

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI ' F ' BENCH
MUMBAI BENCHES, MUMBAI**

BEFORE SHRI VIJAY PAL RAO, JM & SHRI N K BILLAIYA, AM

ITA No. 3144/Mum/2010
(Assessment Year 2006-07)

Smt Maharukh Murad Oomrigar 701 Foreshore Apartment Juhu Tara Road, Mumbai 49	Vs	The Income Tax Officer Ward 21 (1)(3), Mumbai
(Appellant)		(Respondent)

PAN No.	AAAPO2718B
Assessee by	Shri K Gopal
Revenue by	Shi M Rajan
Dt.of hearing	23 rd May 2012
Dt of pronouncement	8 th June 2012

ORDER

PER VIJAY PAL RAO, JM

This appeal by the assessee is directed against the order dated 4.12.2009 of the Commissioner of Income Tax (Appeals) for the Assessment Year 2006-07.

2 There is a delay of 37 days in filing the present appeal by the assessee. The assessee has filed a petition for condonation of delay along with an affidavit stating that the assessee was out of India and thereafter, the mother of the assessee was hospitalised; therefore, the assessee could not take necessary steps to file the appeal within the time limit.

3 We have heard the Id AR of the assessee as well as the Id DR and considered the relevant material on record. We are satisfied with the reasons explained by the assessee for the delay in filing the present appeal. Accordingly, we condone the delay of 37 days in filing the appeal.

4 The assessee has raised the following effective grounds in this appeal:

1. The Ld. Commissioner of Income Tax (Appeals) [hereinafter referred to as "CIT(A)"] has erred in confirming the action of the Assessing Officer in determining the total income of the appellant at Rs. 49,24,380/- without appreciating the facts and circumstances of the case.

2 The Ld. CIT(A) failed to appreciate that the amount of Rs. 1,40,00,000/- received by the appellant is capital receipt hence the same is not eligible to taxation.

3 The Ld. CIT(A) failed to appreciate that the amount of Rs. 1,40,00,000/- is a capital receipt as same is a compensation. Hence the same is not taxable as Long Term Capital Gain also.

4. Without prejudice to the above Ld. CIT(A) erred in confirming the Assessing Officer action to modify the computation of capital gains adopted by the appellant. Hence the addition of Rs. 43,35,154 is not at all justified and the same may be deleted.

5. The Ld. CIT(A) erred in confirming the disallowance of 1,01,962/- being 25% of the expenses incurred towards the conducting the activity of nursery school. The disallowance of Rs. 1,01,0962/- is not at all justified and same may be deleted.

6. The Appellant denies any liability to pay interest u/s 234B and 234C. Hence, the same is not leviable.

5 Ground no. 1 is general in nature; therefore, no specific finding is required.

6 Ground nos 2 & 3 regarding taxability of the amount of ₹ 1,40,00,000/- received by the assessee and offered as long term capital gain.

6.1 This issue has been raised by the assessee for the first time before the Tribunal and therefore, the assessee has also filed additional evidence in the shape of paper book no.2 containing pages 34 to 66.

7 We have heard the Id AR of the assessee as well as the Id DR on the point of admission of new issue of taxability of the amount of ₹ . 1.40 crores received by the assessee as well as the additional evidence. The Id AR of the assessee has

submitted that though the assessee offered the said amount of ₹ 1.40 crores as long term capital gain but the same is compensation received by the assessee to vacate her matrimonial home. Since there is no cost of acquiring the right to occupy and possess the matrimonial house; therefore, the said receipt is capital receipt and hence not taxable.

7.1 The Id AR of the assessee has submitted that the assessee's right to stay, occupy and possess the matrimonial house is by virtue of the marriage of the assessee with her husband and therefore, there is no cost of acquisition of the said right in the matrimonial home. In support of his contention, the Id AR has relied upon the decision of the Hon'ble Gujarat High Court in the case of Commissioner of Income-tax v. Manoharsinhji P. Jadeja reported in 281 ITR 19 (Guj). The Id AR has further submitted that the Assessing Officer has also taken the cost of acquisition of capital asset at nil. Therefore, in the absence of cost of acquisition, the receipt against surrender of right is not taxable under the head 'capital gain'. The Id AR has further submitted that since the issue raised by the assessee goes to the root of the matter and a legal issue; therefore, in support of this issue, the assessee has filed the additional evidence which is relevant for deciding the issue.

