
(1993) 02 GUJ CK 0011

In the Gujarat High Court

Case No : Income-tax Reference No. 269 of 1980

R. Krishnamurthy

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 08-02-1993

Acts Referred:

Income Tax Act, 1961 — Section 277, 45, 53, 54

Citation : (1993) 204 ITR 47

Hon'ble Judges : S.M. Soni, J;G.T. Nanavati, J

Bench : Division Bench

Advocate : D.A. Mehta, for K.C. Patel, for the Appellant; B.J. Shelat, instructed by M.R. Bhatt, of R.P. Bhatt and Co., for the Respondent

Judgement

G.T. Nanavati, J.—The Income Tax Appellate Tribunal has referred the following question to this Court u/s 256(1) of the Income Tax Act, 1961 :

"Whether, on the facts and in the circumstances of the case, the assessee was entitled to exemption u/s 54 of the Income Tax Act, 1961, although the assessee used the building for the purpose of his residence for a period shourter than a period of two years immediately preceding the date of sale ?"

2. The assessee constructed one house in the financial year 1964-62. It was let out to a tenant. The tenant vacated it in May, 1971. The assessee used that house for his residence from June 1, 1971, to September 21, 1971. The house was sold by the assessee on September 21, 1971. In respect of capital gain which arose as a result of sale of that residential house, the assessee claimed exemption u/s 54 of the Act. The Income Tax Officer held that the property was not used by the assessee as a residential house for the immediate period of two years and, therefore, the condition necessary for qualifying for exemption was not satisfied. The claim for exemption was thus denied by the Income Tax Officer. In the appeal to the Appellate Assistant Commissioner, the assessee succeeded as the Appellate Assistant Commissioner was of the view that use of the house for residential purpose during any period within the specified period of two years

was sufficient for claiming exemption u/s 54 of the Act. The Revenue preferred an appeal to the Tribunal which reversed the order of the Income Tax Officer as it was of the view that exemption u/s 54 can be invoked by the assessee if he had used the building for the purpose of his residence for a period of two years immediately preceding the date on which the transfer took place. The assessee then moved the Tribunal for referring the abovementioned question to this court.

3. What is contended by the learned advocate for the assessee is that the Tribunal has not correctly interpreted section 54 and that it ought to have been held that the assessee was entitled to exemption. It was submitted that the word "in" used in the phrase "two years immediately preceding" should have been interpreted as "at any time within", for two reasons (i) that the word "in" has various meanings and that meaning should have been accepted as was in favour of the assessee, and (ii) if the Legislature had intended that user should be for the full period of two years, then it would have used the word "for" instead of "in". With respect to the approach that should be adopted by the Court while interpreting the provision in a taxing statute, he invited our attention to the decision of the Supreme Court in *Commissioner of Income Tax, U.P., Lucknow Vs. J.K. Hosiery Factory, Kanpur*, . It was observed therein that where two interpretations are possible, the Court should take that interpretation which is favourable to the assessee, bearing in mind that a taxing statute is being construed. As regards the interpretation suggested by him, he had relied upon the decision of the Delhi High Court in *S. Harnam Singh Suri Vs. Central Board of Direct Taxes*, . In that case, the assessee, in a statement accompanying his return for 1971-72, had stated that this self-occupied residential house was sold on January 15, 1971, and that the capital gain was utilised for the purchase of a residential flat. The statement made by the assessee was relied upon and on that basis, the assessment was completed and no tax on capital gains was levied. Subsequently, there was a search of the assessee's premises. On examination of the house, the Income Tax Officer had found that it lacked amenities and, therefore, could not have been occupied by the assessee. He had also found that the flat purchased by the assessee was occupied by his son. The Income Tax Officer issued a notice of reassessment and initiated prosecution u/s 277 of the Income Tax Act, 1961, and sections 193 and 196 of the Indian Penal Code. The assessee filed a writ petition in the Delhi High Court to get the said proceedings quashed. The contention raised by the assessee in that case was that section 54 being an exemption provision should be construed in favour of the assessee while considering the question whether the statement made by the assessee that he had resided in the house for not less than two years was correct or not. This contention was rejected by observing that such a broad proposition cannot be accepted and it was held that, if there is ambiguity, the provision for exemption or relief can be construed liberally and in favour of the assessee. After referring to the expression "was being used" and the interpretation put upon it by the Madras High Court in *M. Viswanathan Vs. Commissioner of Income Tax*, and *S. Radhakrishna v. CIT* [1984] 145 ITR 170 the Court observed that, in English

grammar, it can properly be described as the past continuous and, therefore, denoting a continuity which extends up to and terminates with the date of the transfer; but the past continuous in the context would only mean 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 the parent's own residence during the period of two years immediately preceding the date of sale. The Delhi High Court was of the view that the Madras High Court has construed the provision in favour of the Revenue by stretching the plain meaning of the provision and even though the words "in the two years immediately preceding" are followed by the words "was being used", the word "in" can never mean "continuously for not less than".

