IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.06.2019

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

Tax Case Appeal No.289 of 2019
and C.M.P.No.11113 of 2019

Shri C.Shrinivasan,
Block -VI, Flat No.3C,
Rani Meyyammai Towers,
MRC Nagar, Chennai-600 032.
PAN : BMGPS0045E .. Appellant/Respondent

-vs-

The Deputy Commissioner of Income Tax,
Corporate Circle 3(2),
Nungambakkam, Chennai-600 034. .. Respondent/Appellant

Tax Case Appeal filed under Section 260A of the Income-tax Act, 1961 against the order dated 31.01.2019 in I.T.A.No.3083/Chny/2017 on the file of the Income-Tax Appellate Tribunal 'A' Bench, Chennai, for the assessment year 2010-11 against the order of the Commissioner of Income Tax (A)-12,Chennai 34,dated 11.10.2017 made in ITA . NO. 251/CIT(A)-12/2013-14, and against the Assessment order passed by the Joint Commissioner of Income Tax , Business Range XV Chennai dated 28.03.2013 made in GIR NO./PA.NO.BMGP50045E.

For Appellant : Mr.Vijayaraghavan,
For M/s.Subbaraya Aiyar,
Padmanabhan & Ramamani

For Respondent : Mr.M.Swaminathan,
Senior Standing Counsel
and Mrs.V.Pushpa,
Junior Standing Counsel

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JUDGMENT

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

This appeal, by the appellant/assessee filed under Section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), is directed against the order dated 31.01.2019, passed by the Income Tax Appellate Tribunal Madras "A" Bench, Chennai ("the Tribunal"), in I.T.A.No.3083/Chny/2017, for the assessment year 2010-11.

2.The above appeal has been filed raising the following substantial questions of law:-

> "(i) Whether the Tribunal had right in law in holding that the capital gains arose and is taxable in the Assessment Year 2010-11 when the Assessee has offered capital gains tax on the same transaction in his return of income for Assessment Year 2009-10?
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> (ii) Whether the Tribunal was right in law in holding that since the assessee has not registered the sale agreement as per section 17A of Transfer of Property Act, the sale/transfer took place only on the date of sale deed executed on 27.4.2009 and hence the capital gain is taxable in the assessment year 2010-11, without considering that on the facts of the case transfer has taken place in the year relevant to AY 2009-10, as per provisions of sec 2(47)(vi) and the capital gains offered has been assessed and has reached finality?
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> (iii) Whether the Tribunal erred in basing their decision regarding transfer of property u/s 2(47) considering only sub section (v) of sec 2(47) of the Act without considering the applicability of sub-clause (vi) of Section 2(47) to power of attorney arrangements, in deciding whether transfer of property took place under that sub-clause in the AY 2009-10?
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> (iv) Whether the Tribunal erred in law in not following the Judgment of the Jurisdictional High Court in the case of other co-owners Smt. P.T. Geetha Ramani & Shri P.N.Thiagarajan vide Tax Case Appeal Nos.675 & 676 of 2017 dated 14.12.2017 and hold that the year of accrual of capital gains is the same as that of the co-owners in

respect of transfer of the very same property on the very same documents and transaction?

(v) The Tribunal erred in law in directing the CIT(A) to consider only sec 2 (47)(v) in the light of the decision of the Apex Court, instead of directing the CIT(A) to decide the issue in accordance with the applicable provisions of the Act."

3.We have heard Mr.Vijayaraghavan, learned counsel for M/s.Subbaraya Aiyar, Padmanabhan & Ramamani, for the appellant/assessee; and Mr.M.Swaminathan, learned Senior Standing Counsel and Mrs.V.Pushpa, learned Junior Standing Counsel for the respondent/Revenue.

4.With consent of the learned counsel on either side, this appeal is taken for final disposal at the admission stage itself.

5.We need not labour much to answer the substantial questions of law raised for consideration, as in the connected matter, that is, pertaining to the other co-owners, this Court had an occasion to test the correctness of the order passed by the Tribunal dated 31.01.2017, in T.C.A.Nos.675 and 676 of 2017. In the said cases, identical substantial questions of law were raised at the instance of the Revenue.

6.The sum and substance of the contention raised by the Revenue is that whether, the Tribunal was right in holding that the transfer of property has taken place in the assessment year 2009-10 relying on an unregistered sale agreement whereas the actual sale deed was registered in the assessment year 2010-11. The other issue was whether the Tribunal was right in upholding that the transfer of the impugned property took place in the assessment year 2009-10 without considering the provisions of Section 53A read with Section 17(1A) of the Transfer of Property Act, 1882 (hereinafter referred to as "the TP Act") as amended in 2001.