7.2 The Id AR has relied upon the decision of the Hon'ble jurisdictional High Court in the case of *Nirmala L. Mehta v. A. Balasubramaniam*, Commissioner of Income-tax reported in 269 ITR 1 on the point that there cannot be any estoppel against making a claim that the income was wrongly offered to tax. The Id AR has also relied upon the decision of the Hon'ble Delhi High Court in the case of *Commissioner of Income-tax v. Bharat General Reinsurance Co. Ltd.* reported in 81 ITR 303 and submitted that offering the income in the return of income would not operate as estoppel against

challenging the validity of taxing the said income is exempt as per the provisions of the Act.

7.3 The Id AR has then referred the various decisions of the Hon'ble jurisdictional High Court in matrimonial disputes being the suit filed by the assessee as well as the assessee's husband in which certain injunction orders were passed by the High Court and thereafter, as per the consent of the parties, the disputes were compromised and settled. Thus, the Id AR has submitted that the assessee has surrendered her right in the matrimonial home, which was protected by the High Court by the interim order as well as confirmation of injunction order. The Id AR has referred the deed of surrender of tenancy dated 29.10.2005 and submitted that the assessee, being the wife of the previous owner of the property in question, surrendered the tenancy rights in favour of the builder/developer against compensation of ₹ 1.40 crores.

7.4 As per the consent order of the High Court, the owner and the developer have agreed to give a permanent alternate accommodation to the assessee and therefore, the compensation received by the assessee is in lieu of permanent accommodation. Thus, the Id AR has submitted that it is not a surrender of tenancy right; but surrender of right to reside and stay in the matrimonial home for which the assessee has incurred no cost. He has relied upon the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. v. Commissioner of Income-tax reported in 229 ITR 383 (SC) and submitted that the additional ground as well as additional evidences may be admitted and the issue may be remanded to the record of the Assessing Officer for considering the additional evidences and decide the grounds raised by the assessee.

7.5 On the other hand, the Id DR has vehemently objected to the admissibility of the additional grounds as well as the additional evidences. He has referred Rule 29 of the ITAT Rules 1963 and submitted that only in the case where the Income Tax Authorities have decided the case without giving sufficient opportunities to the assessee to adduce the evidences, the assessee maybe allowed to produce such additional evidences. The Id DR has submitted that it is not the case of the assessee that the assessee was not given appropriate opportunity to file the evidence; therefore, the assessee is not entitled to produce any additional evidence at this stage on merits. The Id DR further submitted that as per the amended provisions of sec. 55, the cost of tenancy right is taken at nil and therefore, there will be no effect, even there is no actual cost of acquiring the tenancy right and accordingly, the amount received by the assessee on surrender of the same will be taxed as capital gain. He has relied upon the orders of the authorities below.

7.6 Alternatively, the Id DR has submitted that even, if the receipt is not taxable as capital gain, the same is taxable as income from other sources u/s 56 of the I T Act.

7.7 In rebuttal, the Id AR of the assessee has submitted that the issue raised by the assessee is a legal issue and to substantiate the right of the assessee, the assessee is seeking the production of additional evidence. He has further submitted that the agreement of surrender of tenancy right was before the Assessing Officer which describes the rights of the assessee and the additional evidence is only the order of the Hon'ble High Court.

8 We have considered the rival contentions as well as the relevant material on records including the additional evidence filed by the assessee. Though, the issue of taxability of the receipt has been raised for the first time by the assessee before us,

however, since the issue goes to the root of the matter and can be decided on the undisputed fact. Therefore, in view of the decision of the Hon'ble Supreme Court in the case of NTPC (supra), we admit the additional issue/plea raised by the assessee in the ground nos 2 & 3 for adjudication. The additional evidence filed by the assessee is only copies of notice of motion of Hon'ble jurisdictional High Court in the respective suits filed by the assessee and her husband, interim order, conformity order and consent terms order in the suits and the respective appeals filed by the parties before the High Court. Therefore, this additional evidence does not require any investigation at the level of the Assessing Officer ; but the same is relevant material to understand the dispute between the assessee and her husband and the terms of compromise arrived at between the parties. Accordingly, we admit the additional evidences for limited purposes of finding out the true nature of dispute and the terms of agreement. Since the orders of the High Courts do not give or create any right in favour of the parties; but it is only recognition and acceptance of *inter-se* rights of the parties in the matrimonial home. Therefore, the pleadings and the orders filed by the assessee require no further verification or investigation; but require only careful perusal and construction of the terms and conditions thereof.

