IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.06.2019

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN, J.

Tax Case (Appeal) No.1784 of 2008

South India Minerals Corporation,
F-122/3, Sixth Street,
Anna Nagar East, Chennai-600 102. .. Appellant

-vs-

The Assistant Commissioner of Income Tax,
Circle XIV, Chennai. .. Respondent

Appeal under Section 260A of the Income-tax Act, 1961, against the order dated 30.06.2008, made in I.T.A.No.230/Mds/2007 on the file of the Income-tax Appellate Tribunal Bench 'C' Chennai, for the assessment year 1997-98.

For Appellant	:	Mr.A.S.Sriraman for Mr.S.Sridhar
For Respondent	:	M/s.S.Premalatha Junior Standing Counsel for Mr.M.Swaminathan, Senior Standing Counsel

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JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

This appeal, by the appellant/assessee under Section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), is directed against the order dated 30.06.2008, passed by the Income Tax Appellate Tribunal Bench 'C' Chennai (for brevity "the Tribunal") in I.T.A.No.230/Mds/2007 for the assessment year 1997-98.

2.The appeal was admitted, on 17.11.2008, on the following substantial questions of law:-

> *"(i) Whether the Appellate Tribunal is correct in law in sustaining the assessment of Short Term Capital Gains relating to the transfer of the two industrial sheds on 31.1.1996 and September, 1996 based on the sale deeds executed in favour of the Appellant as on 11.1.1996 by the SIDCO while ignoring totally the allotment of the said sheds on 11.8.1988 and further while wrongly interpreting the lease-cum-sale deed dated 6.2.1989, which were the basis for the claim of assessment as Long Term Capital Gains?*
>
> *(ii) Whether the Appellate Tribunal is correct in*

law in sustaining the action of the Lower Authorities in taxing the capital gains arising or accruing as a result of transfer of two industrial sheds as Short Term Capital Gains brushing aside the definition of Short Term Capital Assets in Section 2 (42A) of the Act as the definition of transfer in Section 2 (47) of the Act, which definitions justify the return of capital gains as Long Term Capital Gains by the Appellant?

(iii) Whether the Tribunal is correct in law in sustaining the taxation of Short Term Capital Gains from the transfer of two industrial sheds even though the effect of the sale deed executed by SIDCO on 11.1.1996 in favour of the Appellant relates back to the date of allotment of the said sheds namely, 11.8.1988, justifying the return of income filed for the above Assessment Year?"

3.The assessee was allotted two industrial sheds by the Small Industries Development Corporation (SIDCO), vide allotment order dated 11.08.1988. The tentative cost of the land and building was fixed at Rs.8,34,600/- and the assessee was required to pay 20% of the margin money being Rs.1,66,920/- and service charges of 5%, i.e., Rs.41,730/-. The allotment order dated 11.08.1988 contains various conditions. The assessee was put in possession of the sheds soon after it was allotted in August, 1988 and continued to be in possession and enjoyment of the industrial sheds. After payment of the entire sale consideration of Rs.8,34,600/-, SIDCO executed a sale deed in favour of the assessee, vide sale deed dated 11.01.1996 registered as Document No.318/1996 on the file of the Joint Sub Registrar II, Chengalput. The assessee sold the two sheds which were allotted to them, to two different purchasers in the year 1996, that is, during January and September, 1996.

4.For the assessment year under question, namely 1997-98, the assessee filed return of income on 25.01.1999, which was processed under Section 143(1) of the Act. In the returns, the Assessing Officer observed that the capital gains on sale of industrial sheds should be assessed under short-term capital gains as against the computation furnished by the assessee in the return of income. For such reason, notice under Section 148 of the Act was issued on 11.07.2003. After receiving the reply from the assessee, the assessment was completed vide order dated 31.12.2004. The Assessing Officer held that the assessee had sold the industrial sheds which were allotted to them by SIDCO and the sheds were purchased only on 11.01.1996 and sold on 31.01.1996 and the assessee having become the owner of the property only in the year 1996, has held the property only for a period less than 12 months. Therefore, capital gains arising on the transfer has to be treated under short-term capital gains. Accordingly, the computation of capital gains was reworked. The assessee preferred appeal before the Commissioner of Income Tax (Appeals) XII, Chennai (for brevity "the CIT(A)"), in I.T.A.No.144/2004-05. The CIT(A), by order dated 23.09.2006, affirmed the order of the assessing authority and the appeal stood dismissed. Challenging the same, the assessee preferred appeal before the Tribunal. The Tribunal by the impugned order confirmed the order passed by the CIT(A). This is how the assessee is before us by way of this appeal.