4. The learned advocate for the assessee also relied upon the decisions of the Karnataka High Court in *M. Abdul Sattar Vs. Commissioner of Income Tax*, wherein it was held that section 54, which employed the terms "in the two years immediately preceding the date of transfer". could only mean at any time within two years. On the plain language of these words, it was not open to the Court to read the same as for a continuous period of two years. The later words "was being used" could not restrict or control the terms "in two years" occurring earlier. Even when the section was read as a whole without minimising the importance of the later words "was being used", there was no justification to restrict or curtail the period occurring in the earlier part of the section. The Karnataka High Court dissented from the two decisions of the Madras High Court and preferred to agree with the decision of the Delhi High Court.

5. Relying upon these two judgments, it was submitted by the learned advocate for the assessee that the latter words "was being used" though connote continuity of user, it should not have any effect upon the interpretation of the word "in" used in the phrase "in the two years immediately preceding the date of the transfer". He submitted that, if the Legislature had intended user for the full period of two years, then it could have used the word "for" instead of "in". He also submitted that, if the word is interpreted in any other manner, then it would amount to adding words in the section. The Legislature, on the other hand, had thought it fit to use the word "in" and, therefore, it should be held that what the Legislature intended was user of the residential house at any time within the period of two years. We do not find any substance in these contentions, but before we give our reasons, it would be more useful to refer to the decisions of the Madras High Court to which our attention was drawn by the learned advocate for the assessee and which have been referred to both by the Delhi High Court and by the Karnataka High Court.

6. In *M. Viswanathan Vs. Commissioner of Income Tax*, the assessee had purchased a residential building which was in the possession of a tenant. The assessee could recover possession on January 5, 1964. He resides in that building from 16, 1964, to June 16, 1965. On these facts, the question which was referred to the Madras High Court u/s 256(1) of the Act was whether the

Tribunal was right in holding that the requirement of the provisions of section 54 of the Income Tax Act, 1961, had not been satisfied and, consequently, the assessee was not entitled to the benefit under the aforesaid provision for the assessment year 1966-67. It was contended on behalf of the Revenue that there should be user of the house as a residential house for the entire period of two years immediately preceding the date on which the transfer took place if that section is to be attracted. The assessee's contention was that the wording of the section did not warrant the insistence on continuous user as residential house for the entire period to two years immediately preceding the date of transfer. The Madras High Court held that (at Page 245) :

"If the words "in the two years immediately preceding" had stood by themselves some ambiguity would have arisen, because it is possible to say that when we speak of "in the two years", it can be any time during the period of two year. But when the words "in the two years immediately preceding" are coupled with the words "was being used", it connotes in the English language is user which extends to the date of transfer and the expression of the English language is described as past continuous, a continuity which extends up to the termination date which is clearly stated as the date of transfer. The wording of the section appears to us to be clear and it is also clear that the wording is not capable of any meaning other than what we have indicated above."

7. According to the Madras High Court, that was the intention of the Legislature and, therefore, even though it was harsh to take such a view, the section could not be interpreted in a different manner.

8. In COMMISSIONER OF Income Tax, MADRAS Vs. R. MALA., the Madras High Court could again held that there was no ambiguity in the provision and, therefore, there was no reason for it to read some words into it to make sense. It held that the requirement of the section is that, for the two years immediately preceding the date on which the transfer takes place, the property must have been used by the assessee or a parent of his mainly for the purpose of his or the parent's residence. The Madras High Court observed that the word "in" in the phrase "in the two years" occurring in the section was quite significant. It was observed that, if the plea of the assessee were to be accepted, then the provision should have been drafted in the following manner "which, at any time during the two years immediately proceedings the year in which the transfer took place was used by the assessee".

9. It further observed that, when the Legislature had advisedly used the particular words in section 54, it would not be proper for it to import other words into it.

10. Thus, the Madras High Court has proceeded on the basis that, by the use of the word "in" in the phrase "in the two years", the Legislature wanted to convey that user should be for the full period of two years and, therefore, if the user is for a shorter period, it cannot be said that the property was used as residence for

"the two years immediately preceding the date of transfer."

