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Court : Kolkata

Decided On : Jan-30-2001

Reported in : [2001]80ITD58(Cal)

Appellant : ici India Ltd.

Respondent : Dy. Cit

Advocate for Pet/Ap. : Dr. D. Pal, *for the Assessee* A.K. Das, *for the Revenue*

Judgement :

ORDER

S. Bandyopadhyay, A.M

Since the main issue involved in these two appeals filed by the assessee, for the two successive years, is common, the appeals have been consolidated and a common order is being passed for the sake of convenience.

2. The facts of the case, as discussed by both the lower authorities, are as under.

The assessee was the leasehold owner of a property at Bombay known by the name 'Crescent House' comprising of the ground, mezzanine, first, second and the third floors of the building. On 9-9-1989, the assessee entered into an agreement with M/s. Reliance Industries Limited (hereinafter referred to as 'Reliance') for sale of the property to the latter party for a total consideration of Rs. 27 crores. An advance of Rs. 18.9 crores was received by the assessee in certain instalments

upto the period ended 31-3-90. The actual Conveyance of the property by a Registered Deed was, however, remaining pending because of lack of completion of certain sale formalities and also non-receipt of approval from the Bombay Port Trust being the owner of the land. During the previous year, corresponding to the assessment year 1991-92, the assessee entered into a Memorandum of Understanding (hereinafter referred to as the MoU) with Reliance. The actual date of the MoU was 3-8-1990. In accordance with this MoU, it was decided upon that the advance of Rs. 18.9 crores received by the assessee would become non-refundable. The assessee-company also agreed to grant Reliance, i.e., the purchaser, a licence to use the basement, ground floor and also the first floor of the said property. It is required to be mentioned in this connection that as per clause 20 of the original agreement dated 9-9-1989, it had been decided upon that vacant possession of the basement, ground and first floors would have to be given by the assessee to the purchaser immediately upon execution of the Deed of Assignment of the property. It was furthermore clarified that possession of the second floor of the property, would be transferred by the assessee after one year from the execution of the aforesaid Deed of Assignment of payment of full purchase price, whichever would be earlier. So far as the third floor of the property is concerned, it was mentioned that the said floor, being under the occupation of government agencies and being also subject to a requisition notice issued by the government, it would not be possible for the assessee to hand over vacant possession of the third floor to the purchaser. On the basis of the above MoU and consequent granting of a licence to the purchaser to use the basement, ground floor and the first floor of the property during the period corresponding to the assessment year 1991-92, the assessee offered the amount of Rs. 18.9 crores received by it till then as the consideration for sale of the capital asset to that extent, in accordance with the extended definition of 'transfer' in relation to a capital asset as provided in section 2(47)(v) of the Income Tax Act, 1961 in its return of income for the assessment year 1991-92 and also wanted to be assessed to capital gains in respect of the aforesaid portion of the property in that year. The actual assignment of the property by way of registered Conveyance Deed was, however, ultimately completed during the period corresponding to the assessment year 1992-93 and, presumably, the assessee received the balance

amount out of the total consideration stipulated at Rs. 27 crores. In its return of income submitted for the assessment year 1992-93, the assessee-company showed capital gains in respect of the balance amount of the consideration being Rs. 8.1 crores.

3. In the assessment order for the assessment year 1991-92, the assessing officer (assessing officer) made a detailed discussion of the facts as well as of the legal position involved therein. He was of the opinion that under the MoU the assessee merely granted a licence to Reliance to use the basement, ground and first floors of the property and did not exactly hand over the possession in respect of those portions of the property as is required in connection with an outright sale of an immovable property. In this connection, he referred to certain stipulations in the MoU like at paragraph 2 (page 5) stating that the purchaser (Reliance) might carry out repairs and renovations to the licensed premises after giving intimation of the same to the Vendor (the assessee) but without affecting the Vendors' rights and interest into and upon the said property, paragraph 9 (page 9) mentioning that the purchaser shall pay to the Vendor on demand the actual charges for the electricity and water consumed; and also paragraph 11 (page 9) stating that the purchaser shall pay to the Vendor on demand operating and maintenance costs/charges in respect of the aforesaid property and the lifts installed in the said property proportionate to the area in the house of the licensing. On the basis of the above discussion, the assessing officer ultimately held that it cannot be said that possession of the property, or even a part thereof, had been handed over to Reliance in the real sense involving 'part performance' of the Agreement for sale. It was contended by the assessing officer that the assessee had merely allowed Reliance to use the property as a licensee.