5.We have heard Mr.A.S.Sriraman, learned counsel for Mr.S.Sridhar, learned counsel for the appellant/assessee; and M/s.S.Premalatha, learned Junior Standing Counsel for Mr.M.Swaminathan, learned Senior Standing Counsel for the respondent/Revenue.

6.The short issue which falls for consideration is the date to be reckoned for the purposes of computing the capital gains, in other words, it has to be seen as to whether the capital gains arising on the transfer has to be treated as the short-term capital gains or a long term capital gain as claimed by the assessee. To arrive at a decision to this question, we need to necessarily look into the factual position, more particularly, the terms and conditions of allotment. The promoter of the industrial establishment is a wholly owned Government of Tamil Nadu Undertaking. The allotment is made to the successful applicants and an order of allotment is issued which, in fact, is the vital document, by which, the assessee acquired right to enter upon the property.

7.The order of allotment states that the assessee has executed the sale deed before taking over possession of the property. It is not in dispute that the assessee has complied all those conditions and there is no breach of any of the conditions contained in the order of allotment or the lease-cum-sale deed. As pointed out earlier, tentative cost is fixed by the SIDCO while allotting the property which in the instant case is Rs.8,34,600/-, 20% of the tentative cost of the land and building allotted to the assessee is recovered as margin money that being a sum of Rs.1,66,920/-. The balance cost of the sheds has to be paid with interest in ten equal half yearly instalments after the expiry of two years moratorium period, as per the schedule given separately. The moratorium interest shall be paid which will be raised by the Branch Office at Chengalput. The moratorium period for the commencement of repayment is two years from the date of financial effect. Thus, the amount which is paid by the assessee as margin money and the subsequent payment effected by the assessee in ten equal half yearly instalments after the expiry of moratorium period are all to be reckoned to be part of the sale consideration payable for the industrial sheds.

8.The Assessing Officer, the CIT(A) and the Tribunal have held that the assessee becomes the owner of the property only on 11.01.1996 and having transferred the property in about 12 months' time, the capital gains arising there from should be computed as short-term capital asset. To examine the correctness of such decision, we need to necessarily take note of the definition of "short-term capital asset" under Section 2(42A) of the Act which reads as follows:-

> *"Section 2(42A):-*
>
> *Short-term capital asset" means a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer."*

9.In terms of the above definition, short-term capital asset means a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer. The word which is of at most significance in Section 2(42A) of the Act is the word "held". The definition does not use the expression "purchase" or "owned", but specifically uses the word "held". We are not expected to add any words or phrases in a statute, more particularly, in a taxation statute and the same has to be read as it is. Apart from the above definition, the definition of the word "transfer" also assumes significance in the instant case, which has been defined under Section 2(47) of the Act. The definition stood amended and sub-Clause (v) was inserted by Finance Act, 1987 with effect from 01.04.1998. The said provision reads as follows:-

> *"Section 2(47)(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."*

10.In terms of sub-Clause (v) of Section 2(47) of the Act, any transaction involving 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 (hereinafter referred to as "the TP Act") will also fall within the ambit of transfer. Thus, in our considered view, on a conjoint reading of Section 2(42A) and Section 2(47)(v) of the Act, makes it evidently clear that holding of property does not essentially mean holding of a property pursuant to an absolute deed.

11.We would refer to some of the conditions in the agreement, which are relevant for the purposes of this case. The agreement between SIDCO and the assessee refers the assessee as the "lessee purchaser". The agreement specifically states that the price of the sheds has been tentatively fixed by SIDCO and part of this has already been paid by the assessee and the balance amount was agreed to be paid in instalments. Further, the agreement states that SIDCO had transferred the property to the firm by way of lease for the time being with the ultimate object of selling the property to the lessee purchaser, the firm, but on the fulfilment of the terms and conditions laid down therein.

12.As pointed out earlier, there is no allegation against the assessee that they have flouted the terms and conditions laid down by

SIDCO. Thus, for all practical purposes, the assessee was treated to be the owner of the property except that he was not entitled to transfer, assign or sublet the industrial sheds. The sale deed also imposes certain conditions, but those conditions can operate only for the time limit prescribed therein and there is no time limit for the assessee to obtain permission from the SIDCO. The sale deed clearly states that the entire sale consideration of Rs.8,34,600/- was paid by the assessee. Even as per the terms and conditions, 20% of the margin money has to be paid by the assessee and they were granted moratorium period after which they have to pay the balance amount in 10 equal half yearly instalments. All these conditions have been complied with by the assessee. Thus, considering the totality of the factual matrix in the instant case, it has to be held that the assessee has been holding the property ever since the date of allotment, i.e., 11.08.1988.

