

Dcit Vs. Shri Kishore Kanungo

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Oct-27-2005

Reported in : (2006)102ITD437(Mum.)

Judge : S K Yadav, A Garodia

Appellant : Dcit

Respondent : Shri Kishore Kanungo

Judgement :

1. Both these appeals are assessee's appeals directed against the order of learned CIT(A)-XLIV, Mumbai dated 8.3.2001 in case of Shri Kishore Kanungo and order of learned CIT(A)-XXXVI, Mumbai dated 30.1.1001 in case of Shri Deepak K. Kanungo both for A.Y. 1993-94. In both these appeals the issue involved is common; and hence, for the sake of convenience, both these appeals are being disposed off by this common order.

2. In both the appeals, common grievance of the revenue is that learned CIT(A) has erred in allowing the adoption of fair market value at Rs. 33.73 lakhs as on 1.4.81 for the purpose of computation of capital gains on the property purchased for Rs. 1,05,643/- vide agreement dated 16.3.1981 and the other grievance of the revenue is that learned CIT(A) has erred in allowing indexation with effect from F.Y. 1981-82 instead of F.Y.1999-92.

3. Briefly stated, the facts are that both the assesseees were co-parcener of the HUF of Shri Kishor S. Kanungo. This HUF has entered into an agreement dated 16.3.81 for purchase of flat in a building called 'Cliff at Ridge Road, Mumbai for a consideration of Rs. 11,01,101/-. The said HUF was partitioned during A.Y. 1992-93 on which, both these assesseees became the owner of the asset of the above said HUF. Said flat at 'Cliff was sold for a consideration of Rs. 3.61 crores, which was partitioned equally among the four owners. On sale of the above flat during A.Y. 1992-93, both the assesseees claimed that it was a capital asset and it was possessed on 16.3.81 and the fair market value as on 1.4.81 was Rs. 33.73 lakhs as per the valuation report of the approved valuer; and it was claimed that for the purposes of calculating the long term capital gain, the market value of the flat as on 1.4.81 should be adopted and indexation should be allowed from 1.4.81. This claim of the assesseees was not accepted by the Assessing Officer and he computed capital gain by considering cost of acquisition at Rs. 11,05,643/- and he granted indexation from F.Y. 1991-92 i.e.

first year in which, asset was held by these assesseees on partition of HUF. On appeal, it was held by learned CIT(A) that the assesseees are entitled to adopt cost or the fair market value as on 1.4.81 having acquired a capital asset prior to the said date on 16.3.81 and regarding indexation also; it was held by him that the assesseees are entitled for indexation not from the date of partition of HUF but from the date of acquisition of the property by the HUF; and now, the revenue is in appeal before us.

4. It was submitted by learned DR of the revenue that page No. 15 to 22 of the paper book contains, an agreement dated 16.3.81 and our attention was drawn to the second para on page No. 17 of the paper book, as per which, it is clear that a Society is constructing a building and hence, building was not completed on the date of agreement. It was submitted that page No. 23 to 36 of the paper book contains valuation report and in particular, our attention was drawn to page No. 27 of the paper book, as per which, construction of the building commenced about 1978 and was completed about 1988 and it was contended that there could not be any market value of the building as on 1.4.81 when the construction of the building was completed in about 1988. Regarding the Judgement of Punjab 8b Haryana

