HIGH COURT OF ALLAHABAD

Commissioner of Income-tax -I

v.

Smt. Najoo Dara Deboo*

RAJIV SHARMA AND DR. SATISH CHANDRA, JJ.
IT APPEAL NO. 65 OF 2008
SEPTEMBER 16, 2013

ORDER

Dr. Satish Chandra, J. - The present appeal has been filed by the Department under Section 260A of the Income-Tax Act, 1961 against the judgment and order passed by the Income Tax Appellate Tribunal, Lucknow in ITA No. 143/Luc/2003, for the assessment year 1995-96.

2. On 01.04.2008, a Coordinate Bench of this Court has admitted the present appeal, on the following substantial questions of law:—

"1. Whether on the fact and circumstances of the case Income Tax Appellate Tribunal was justified in concluding that there was no extinguishment of right in the property, in question, by the assessee and no transfer of capital asset within the meaning of Section 2(47)(ii) of the Income Tax Act, 1961 during the previous year relevant to the assessment year 1995-96.

2. Whether on the fact and circumstances of the case Income Tax Appellate Tribunal has not erred in law in holding that vide original agreement dated 29.12.1994 registered on 04.01.1995 it was only intended to transfer the impugned property and the transfer took place after March 1997, only, on the basis of a certificate dated 29.08.2000 issued by the builder to this effect, in total disregard to the provisions of Registration Act, 1908.

3. Whether on the fact and circumstances of the case Income Tax Appellate Tribunal was right in law in holding that the impugned property had been converted into stock in trade and thus CBDT Circular No. 791 was applicable, without rebutting the merits of the finding of facts recorded by the Assessing Officer in this respect".

3. The brief facts of the case are that assessee is a widow and 81 years old lady. The assessee is the owner of the premises know as "Dady Villa", situated at R.F. Bahadurji Marg (Meera Bai Marg), Lucknow. On 29.12.1994, the assessee entered into an agreement with the builder Shivalik Real Estate Promoters Pvt. Ltd. As per agreement, an area of 18603 sq. ft. was to be developed into a multi story apartment. The builder developed the land and constructed a complex known as "Khushnuma Complex". The built up area was 1,670.3147 sq. mtrs. The builder was to give 35% of the built up area to the assessee or its sale value if the assessee wanted it to be sold through the builder. The builder was to get 65% of the built up area along with undivided 65% interest on the land. On 28.03.2000, the Assessing Officer made assessment under Section 147 of the Act holding that since assessee had handed over the possession of the plot to the builder in pursuance of an agreement for transfer i.e. in part performance of a contract referred to in Section 53A of the Transfer of Property Act, the transfer took place during the previous year itself in view of the provisions of Section 2(47) of the Act.

4. Being aggrieved, the assessee has filed an appeal before the CIT(A), who had set aside the assessment

order with a direction to the Assessing Officer to frame the same *de-novo*. Accordingly, in the second round, vide order dated 26.03.2002, the Assessing Officer has framed the assessment, where he has worked out cost of acquisition after considering the circle rate of residential land at Meera Bai Marg w.e.f. 01.04.1981. Finally, the Assessing Officer has worked out the total income of the assessee at Rs.24,98,920/-, which include rental income at Rs.37,776/- and long term capital gains at Rs.24,61,147/- and made the addition for the long term capital gain. However, the same was deleted not only by first appellate authority but also by the Tribunal. Being aggrieved, the Department has filed the present appeal.

5. With this background, Sri D.D. Chopra, learned counsel for the Department has justified the order passed by the Assessing Officer. At the strength of written note, he submits that the Circular No. 791 relied upon by the Tribunal is not at all applicable to the facts of the case because the circular was essentially meant for tax exemption on the sale of capital assets converted into stock in trade only in reference to its qualifications for deduction under Sections 54EA, 54EB & 54EC.

He also submits that for the purposes of Section 2(47) it is immaterial as to whether any sale consideration has been received or construction started or not. The said agreement itself establishes the fact that there was an extinguishment of assessee's right in the land, to the extent of 65% of the land if not more, in so far as the builder acquired an enforceable right to develop the plot within the meaning of definition of 'transfer' under Section 2(47)(ii) of the Income Tax Act, 1961. Lastly, he submits that the capital gain has been paid by the assessee during the assessment year 1998-99 to 2000-01, but it is not relevant to the facts of the case, because it is no longer *res integra* by virtue of pronouncement made by the Hon'ble Supreme Court "that a document so long as it is not registered is not valid, yet once it is registered it takes the effect from the date of execution." Lastly, he submits that in the instant case, the agreement in question was not a registered documents.

6. On the other hand, none appeared on behalf of the assessee, though the name of Sri Mudit Agarwal is printed in the cause list.

7. After hearing learned counsel for the Department and on perusal of the record, it appears that in the instant case, the Assessing Officer has passed an order under Section 143(3)/144/148/251 of the Income Tax Act, 1961, as mentioned by the CIT(A) in his order. But fact remains that if return was not filed then assessment order could not have been passed ex-parte under Section 144. If the return was filed, assessment order could have been framed only under Section 143(3) of the Act. Thus, the Assessing Officer has framed the assessment order under the contradictory sections, which cannot be held as a valid assessment order. So, the CIT(A) has cancelled the assessment order. The Tribunal has deleted the addition on merit.

8. From the record, it appears that the assessee has paid capital gain since the assessment year 1998-99 to 2000-01, as mentioned in the impugned order.

We have examined the agreement, where Clauses 3 & 14 states that :—

> "3. That by the development of this piece of land and built-up area of about 1670.3147 Sq. Meters. The 'SECOND PARTY' will give 35% of this proposed Build-up area to the 'FIRST PARTY' or its sale value if 'FIRST PARTY' wants it to be sold through 'SECOND PARTY'. The 'SECOND PARTY' will get 65% of the built-up area and by selling it shall meet all expenses of construction, development and any other expenses incurred is executing the 'PROJECT'.
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> 14. That Sale/Transfer Deeds in respect of the building shall be executed both the parties in favour of purchaser/allottees on the completion of building."

9. It may be mentioned that the capital gain can be charged only on receipt of the sale consideration and not otherwise. How can a person pay the capital gain if he has not received any amount. In the instant case,

the assessee has honestly disclosed the capital gain for the assessment year 1998-99 to 2000-01, when the flats/areas were sold and consideration was received. During the year under consideration, only an agreement was signed. No money was received. So, there is no question to pay the capital gain. When it is so, then we find no reason to interfere with impugned order passed by the Tribunal. The same are hereby sustained along with reasons mentioned therein.

10. The answer to the substantial questions of law are in favour of the assessee and against the department.

In view of above, the appeal filed by the department is dismissed, as stated above.

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*In favour of assessee.

Arising out of IT Appeal No. 143/Luck/2003.