9 Before we discuss the issue on merits, the brief history of the case is as under:

There were some serious matrimonial disputes between the assessee and her husband which led to matrimonial suit no.38 of 1995 filed by the husband of the assessee before Matrimonial Court at Mumbai. The assessee and her husband also filed petition for interim relief which resulted certain interim order passed by the Court in favour of the assessee. The main dispute was regarding the right of occupation and possession of the property known as Palm Beach Bunglow situated at Juhu Tara Road, Mumbai 400 049.

9.1 In the interim order, the husband of the assessee was restrained in dealing with or create any third party right in respect of the property in question, being matrimonial home. The husband of the assessee subsequently filed an application seeking to withdraw the matrimonial suit, which was permitted by the Court vide order dated 9.6.2000. However, the interim order passed on 3.4.1996 ordered to be in force for further 5 weeks from 9.6.2000 in the modified form. As a result thereof, the husband of the assessee was restrained from disposing of or creating third party rights or initiating any steps regarding development of the property in question or inducting any third person for five weeks from 9.6.2000. The said order was then extended to 21.7.2000. In the meantime, on 20.7.2000, the assessee has also filed a suit no.2929 of 2000 u/s 6 of Specific Relief Act and sought a mandatory order and injunction against the husband for removal of newly erected four concrete walls,, newly placed padlocks/locks on the front entrance door and the newly fixed iron framed grill door with separate locking arrangements.

9.2 By order dated 21.7.2000, the Hon'ble jurisdictional High Court granted ad-interim relief to the assessee as pleaded for removal of;

- i) Newly erected four concrete walls, padlocks/locks on the front entrance door and the newly fixed iron framed grill door;
- (ii) Restrained from any manner directly or indirectly interfering with or obstructing the plaintiff and her daughter's use and occupation of the property in question including the first floor and the entire ground floor compound, lawn and the garden;
- iii) Restrained directly or indirectly transferring, selling, disposing of, alienating, creating third party rights, altering or dealing with in any manner whatsoever with the property in question etc.

9.3 Against the said interim order, the husband of the assessee filed an appeal no.713/2000 which was disposed vide order dated 5.10.2000 whereby the Hon'ble

divisional Bench of the High Court modified the interim order passed by the Single Judge in Suit No.2959/2000 filed by the assessee resulting some stringent conditions were relaxed with respect to the liberty given to the husband to negotiate with third party for development of the property. However, the development, transfer or creating any third party right was allowed only with express permission of the High Court. Subsequently, the assessee and her husband and two other parties namely M/s Dev construction and M/s Manas Properties Pvt Ltd moved the constant terms of compromise arrived at between the parties as incorporated in the minutes order by dated 5.5.2005. The relevant part of the minutes of order in para 5 to 7 are reproduced hereunder:

"5. The Appellant has no objection and hereby gives her consent to the development: of the said Palm Beach property in favour of the Respondent No. 3 being the nominee of the Respondent No. 2 to enable the Respondent No. 3 to develop the property.

6. In consideration of the No Objection and consent given by the Appellant in terms of Clause 3 hereof, the said Mr. Vijay Thakkar of M/s. Manas Properties Private Ltd. have agreed that (i) the Appellant will become a tenant of the Palm Beach Property at or for the rent of Rs. 100/. per month during her life time and the said Mr. Vijay Thakkar of M/s. Manas Properties Private Ltd. will accordingly allow the Appellant to use and occupy the same exclusively, and (ii) the Appellant will be allowed to run her pre-primary school without being required to pay any further rent or compensation for the said "Palm Beach Property" as at present without any hindrance from the said Mr. Vijay Thakkar of M/s. Manas Properties Private Ltd. or his/ their servants and agents.

7. The Appellant has subject to the provisions of Clause 6 hereof further given her no objection and consent to the said Mr. Vijay Thakkar of M/s. Manas Properties Private Ltd. developing the said property by demolishing the bungalow and constructing a new building utilising the entire permissible SI subject to the said Mr. Vijay Thakkar of M/s. Manas Properties Private Limited providing the Appellant permanent alternate accommodation in the new building of an equivalent area on "ownership basis" and compensation for the period of construction."