4. Another point which was also emphasised upon by the assessing officer was that the property was agreed upon to be sold as a whole and the transaction should, therefore, be considered as one and sole transaction. The assessing officer thus contended that it would not be possible to conceive of the property having been sold in parts and hence there could not be any question of subjecting the sale consideration of the property to capital gains tax in two different years. The assessing officer thus finally held that the property having ultimately been sold

legally during the year corresponding to the assessment year 1992-93, the capital gains tax in respect of the entire sale consideration was liable to be assessed in the assessment year 1992-93 alone. Accordingly he assessed the capital gains tax in respect of the entire property in the assessment year 1992-93.

So far as the assessment year 1991-92 is concerned, the assessing officer was of the opinion that no part of the capital gains tax was required to be assessed in this year. However, since the assessee had itself disclosed the capital gains tax in respect of a part of the property in its return for that assessment year, the assessing officer included the amount of Rs. 12,01,41,997 being short-term capital gains in respect of the part of the property in the total income of the assessee for the assessment year 1991-92, on a protective basis.

5. The Commissioner (Appeals) passed a combined appellate order for both the years on 29-12-1995. She upheld the contentions of the assessing officer, as discussed above, and agreed with him that the property should be considered as having been transferred, as a whole, in the year corresponding to the assessment year 1992-93 and, therefore, the entire capital gains tax would be liable to be assessed to tax in that year alone. She, therefore, upheld the order of the assessing officer for the assessment year 1992-93. At the same time again, she deleted the protective inclusion of the amount of Rs. 12,01,41,997 in the assessment for the assessment year 1991-92.

6. The assessee challenges the action of the Commissioner (Appeals) in these two appeals for both the years. So far as the assessment year 1991-92 is concerned, it is the plea of the assessee that the amount of capital gains offered by it should have been included in the assessment for that year. As regards the assessment year 1992-93, the assessee contends that only that part of the capital gains tax which was offered by it for that year should have been assessed to tax and the balance amount considered by the assessee to be pertaining to the assessment year 1991-92, should be deleted.

7. At the stage of hearing of the appeals before us, the learned counsel for the assessee, Dr. D. Pal, brings to our notice the provisions of section 2(47)(v) of the Income Tax Act, 1961 and also section 53A of the Transfer of Property Act, 1882.

He contends that, so far as the assessment year 1991-92 is concerned, the handing over of possession of a part of the property, would come within the ambit of 'part performance' of the original agreement as per the provisions of section 53A of the Transfer of Property Act and hence also within the ambit of section 2(47)(v). In this connection, he relies on the judgment of the Supreme Court in the case of CIT v. Podar Cement (P) Ltd. : [1997]226ITR625(SC) to contend that the transfer of 'ownership' of a property, for income-tax purposes, does not require transfer of the full ownership in the true legal sense by way of execution of the Registered Conveyance Deed. On the other hand, the learned Departmental Representative strongly relied on the orders of both the lower authorities.

8. Before proceeding on with the issue any further, it would first of all be required by us to examine the relevant provisions of the two Acts under consideration. So far as the Income Tax Act, 1961 is concerned, the following are the relevant provisions :

'Section 2(47) - 'transfer', in relation to a capital asset, includes

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882);

On the other hand, section 53A of the Transfer of Property Act, 1882 reads as under :

'53A. Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed

therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights or a transferee for consideration who has no notice of the contract or of the part performance thereof.'

