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Court : Kolkata

Decided On : Mar-22-1982

Reported in : (1982)30CTR(Cal)47,[1983]142ITR427(Cal)

Judge : Sabyasachi Mukharji and ;Suhas Chandra Sen, JJ.

Acts : [Income Tax Act, 1961](#) - Section 52(2)

Appeal No. : Income-tax Reference No. 212 of 1976

Appellant : Brijmoni Devi and ors.

Respondent : Commissioner of Income-tax

Advocate for Def. : B.L. Pal and ;B.K. Nahar, Advs.

Advocate for Pet/Ap. : Kalyan Roy and ;R.N. Dutt, Advs.

Judgement :

Sabyasachi Mukharji, J.

1. In this reference under Section 256(1) of the I.T. Act, 1961, the following question has been referred to this court :

'Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that amount of Rs. 1,00,000 could be subjected to tax as capital gains under the provisions of Income-tax Act, 1961?'

2. The assessee was one Shri Laxmandas Agarwalla and was dead and the assessment was made upon the legal heirs, Smt. Brijmoni Devi and others. This reference relates to the assessment year 1965-66 for which the previous year ended on the Dewali 2021. The assessee stated before the ITO that the property at No 7, Jatindra Mohan Avenue, Calcutta, has been sold for Rs. 3 lakhs to Prayag Devi Trust, a trust created by Shri Laxmandas Agarwalla in which he and his wife, Smt. Brijmoni Devi, were trustees. The building was a five-storeyed brick-built building constructed on 10 cottahs-7 sq. ft. of land. The property was mortgaged to M/s. Allahabad Bank Ltd. to cover up the security for overdraft arrangement along with the other shares, etc. On the 30th June, 1960, the building was released by payment of Rs. 3 lakhs to the bank. According to the assessee the valuation as on the 1st January, 1954, should be substituted in place of the original cost, which could not be furnished. After considering the valuation report made by M/s. Ballardie Thompson & Mathews of No. 7, Wellesley Place, Calcutta, the ITO held that when the consent of this hon'ble court was obtained on the 20th August, 1957, and when the sale was effected OH the 20th November, 1963, there was no liability cast upon the vendor to sell the property at the price approved by the court even if the price went up substantially when the property was actually transferred. He also found that the assessee intended to transfer the property to the trust in which the assessee was a trustee at a value and after finding the valuation made by the approved valuer, M/s. Ballardie Thompson & Mathews at Rs. 3 lakhs 50 thousand, it could not be accepted, according to the ITO, that the value of the property would be less than the value in 1957 by Rs. 50,000. He also found that no details about the basis of the valuation report adopted by M/s Ballardie Thompson & Mathews had even been submitted by the assessee. He thus concluded that in the absence of any data available and considering the rise in prices of land and building in cities particularly in Calcutta, it would be fair and reasonable to estimate the value of the property at Rs. 4 lakhs. He thus included Rs. 1 lakh as capital gains in the total income of the assessee which included the income from property, income from business and income from dividend.

3. When the assessee went up in appeal before the AAC, he held that the ITO's view was rather liberal when the ITO estimated the fair market value of the property at Rs. 4 lakhs six years later and after considering the provisions of

Sections 43 and 52(2) of the Act he held that the transfer was effected with the object of avoidance or reduction of the liability as provided in the Act. The assessee went up in appeal before the Tribunal.

4. Various contentions were raised before the Tribunal and after considering the facts which we have mentioned hereinbefore and the Specific Relief Act and Contract Act referred to by the assessee, the Tribunal observed that it might be true that the assessee acted in different capacities as trustee. The property had been sold to Brijroni Devi, wife of the assessee, along with Kali Prasad Agarwalla. The Tribunal, after considering the contentions, held as follows :

'The trust was a family trust and it was meant for the settlor's sons, Kali Prasad Agarwalla, Durga Prasad Agarwalla, Bhagwati Prasad Agarwalla, Krishnakumar Agarwalla, Balaram Agarwalla, Bejoy Kumar Agarwalla and Benoy Kumar Agarwalla and their sons and for education and maintenance of settlor's daughter. The beneficiaries of the trust property were the sons of the assessee. In such circumstances, it cannot be held that there was no extraneous circumstance which led the assessee to fix up the lower consideration than what was valued by Ballardie Thomson & Mathews, an approved surveyor and engineer of the Calcutta High Court. The details of the valuation report could not be produced by the assessee and we do not know the basis it adopted. The fact remained that as early as 28th August, 1957, the valuation of the property was Rs. 3,50,000. Thus, when this property was sold during the accounting year, the value of the property cannot be lower than the value accepted by the assessee as early as 1957. The case of Radha Devi Jalan [1968] 67ITR 761 (Cal) on which the assessee's counsel relied is distinguishable from the facts of the present case because in that case at page 770 of the report the Calcutta High Court found that the land and building method as adopted by the Assistant Controller and the Appellate Controller was somewhat an off-hand method. In that case the High Court found that the Appellate Controller was not sure of the area which this structure covered but merely made a rough estimate of it. The High Court further held : 'Wherefrom he got the per cottah land value and per square foot rate of construction do not appear. If the Tribunal disregarded this off-hand method of valuation we do not find fault with the Tribunal.' In the instant case in the absence of production of