9.4 The disputes between the parties were stand dissolved and comprised by this minutes of order dated 5.5.2005 and the suit filed by the assessee in 2995 of 2000

stands decreed in terms of the compromise. Accordingly, consequential order dt 6.5.2002 was passed.

9.5 It is clear from the minutes of order dated 5.5.2005 that the assessee gave her consent for development of the property in question in favour of M/s Manas Properties Pvt Ltd as well as Dev Constructions and in consideration, the developers have admitted the assessee as a tenant in the property in question for a rent of ₹ 100/- per month during her life time. This right of the assessee was also continued in the new building and for equallant area to be constructed by the developer.

9.6 It is evident that the tenancy right of the assessee against the developer were created only by virtue of minutes of order dated 5.5.2005 and subsequent order of dated 6.5.2005. Even otherwise, the assessee's right to occupy and possession of the matrimonial house was culminated and transferred into tenancy right against the developer in the existing property and thereafter in the new developed property.

9.7 From the facts of the case as well as from the relevant material as produced by the assessee as additional evidence, it is clear that whatever the right the assessee has finally surrendered vide agreement dt 29.10.2005 is tenancy right of the assessee in the property in question and not any other right than the tenancy right as claimed by the assessee in the fresh/additional issue raised before us.

10 The decision of the Hon'ble Gujart High Court in the case of Manoharsinhji P Jadeja (supra) would not help the case of the assessee because in the said case, the assessee acquired the property by mode of inheritance and the last previous owner of the capital asset acquired it by conquest i. e. without paying any price for acquisition. Therefore, the High Court has held that neither the cost nor the date of acquisition were ascertainable in respect of the long term capital asset and

therefore, the Income Tax Authorities were not right in working out the capital gain so as to bring the same into tax under the head "capital gain" .

10.1 Since the assessment year in the said case was the year 1983-84, which is prior to the amendment of sec 55 and the High Court has observed that the asset in question was not as mentioned under sub.sec. 2 of section 55 therefore, the amendment would not effect the taxability of the said capital asset in question as observed in para 29 & 30

"29 The contention that when the cost of the asset is nil the entire sale consideration is required to be taxed as profits and gains under the head "Capital gains" is also sought to be supported by the amendment in section 55 of the Act. According to learned counsel for the Revenue the principle—that a capital asset which does not have cost of acquisition does not fall within the charging section—is now superseded by the amended provision of section 55 of the Act. However, it requires to be noted that by the Finance Act, 1987 with effect from April 1, 1988, the amendment to section 55 of the Act only ropes in taxability of goodwill on transfer of the same even if there is no cost of acquisition. Similarly, section 55 has been amended from time to time to enable the taxation of other assets wherein no cost of acquisition is envisaged ; tenancy rights, stage carriage permits and, loom hours by the Finance Act, 1994 with effect from April 1, 1995 ; right to manufacture, produce or process any article or thing by the Finance Act, 1997 with effect from April 1, 1988 ; trademark or brand name associated with business by the Finance Act, 2001 with effect from April 1, 2002 ; and right to carry on any business by the Finance Act, 2002 with effect from April 1, 2003.

30 Therefore, even if the amendment is taken into consideration section 55 can be invoked in cases of nil cost of acquisition for the purpose of bringing to tax the entire sale consideration only in relation to the specified assets. The Legislature having amended the said section from time to time has roped in only specified assets as noted hereinbefore. In the circumstances, the amendment instead of working to the advantage of the Revenue goes to indicate that the Legislature does not want to bring within the purview of the tax net all assets (except the specified assets) which do not have cost of acquisition and the entire sale consideration cannot be treated as profits and gains chargeable under the head "Capital gains" by adopting the cost of acquisition as nil."

10.1 It is to be noted that in the case in hand, what has been transferred by the assessee is the tenancy right which is very much part of the capital asset as envisaged in sub.se 2(a) of sec. 55 as under:

"55(2)(a): In relation to a capital asset, being goodwill of a business or a trade mark or brand name associated with a business or a right to manufacture, produce or process any article or thing or right to carry on any business, tenancy rights, stage carriage permits or loom hours:

- i) in the case of acquisition of such asset by the assessee by purchase from a previous owner, means the amount of the purchase price; and
- ii) in any other case not being a case falling under sub clauses (i) to (iv) of sub. sec (1) of sec 49 shall be taken to be nil."