9. So far as the present case before us is concerned, there is no doubt about the fact that the assessee, being the vendor in this case, entered into a contract (by agreement dated 9-9-1989) to transfer, for consideration of Rs. 27 crores, the immovable property known as 'Crescent House', by writing signed by the assessee. The assessee was also paid a sum of Rs. 18.9 crores as advance in terms of the said contract and the balance amount was stipulated to be paid on completion of the Conveyance Deed of the property. There is no doubt about the fact that by virtue of the MoU dated 3-8-1990, the above-mentioned amount of Rs. 18.9 crores become non-refundable and was, therefore, considered to be appropriated by the assessee. The transferee, Reliance, performed its part in the contract by payment of the advance as mentioned above and was also willing to pay the balance amount on completion of conveyance of the property. It is also an undisputed fact that by the licence agreement, the possession of a part of the property viz. basement, ground and first floor therein, was handed over to the transferee. The question is now whether the said handing over of the possession is to be considered as merely a licence arrangement enabling the transferee simply to use the property or exact handing over of the possession of that part of the property to Reliance as a purchaser of the property.

We have studied both the agreement dated 9-9-1989 and the MoU dated 3-8-1990 and we are of the opinion that the MoU is merely an addendum or a supplement to the earlier agreement and cannot be considered to form a completely separate and independent licence agreement. The MoU clearly mentions the earlier agreement dated 9-9-1989 and all the terms and contracts of the MoU are actually based on such agreement. It is also mentioned in the MoU that despite best efforts

made by the Vendor, the Trustees of the Port of Bombay had so far not updated its records pertaining to the said property by bringing the name of the Vendor thereon and, therefore, the purchaser were not in a position to obtain permission from the Bombay Port Trust for transfer and assignment of the property. The MoU also mentions the purchaser as having paid to the Vendor the agreed sum of Rs. 18.9 crores leaving a balance of Rs. 8.1 crores. In accordance with the MoU the purchaser obtained the licence to use the basement, ground and first floor of the property, although certain conditionalities were mentioned in the said MoU, as discussed by the assessing officer, yet it is quite clear that those conditions were kept on papers simply for the purpose of safeguarding interests of both the sides till the actual conveyance of the property was completed. As mentioned by us above, even under the original agreement itself, the assessee was not required to hand over immediate possession of the second and third floors of the property even on completion of the conveyance in full legal manner.

Therefore, we are of the opinion that although the MoU speaks of only allowing a licence to the purchaser to use the property, this should be considered as sufficient situation involving actual hand over of the possession of the property in respect of such parts thereof which had been stipulated in the original agreement. Hence, we are of the opinion that the present case would come within the ambit of 'part performance' as mentioned in section 53A of the Transfer of Property Act and, consequently, under the purview of section 2(47)(v) of the Income Tax Act. The assessee should, therefore, be considered to be correct in claiming that by virtue of the extended definition of 'transfer', the capital gains tax in respect of the property should be considered to have arisen in the assessment year 1991-92.

10. At the same time again, we perfectly agree with the assessing officer that this is the case of transfer of a single property. There is a single agreement and most probably by a single Conveyance Deed (a copy of the Conveyance Deed has not been produced on our record by either sides) the property was, ultimately, transferred by the assessee to Reliance. It is nobodys case that the property was divided into parts and the transfers in respect of the different parts of the property took place separately. The entire transfer process is one and indivisible. It is, therefore, not possible to comprehend that a part of the property was transferred

under the deeming provisions of section 2(47)(v) in one year and the balance portion under the actual provisions of section 45 in the later year. The theory of 'part performance' applies to the whole property and hence even though the possession of a part of the property was merely handed over by the assessee in the assessment year 1991-92, it has got to be held that there was 'part performance' by both the sides in respect of agreement for sale of the entire property by the assessee to Reliance in the assessment year 1991-92 itself. Therefore, ultimately, we are of the opinion that the provisions of section 2(47)(v) would apply to the entire property and not to basement, ground and first floors of it only. Furthermore, there is nothing on record to show that the total price of Rs. 27 crores was allocated as Rs. 18.9 crores corresponding to basement, ground and first floors and the balance corresponding to other floors. Ultimately, therefore, we consider that the capital gains under consideration in respect of the entire property is exigible to tax in the assessment year 1991-92 only and not in the assessment year 1992-93 at all.