High court rendered in the case of Ved Prakash and Sons (HUF), 207 ITR 148 relied upon by learned CIT(A) as per para No. 12 of his order and regarding the Tribunal order in the case of Smt. Sheela Mukund Chitnis V. ITO as per ITA No. 6361/B/90 dated 10.4.97, copy of which is submitted by the assessee on page No. 55 to 57 of the paper book; it was submitted by learned DR of the revenue that in both these cases, transfer was of the right under the agreement and not of the house property and since, in the present case, transfer is of the house property, these Judgements are not applicable in the present case. Regarding the provisions of Section 55(2)(b)(ii), it was submitted that HUF was not owner of the property as on 1.4.81 because neither the property was ready by that time because admittedly, construction was completed in 1988 and even payments were made of Rs. 5,79,941/- after 31.3.81 i.e. on 3.4.81 Rs. 2 lakhs, on 20.4.81 Rs. 2 lakhs, on 17.6.81 Rs. 30,000/- and on 27.7.81 Rs. 1,49,741/-, the details of which are given by learned CIT(A) in para No. 7 on page No. 2 of his order. Reliance was placed on the following judicial pronouncements: It was submitted that provisions of Section 2(47)(v) and 2(47)(vi) were inserted by the Finance Act, 1987 w.e.f. 1.4.88; and hence, provisions of these sections are not applicable in the present case because in the present case, agreement is dated 16.3.81. Regarding the indexing, our attention was drawn to Explanation (iii) to Section 48 as per which, cost inflation index for the first year in which, asset was held by the assessee or for the year beginning on title first day of April, 1981, whichever is later is to be adopted. It was submitted that in the present case, both the assessees were holding the asset from F.Y.1991-92 when the partition of the HUF took place and hence they are entitled to indexing only from F.Y. 1991-92 as per this Explanation.

Regarding Section 49, it was submitted that Section 49 deals with amount of cost with reference to certain mode of acquisition and not the date from which indexing is to be allowed. Regarding Explanation I(b) to Section 2(42A), it was submitted that the period of holding by the previous owner has to be considered for the purpose of deciding as to whether asset is a short term capital asset or long term capital asset; but the same cannot be considered for the purpose of indexing as per Explanation (iii) to Section 48. Assessment order was strongly supported and it was submitted that the order of learned CIT(A) should be reversed and that of the

Assessing Officer should be restored.

5. As against this, it was submitted by learned AR of the assessee that since, HUF acquired property on 16.3.81, as per the provisions of Section 55(2)(b)(ii), the assessee is entitled to adopt market value of the flat as on 1.4.81. It was submitted that HUF became owner of the shares in the Society on 12.11.81 and as per the agreement dated 16.3.81, HUF had right to those shares. Reliance was placed on the Judgement of Hon'ble Jurisdictional High Court rendered in the case of CIT v. Daulatran Nayar, 105 ITR 843; and in particular, our attention was drawn to page No. 846 and 847 of this report as per which, it was held that where capital asset become property of the previous owner prior to 1.1.54, the actual cost allowable to the assessee shall be fair market of the asset as on 1.1.54.

6. We have considered the rival submissions and perused the materials on record. We find that in the present case, HUF has entered into an agreement for acquiring a flat on 16.3.81 for a consideration of Rs. 11,01,101/-. Consideration was paid partly up to 31.3.81 but major portion was paid after 1.4.81 and last payment was made on 27.7.81. As per the valuation report submitted by the assessee, construction of the property was completed in about 1988. Now, the issue before us is whether the capital asset, which became the property of previous owner i.e. HUF on 16.3.1981 was the house property, which was transferred for consideration of Rs. 3.61 crores in F.Y. 1992-93 or capital asset which became property of HUF was only the right to acquire that flat and not the flat itself. As per provisions of Section 55(2)(b)(ii), the indexing has to be allowed if transferred capital asset become property of the assessee or of the previous owner before the first day of April, 1981. In the present case, this is an admitted position that construction of flat was completed in about 1988 as per valuation report submitted by the assessee appearing on page No. 27 of the paper book. Regarding Judgement of Hon'ble Jurisdictional High Court rendered in the case of Sterling Investment Corporation as reported in 123 ITR 441 relied upon by learned CIT(A) in para No. 11 of his order, we find that the issue involved in that case was different because in that case, it was held that contractual right of a purchaser to obtain title to immovable property was acquired and it can be considered as property and therefore, a capital asset. Dispute in the present case is not whether

any capital asset was acquired by the agreement dated 16.3.81; but the dispute is whether capital asset acquired by the agreement dated 16.3.81 being right to obtain title to the flat was same and equivalent to the flat itself because in the present case, flat was transferred and not right to obtain title to the flat was transferred.