9.1 Sub.sec. 2(a) of sec. 55 stipulates cost of acquisition in relation to asset inter-alia tenancy rights not falling under sub. Clause 1(iv) of sub sec. 1 of sec. 49 of the Act shall be taken to be nil. Hence, as per the amended provisions of sec. 55, cost of acquisition of tenancy rights shall be taken at nil and therefore, there will be no effect even, if the actual cost of acquisition of tenancy rights is nil. The assessee has received the consideration of Rs. 1.40 crores against surrender of tenancy right which is clear from clause (1) of agreement dt 29.10.2005 as under:

"Notwithstanding anything to the contrary contained in the aforesaid Minutes of Order dated 5^o March, 2005 and pursuant to the agreement arrived at between the parties hereto and in consideration of the Landlord agreeing to the Tenant an amount of Rs.1,40,00,000/- (Rupees One Crore Forty Lacs only) by way of compensation in lieu of permanent alternate accommodation to be provided by the Landlord in the proposed new building to be constructed on the said property, the Tenant hereby surrenders and relinquishes free from all encumbrances, all her right, title, interest and claim into or upon the said property known as "Palm Beach Property" more particularly described in the Schedule hereunder written and delineated on the plan thereof hereto annexed and marked as Annexure "A" and thereon shown surrounded by green coloured boundary line as tenant or otherwise in favour of the Landlord against receipt of the aforesaid compensation."

10 In view of the above discussion and in the facts and circumstances of the case, we hold that consideration received by the assessee against surrender of tenancy right is assessable as capital gain and therefore, we do not find any substance or merit in the fresh grounds/plea raised by the assessee and the same is rejected

11 Ground no.4 is regarding addition of ₹ 43,35,154/- in the capital gain.

12 The assessee has estimated the cost of acquisition of the tenancy right at ₹ 10 lacs which was rejected by the Assessing Officer as the Assessing Officer adopted cost of tenancy right at nil. Therefore, the claim of the assessee of adopting cost of acquisition of asset as on 1.4.81 at ₹ 10 lacs is not allowable in view of our findings on the additional issues raised in ground no. 2 & 3; accordingly, the same dismissed.

13 Ground no.5 is regarding disallowance of ₹. 1,01,962/- on account of expenses incurred for conducting the activity of nursery school.

13.1 We have heard the Id AR as well as Id DR and considered the relevant material on record. The assessee claimed total expenses of ₹. 4,07,846/- for running a nursery school. The Assessing Officer disallowed 25% of the expenditure amounting to ₹. 1,01,962 for want of evidence to prove the same.

13.2 On appeal, the Commissioner of Income Tax(Appeals) confirmed the addition made by the Assessing Officer because the assessee did not produce any evidence in support of its claim. The relevant part of the order of the Commissioner of Income Tax (Appeals) in para 4.1 & 4.2 are as under;

4.1. In this regard, the Ld. A.R. of the appellant has stated in the ground of appeal itself that the appellant had to leave Mumbai on 29th August, 2008 and had to stay with her daughter to look after her. Thereafter, she shifted her residence and books were not traceable.

4.2. This clearly establishes the fact that the appellant had no evidence to prove the expenses claimed. Under the circumstances, the A.O. was left with no option to make an estimated disallowance. The same requires no interference. Accordingly, this ground of appeal is dismissed.

14 It is clear from the above findings of the CIT(A) that the assessee failed to produce any evidence to prove the claim of expenses. Even before us, nothing has

been brought in support of the claim. Therefore, we do not find any reason to interfere with the findings of the Commissioner of Income Tax (Appeals) on this issue; accordingly, the same is dismissed.

16 Ground no.6 is regarding levy of penalty u/s 234B and C,

17 Levy of interest u/s 234B and C is consequential in nature; therefore, no finding is required.

18 In the result, the appeal filed by the assessee is dismissed.

Order pronounced on this 8th day of June 2012

Sd/-

Sd/-

(N K BILLAIYA) Accountant Member	(VIJAY PAL RAO) Judicial Member
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Place: Mumbai : Dated: 8th, June 2012

Raj*

Copy forwarded to:

1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

/TRUE COPY/
BY ORDER

Dy /AR, ITAT, Mumbai