11. In these appeals, only a portion of the capital gains (most probably corresponding to the consideration amount of Rs. 19.8 crores) has been subjected to tax in the assessment year 1991-92. We confirm the orders of the lower authorities in considering this amount as part of income of the assessee for this year. The appellate ground taken up by the assessee is, therefore, liable to be rejected. At the same time again, we also direct that the department should take appropriate steps to include in the assessment for this year even the balance amount of capital gains which was offered by the assessee in the assessment year 1992-93 and also subjected to tax by the department in that year, though as a portion of the bigger amount taxed in that year.

12. So far as the assessment year 1992-93 is concerned, the assessee challenges the inclusion of Rs. 12 crores (approx.) only in the income for this Year and not the balance amount corresponding to the remaining portion of Rs. 8.1 crores. We are of the opinion that no capital gains tax can be levied in respect of this property in the assessment year 1992-93. Since, however, the claim of the assessee is restricted to Rs. 12 crores (approx.) we allow the appeal of the assessee and delete that amount from the total income of the assessee for this year.

As regards the balance amount, since the assessee is not in appeal before us, we are not in a position to give any relief to it with regard to that portion. We, however, hope that since the entire capital gains tax has been directed by us to be assessed in the assessment year 1991-92, the department would allow relief in respect of the balance portion corresponding to consideration amount of Rs. 8.1 cr. in the assessment year 1992-93.

13. In the assessment year 1992-93, another ground has been taken to the effect that the Debenture Redemption Premium paid by the assessee-company amounting to Rs. 75 lakhs has wrongly been disallowed. The assessing officer discusses in this connection that the assessee paid Rs. 75 lakhs as Debenture Redemption Premium in the previous year relevant to this assessment year. He adds that the claim in the computation of income has been on the basis of deferred revenue expenditure being 1/10th of the provision in each year and amounts to Rs. 10,05,384. The assessing officer states in this connection that the assessee, by referring to certain decisions of court, claimed deduction in respect of the entire amount of Rs. 75 lakhs; as against the earlier claim in respect of Rs. 10,05,384. The assessing officer furthermore states in this connection that on examining the matter, he finds that in earlier years the assessee had made valid and prudent claim in accordance with the accounting norms. In that way, the assessing officer disallowed the fresh claim of Rs. 75 lakhs. At the same time, however, he allowed the original claim to the extent of Rs. 10,05,384.

14. At the stage of hearing before us, the Id. Counsel for the assessee relied on the judgment of the Calcutta High Court in the case of CIT v. Tungabhadra Industries Ltd. : [1994]207ITR553(Cal) . On the other hand, the learned Departmental Representative relied on the Supreme Court decision in the case of Madras Industrial Investment Corpn. Ltd. v. CIT : [1997]225ITR802(SC) .

15. We find that in the above-mentioned judgment in the case of Madras Industrial Investment Corpn. Ltd. (supra), the Supreme Court has indirectly overruled the earlier decision of the Calcutta High Court in the case of Tungabhadra Industries Ltd. (supra). According to the said decision of the Supreme Court the amount of discount allowed by the assessee on debentures in one year is required to be

spread over the entire period of continuation of the debentures. This decision should apply even to the case of allowing premium on the debentures in the year of redemption thereof. We, therefore, direct that instead of allowing the claim of the assessee either at the original stage or at the later stage, as discussed by the assessing officer, the assessee should be entitled to a proportionate allowance in respect of the total amount of premium paid by the assessee corresponding to the total period of continuation of the debentures. The assessing officer should recompute the amount of allowance to be made to the assessee in this regard.

16. In the result, for statistical purposes, the appeal filed by the assessee for the assessment year 1991-92 should be considered to be dismissed, whereas the appeal for the assessment year 1992-93 should be treated as partially allowed to the above-mentioned extent.