11. We may now refer to the section as it stood then :

"54. 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 purpose 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 construed, a house property for the purposes of his own residence, then, instead of the capital gains 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 purposes 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."

12. It is an exemption provision as it grants exemption from payment of tax on capital gain arising from transfer of a capital asset. What should be the approach while interpreting or construing the exemption provision is pointed out by the Supreme Court in *Union of India and others Vs. M/s. Wood Papers Ltd. and another*, . The following observations of the Supreme Court are material for our purpose (headnote of AIR) :

"Literally exemption is freedom from liability, tax or duty. Fiscally, it may assume varying shapes, especially in a growing economy. For instance, tax holiday to new units, concessional rate of tax to goods or persons for limited period or with the specific objectives, etc. That is why its construction unlike a charging provision. Has to be tested on a different touchstone. In fact an exemption provision is like any exception and on the normal principle of construction or interpretation of statutes, it is construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provisions intended to augment state revenue. But once the exception or exemption becomes applicable no rule or principle requires it to be construed strictly. Truly speaking liberal and strict construction of an exemption

provisions are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in the nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction."

13. Though the above observations of the Supreme Court were made while construing a notification issued under the Central Excises and salt Act, 1944, and the rules made thereunder, we see no reason why this principle of interpretation should not apply where an exemption provisions under the Act itself falls for interpretation.

14. It is not in dispute that, before the assessee can claim exemption u/s 54, he must satisfy the conditions laid down therein. On a plain reading of the section, it can be said that one of the conditions which is required to be fulfilled is that the building or house property should have been used by the assessee or a parent of his only for the purpose of his own or the parent's own residence in the two years immediately preceding the date on which the transfer took place. The use of the words "was being used", as rightly pointed out by Madras High Court, denotes continuity of user. In order to clarify what was in its mind while providing for the requirement of continuous user, the Legislature specified the period with reference to which continuous user is to be determined. The starting point of that period is "two years immediately preceding the date on which the transfer took place." For the purpose of deciding whether the property was being used by the assessee for the purpose stated in the section, one has to look to that period of two years and to no other period. It appears that the Legislature specified the period as it intended to give the benefit of exemption to those assessee only who, for the period of two years immediately preceding the date on which the transfer took place, were using the building or house property for their or their parent's residence.

15. In order to avoid any ambiguity and uncertainty, the Legislature has provided not only the length of the period but also the starting point of that period. It appears that the Legislature also wanted to make clear which period should be regarded as sufficient for the purpose. Otherwise, even user by the assessee was for a shorter duration, say for example, six months, he could have contended that it should be regarded as sufficient for the purpose of holding that he had used the premises for his residential purposes in the period of two years contemplated by the section. Similarly, if, intermittently, he was using the property as his residential house, he could have contended that he was entitled to the benefit of exemption, even though the total user was for a shorter period. In order to see that such contentions were to be raised, the Legislature specified the period. Thus, the intention of the Legislature in specifying the period appears to be not only to remove vagueness, but also to indicate clearly the conditions, on fulfillment of which it intended to grant the benefit of exemption. It is in this

context that we have to give meaning of the words "in" used in the expression "in the two years immediately preceding". We have also to bear in mind the object of the provision itself. It is an exemption provisions and it grants exemption from payment of tax on the capital gain arising as a result of transfer of a capital asset. This exemption is granted in respect of building, because it happens to be a building or a house utilised by the assessee for the purpose of his or his parent's residence and the old house is given up for a new house again for the purpose of residence. The Legislature would not have thought it fit to grant such exemption if the occupation of the building for residence was not for a sufficiently long period. That appears to be the reason why it has specified the period of two years in the section with reference to which it is to be considered whether the building was being used by the assessee for the stated purpose. Thus, from the object of the provision and the reasons as to why the duration of the period is specified in the section, it becomes clear that what was in the mind of the Legislature was use for the full period of two years in order to qualify for the benefit of exemption. In our opinion, if any other interpretation is put on the word "in", then that would enlarge the scope of the exemption without any justification in that behalf.

16. We are, therefore, of the opinion that the Tribunal was right in holding that the property should have been used by the assessee for his own residence for at least two years prior to its sale.

17. For the reasons stated above, the question is answered in the negative, that is, against the assessee and in favour of the Revenue, Reference, is disposed of accordingly with no order as to costs.