13.For the purposes of determining whether it is a short-term capital gain or a long term capital gain, the CIT(A) while rejecting the assessee's appeal, placed heavy reliance on the decision of the High Court of Karnataka in the case of ***CIT vs. V.V.Mody*** reported in ***(1996) 218 ITR 0001.*** Firstly, the facts of the said case are slightly different from the case on hand. Apart from that, the said decision was rendered prior to insertion of sub-Clause (v) to Section 2(47) of the Act and therefore, in our considered view, the same could not have been applied to the facts of the present case.

14.Our view is strengthened by the decision of the Karnataka High Court in the case of ***Income Tax Officer Ward 6(1) vs. R.Sathyanarayana, I.T.A.No.25 of 2001, dated 17.12.2007*** wherein, the Court took note of the fact that the assessee was put in possession of the property in 1992 and was enjoying the property as that of an absolute owner except to fulfil the terms and conditions of the lease-cum-sale deed. In other words, the assessee was enjoying the property as an owner and that he was put in possession of the property in terms of the agreement and such possession has to be treated as if he was enjoying the property under the part performance of the contract as defined under Section 53A of the TP Act. Thus, the Court held that if the assessee was enjoying the property under the provisions of the TP Act, it has to be considered the date of ownership from the date on which he was put in possession of the property. Accordingly, the Court held that the transaction has to be treated as a long term capital gains, as the assessee was enjoying the property for more than 36 months.

15.In the case of ***Commissioner of Income-tax, Central Circle vs. Ved Prakash Rakhra, [2012] 26 taxmann.com 166 (Karnataka),*** the Court took note of the decision in the case of ***V.V.Mody*** (supra) and after noting that the said decision refers to the insertion of sub-Clause (v) to Section 2(47) of the Act, held that insertion of sub-Clause (v), which provides that any transaction involving 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 TP Act, will also come within the ambit of transfer is relevant.

16.The decision of the Hon'ble Division Bench of this Court in the case of ***Commissioner of Income-tax, Salary Circle, Chennai, vs. S.R.Jeyashankar, [2015] 373 ITR 120 (Madras)*** was considered as a case pertaining to an assessee who had entered into an agreement with a builder for purchase of undivided share of land. The Court took note of the terms and conditions of the agreement and the Circular of the Board in Circular No.471, dated 15.10.1986, and held that the date of allotment of flat shall be treated as case of construction for the purpose of capital gain.

17.The learned counsel for the Revenue strenuously contended that the circular issued by the Central Board was, in particular, with reference to Sections 54 and 54A of the TP, 1882, and also for the purposes of residential accommodation. Therefore, the circular can have no impact on the present appeal.

18.We agree with the learned counsel for the Revenue to a certain extent that the circular was issued bearing in mind the cases arising under Sections 54 and 54A of the TP Act, more particularly, relating to residential accommodation, but what we note from the circular is that the Board held that the date of allotment of the flat should be reckoned for the purposes of computing the capital gain. We would be well justified in applying the said decision of the Board to the case on hand also, though the present case does not relate to a residential accommodation. In any event, the terms and conditions of the agreement are more or less similar and both are wholly owned Government of Tamil Nadu Undertakings which have allotted the properties, that is, in the case of the assessee which has been allotted by the SIDCO and in the circular issued by the Board, it is an allotment by the Delhi Development Authority.

19.Thus, we are of the clear view that the order passed by the Assessing Officer treating the industrial sheds as a short-term capital asset is incorrect and it should be treated as a long term capital asset and the gains arising therefrom should be assessed as low tax effect.

20.For all the above reasons, the appeal is allowed and the substantial questions of law are answered in favour of the appellant/assessee. No costs.

(T.S.S., J.) (V.B.S., J.)
04.06.2019

Index : Yes/No
Speaking/Non-Speaking Order

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To

1.The Assistant Commissioner of Income Tax,
Circle XIV, Chennai-6.

2.Commissioner of Income Tax (Appeals)-XII, Chennai.

3.The Income Tax Appellate Tribunal Bench 'C' Chennai.

T.S.Sivagnanam, J.
and
V.Bhavani Subbaroyan, J.

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T.C.(A) No.1784 of 2008

04.06.2019