Judgement of Hon'ble Apex Court rendered in the case of Alapati Venkataramiah (supra) relied upon by learned DR of the revenue supports the case of the revenue because it was held in that case that even delivery of possession of immovable property could not by itself be treated as equivalent to the conveyance of the immovable property and since, the sale deed in that case was executed after 1.4.1948, it was held that no capital gain arose in A.Y. 1948-49, previous year of which has ended on 31.3.1948. Judgement of Hon'ble Delhi High Court in the case of Mercury General Corporation P. Ltd. (supra) relied upon by learned DR of the revenue also supports the case of the revenue because it was held in that case that no sale was affected during the previous year because there could be no sale without a duly registered documents. Similarly, it was held by the Hon'ble Apex Court in the case of Nawab Sir Mir Osman Ali Khan(Late) (supra) relied upon by learned DR of the revenue that for the purpose of wealth tax, the property belongs to the assessee even after receiving full consideration from purchaser because sale deed was not executed and registered; and the value of such property has to be included in the assessee's net wealth. In the present case, most important point is that building was not even in existence as on 1.4.81 because admittedly, construction of the building was completed in about 1988 and hence, in our considered opinion till construction of the building was completed and possession was handed over to the previous owner i.e. HUF, capital asset, which was held by the previous owner i.e. HUF was the right to obtain title and possession of the flat and it cannot be said that the flat itself became property of the HUF prior to that date and hence, in our considered opinion, learned CIT(A) was not justified in holding that the assessee is entitled to adopt market value of the flat as on 1.4.81. Provisions of Section 55(2)(b)(ii) are very clear and the same are reproduced below: 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 April 1981), means the

cost of the capital asset to the previous owner or the fair market value of the asset on the (1st day of April 1981), at the option of the assessee.

From the above, it can be seen that the capital asset i.e. flat in the present case should have become the property of the previous owner before 1.4.81 to make the assessee entitled for this benefit i.e.

adopting market value as on 1.4.81 but since, in the present case, flat was not even in existence till 1988, the assessee cannot be given this benefit. In our considered opinion till 1988, the previous owner i.e.

HUF was not owner of the flat but was owner of right to get possession and title of the flat. In view of the above, the first issue i.e.

whether the assessee can be given benefit to adopt market value of the flat is decided against the assessee and order of learned CIT(A) is reversed and that of the Assessing Officer is restored to this extent.

Regarding the second issue, i.e. from which year the assessee should be entitled for indexation, we find that the Assessing Officer has adopted the F.Y. 1991-92 i.e. year in which, partition of HUF took place. In this regard, Explanation (iii) to Section 48 is relevant and the same is reproduced below: Indexed cost of acquisition' means an amount which bears to the cost of acquisition the same proportion as cost inflation index for the year in which the asset is transferred bears to the cost inflation index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April 1981, whichever is later.

From the above, it can be seen that cost inflation index for the first year in which the asset was held by the assessee has to be considered.

In the present case, there is no dispute that the asset in question i.e. flat was held by the assessee only from F.Y. 1991-92 i.e. when the partition of HUF took place. As per provisions of Section 2(42A) read with Explanation I(i)(b), the period for which the asset was held by the previous owner has to be added to decide as to whether the asset is short term capital asset or long term capital asset and since,

admittedly, construction of the house was completed in 1988, the asset is a long term capital asset in view of this Explanation to Section 2(42A); but in view of the specific provisions of Explanation (iii) to Section 48, indexing has to be allowed from F.Y. 1991-92, i.e. the year from which flat was held by the assessee on partition of HUF and hence, on this issue also, order of learned CIT(A) is reversed and that of the Assessing Officer is restored.

Order has been pronounced in the open Court on 27th Day of October, 2005.

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