of the Act is that a person who sells a residential house for the purpose of purchasing another convenient house must be given exemption so far as capital gains are concerned. As long as the sale of the house and purchase of another house are part of the same scheme, the lapse of some time between the sale and purchase makes no difference. The word "assessee" must be given a wide and liberal interpretation so as to include his legal heirs also. There is no warrant for giving too strict an interpretation to the word "assessee" as that would frustrate the object of granting the exemption and what is more, in the instant case, the very same assessee immediately after the sale of the house, entered into an agreement for purchasing another house and paid a sum of Rs. 1,000 as earnest money and subsequently the legal representative completed the transaction within a period of one year from the date of the death of the deceased. The sale and purchase are two links in the same chain. We are fortified in this view by a decision of the Madras High Court in *C.V. Ramanathan v. CIT [1980] 124 ITR 191*.

We are not inclined to accept the liberal view to the word "assessee" in *Late Mir Gulam Ali Khan (supra)* for the reason already recorded in the above paras. The Scheme of Section 54F is clear. The facts are different here.

15. The deceased assessee admittedly sold and purchased the property from the realisation but in the name of the adopted son, who in the scheme of the Act and Section 54F is not an assessee, who after selling the old asset purchased and constructed the new property. He was not the owner of the new purchased property. In *Ponds India Ltd. (Merged with H.L. Ltd.) v. Commissioner of Trade Tax, Lucknow* : JT2008(9)SC94 , the Apex Court's following declaration supports the view we have taken based upon the principle of interpretation of revenue/taxation status.

39. When a case of obvious intent on the part of the Legislature is made out, a meaning which subserves the legislative intent must be given effect to. It is however also well known that when a word is defined by the legislature itself, the same meaning may be attributed even in the changed situation.

16. In this background, the submission with regard to the principle of Benami transaction based upon the Supreme Court judgments in *Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan Singh, and Controller of Estate Duty, Lucknow Vs. Aloke Mitra*, , are unacceptable. The intention, as well as, transaction on record makes the position very clear. In no way this can be said to be a Benami transaction. The facts and circumstances are totally distinct and distinguishable of the judgments cited by the learned Counsel appearing for the assessee in all respects.

17. In light of above, the reasoning given by the Tribunal by maintaining the order passed by the Assessing Officer, need no interference. The reasonings, as given, are as under:

8. ...A plain reading of Section 54F would show that it is the assessee who has to invest the capital gain in the new construction of a residential house in his name. The expression that the assessee has purchased or constructed a new asset in Sub-section (1) would only mean that the new asset has to be in the name of the assessee. The proviso to Sub section (1) makes the position very clear in as much as it says that the assessee shall not own any residential house on the date of transfer or purchase a residential house within 1 year of the transfer or construct residential within a period of 3 years, other than the new asset. Thus, reading of Sub-section (1) together with the proviso would show that the investment in the new asset by the assessee has to be in his own name and not in the name of any other person. The legal consequences of purchase of the new asset by assessee in the name of his son is to constitute his son as the beneficial owner of the new asset. The assessee has, therefore, not made the investment in this name. Therefore, he has rendered himself liable to pay tax on capital gains arising out of the transfer of a capital asset.

9. ...

10. In all the above case, it will be significant to note that the issue was never regarding purchase of the new asset in the name of other person. Death during the period within which the new asset had to be acquired was an intervening

event in some cases. The distinction between a legal heir and an heir apparent in law is very significant. An heir apparent succeeding to the estate of a propositus is dependent on the fact of his surviving the propositus. Death is a certain event but who will die first is not a certain event. This is the reason why law regards transfer by a heir apparent of his chance of succession as non transferable u/s 6 of the Transfer of Property Act.

11. ...In the present case, the assessee has not made any such claim. In the affidavit filed before the Assessing Officer he had admitted that his son is the beneficial owner of the property and the investment was made in his name in view of the fact that he is 86 years old and that he was counseled to do so. Thus, on facts and circumstances of this case, we are of the view that the decision of the Madras Tribunal is also distinguishable.

18. In view of the above reasons, we answer the substantial questions of law framed by this Court in the appeal as under:

Question No. 1....YES:

We hold that the appeal filed before the Income Tax Appellate Tribunal on 01.05.1988 is competent. It was arising out of the Assessment Year 1983-84. The Department had issued notice u/s 139(2) of the Act calling upon the assessee (Timaji Dhanjode) who had filed his return; who was alive at the relevant time. The Assessing Officer held that the investment by the deceased assessee in the name of his adopted son not calling for an exemption and, therefore, demanded capital tax. Against the order, the appeal filed by the deceased was allowed on 25.01.1989 and after remand, CIT-A reversed the order of Assessing Officer on 11.02.1998, therefore, the department appeal dated 01.05.1998 against the same, even after the death of the assessee on 09.05.1991, against the appellant being the only legal heirs, is maintainable.

Question No. 2....NO:

The appellant does not qualify for the exemption u/s 54F of the Income Tax Act.

Question No. 3....YES:

For qualifying the exemption it is necessary and applicable to have the investments made in residential house in the name of the assessee only.

The appeal is dismissed accordingly.

19. For the above reasons, the proceedings u/s 156 of the Income Tax Act as initiated and proceedings u/s 221 and 271(1)(a) of the Income Tax Act cannot be said to be bad in law, illegal or violative of any Constitutional and/or legal right. The writ petition filed by the petitioner being an adopted son of the deceased assessee is, therefore, dismissed. Interim relief, so granted, also stands vacated. However, a liberty is granted to the appellant/petitioner to take steps, if any, in accordance with law. Both the matters are dismissed with order as to costs.