valuation report of the valuer like Ballardie Thompson & Mathews, we cannot hold that the valuation adopted by the architect was an off-hand method and as soon as it is held that it is not an off-hand method, we cannot accept the reasoning of the learned counsel for the assessee. Besides, even in 1957 in spite of tenants not paying higher rent, the value of the property was Rs. 3,50,000. The value of the property during the accounting year was taken at Rs. 4 lakhs and this cannot be said to be unreasonable. The Supreme Court in the case of Corporation of Calcutta v. Padma Devi : [1962]3SCR49 , has stated that: ' 'Reasonable' signifies 'in accordance with reason.' In the ultimate analysis it is a question of fact. Whether a particular act is reasonable or not depends on the circumstances in a given situation,' On the basis of the given situation found in the case of Radha Devi Jalan : [1968]67ITR761(Cal) , the Tribunal accepted the method of valuation. But such a situation is lacking specially in the present bargain. In the present premises it cannot be held that there was no extraneous circumstances. Thus in, view of our discussion hereinbefore, we uphold the order of the Appellate Assistant Commissioner and dismiss the assessee's appeal.'

5. In the circumstances aforesaid, the question as indicated above has been referred. We must bear in mind that in order to attract Section 45 of the I.T. Act, 'profits and gains' must arise from the transfer of a capital asset. Section 52 of the I.T. Act, 1961, provides for consideration of transfer in cases of understatement. In this case it is apparent that the sale was more or less to a party to whom the assessee was closely connected and from one point of view it may be considered to be a favoured party. But the difficulty in accepting the Revenue's contention in this case is that there is no finding by any of the authorities that in fact the assessee had received more as a consideration than what the assessee had indicated in the statement, i e., more than Rs. 3 lakhs. If that is the position, then the question is whether any amount in this case, i. e., Rs. 1 lakh, said to be the difference between Rs. 3 lakhs, the price received and Rs. 4 lakhs, being the market value of the property, can be assessed to tax. There was some argument whether Section 52 of the Act was correctly invoked or not. We are not concerned with it. We are proceeding on the basis that Section 52 can be applied but in order to make the provisions of Section 52 of the Act applicable it must be established by the Revenue, the onus being on it, that the assessee received more but had

declared less, i.e., the assessee must have received an amount higher than what it had declared. Once it was established that the assessee had received more than it had declared then how much higher may be deduced from the circumstances by the adjudicating authority. This position has been enunciated by the Supreme Court in the case of K. P. Varghese v. ITO : [1981]131ITR597(SC) where the Supreme Court has observed at p. 618 of the report as follows :

'We must, therefore, hold that Sub-section (2) of Section 52 can be invoked only where the consideration for the transfer has been understated by the assessee or, in other words, the consideration actually received by the assessee is more than what is declared or disclosed by him and the burden of proving such an understatement or concealment is on the Revenue. This burden may be discharged by the Revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has not correctly declared or disclosed the consideration received by him and there is an understatement or concealment of the consideration in respect of the transfer. Sub-section (2) has no application in the case of an honest and bona fide transaction where the consideration received by the assessee has been correctly declared or disclosed by him, and there is no concealment or suppression of the consideration. We find that in the present case, it was not the contention of the revenue that the property was sold by the assessee to his daughter-in-law and five of his children for a consideration which was more than the sum of Rs. 16,500 shown to be the consideration for the property in the instrument of transfer and there was an understatement or concealment of the consideration in respect of the transfer. It was common ground between the parties and that was a finding of fact reached by the I.T. authorities that the transfer of the property by the assessee was a perfectly honest and bona fide transaction where the full value of the consideration received by the assessee was correctly disclosed at the figure of Rs. 16,500, Therefore, on the construction placed by us, Sub-section (2) had no application to the present case and the ITO could have no reason to believe that any part of the income of the assessee had escaped assessment so as to justify the issue of a notice under Section 148. The order of reassessment made by the ITO pursuant to the notice issued under Section 148 was accordingly without jurisdiction and the majority judges of the Full Bench were in error in refusing to quash it.'

6. Applying the ratio of the said principle of the Supreme Court in the facts found in the instant case we must, therefore, answer the question in the negative and in favour of the assessee.

7. In the facts and circumstances of this case, parties will pay and bear their own costs.

Suhas Chandra Sen, J.

8. I agree.

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