7.The Court considered the contentions raised by the Revenue, heard the assessee and dismissed the appeals by common judgment dated 14.12.2017. The operative portion of the judgment read as follows:-

"6.Aggrieved by such orders, the assessees preferred appeals before the Commissioner of Income Tax (Appeals) reiterating the stand, which they had taken before the Assessing Officer. The

> Commissioner of Income Tax (Appeals) considered the sale agreement and also the transaction, which took place in the financial year 2008-09 and held that the assessees received the full sale consideration though the property was registered by the power of attorney holder in 2009. After considering the provisions of Section 2(47) of the Income Tax Act and Section 53A of the Transfer of Property Act and the decision of this Court in the case of D.Kasthuri vs. CIT [reported in (2010) 323 ITR 40], it was held that the capital gains arose to the assessees on the basis of the sale agreement between the vendor and the vendee and applied the provisions of Section 2(47)(v) of the Income Tax Act and the transfer is complete in all aspects.
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> 7.The Tribunal noted the findings rendered by the Commissioner of Income Tax (Appeals) in paragraph 32 of its order and held that the observation of the Commissioner of Income Tax (Appeals) that the assessee had complied with the provisions in the financial year 2008-09 and paid capital gains and that there were no long term capital gains taxable in the assessment year 2010-11 to be just and proper. The above finding rendered by the Tribunal is on re-appreciation of the factual position as recorded by the Commissioner of Income Tax (Appeals). In respect of other co-owners, similar orders were passed by the Commissioner of Income Tax (Appeals) and they had attained finality, as the Revenue did not prefer appeals against those orders. In the light of the above factual position, we are of the considered view that the above questions framed by the Revenue stating to be the substantial questions of law would not arise for consideration in these appeals, as the entire matter is fully factual. There is no error of law committed by the Tribunal warranting interference by this Court.
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> 8.Accordingly, the above tax case appeals are dismissed.”

8.In the aforementioned judgment, it had been noted that in respect of other co-owners, similar orders were passed by the CIT(A) and they had attained finality, as the Revenue did not prefer any appeals against those orders.

Furthermore, the judgment in T.C.A.Nos.675 and 676 of 2017, dated 14.12.2017, has attained finality, as the Revenue has not preferred any appeals against the said judgment. In such circumstances, the Tribunal ought to have followed the earlier orders and allowed the appeals filed by the assessee. On the contrary, by the impugned order, the Tribunal has dismissed the assessee's appeals. The reason assigned by the Tribunal for doing so could be seen in paragraph 4.1 of the impugned order. In the said paragraph, the Tribunal takes note of the judgment of this Court dated 14.12.2017 in T.C.A.Nos.675 and 676 of 2017. However, the Tribunal does not follow the said decision on the ground that the Department had not placed reliance on the judgment of the Hon'ble Supreme Court in the case of CIT vs. Balbir Singh Maini reported in [2017] 86 taxmann.com 94. In the said decision, the Hon'ble Supreme Court pointed out that for the purpose of application of Section 53A of the TP Act, the agreement should be registered, if it is entered after 2001, when Section 17A of the TP Act was amended. The Tribunal holds that the assessee has not registered the sale agreement in the instant case and therefore, the sale/transfer took place only on the date of sale deed executed on 27.04.2009, the capital gain is taxable in the assessment year 2010-11.

9.In our considered view, the Tribunal failed to take into consideration sub-Clauses (v) and (vi) of Section 2 (47) of the Act read with Explanation 2 contained thereunder. At this juncture, it would be beneficial to refer to the said provisions:-

> "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 (4 of 1882); or
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> Section 2(47)(vi):- any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.
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> Explanation 1:- For the purpose of sub-clauses (v) and (vi), immovable property shall have the same meaning as in clause (d) of Section 269UA.
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> Explanation 2:- For the removal of

doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;"

10.A conjoint reading of the above provisions will clearly show that 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 TP Act. Furthermore, Explanation 2 makes it abundantly clear that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.

11.The above Explanation comes to the aid and assistance of the assessee and in the instant case, the assessee has received consideration, handed over possession of the property, executed registered Power of Attorney in favour of the holder empowering him to absolutely deal with the property and the arrangement is covered by an agreement for sale. Thus, the agreement for sale should not be read in isolation, but should be read in conjoint with the power of attorney which in sum and substance is irrevocable.

12.Furthermore, we find from the circular issued by the CBDT in Circular No.495 dated 22.09.1987, which is Explanatory Notes on the provisions relating to direct taxes and in the said circular, the Board discusses about the definition of "transfer" which had been widened to include paragraph 11.2. In terms of the above circular, the newly inserted sub-Clause (vi) of Section 2(47) of the

TP Act has brought into the ambit of “transfer”, practice of enjoyment of property rights through what is commonly known as Power of Attorney arrangements. Thus, the Tribunal committed an error in holding that the transfer took place only on the date of sale deed which was executed on 27.04.2009. As observed earlier, in respect of the other co-owners, they have succeeded either before the CIT (A) or before the Tribunal and those orders are attained finality.

13.In the light of the above, the order passed by the Tribunal calls for interference.

14.Accordingly, the appeal filed by the assessee is allowed, the order passed by the Tribunal is set aside and the substantial questions of law, raised for consideration, are answered in favour of the assessee. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

abr
To

1.The Deputy Commissioner of Income Tax,
Corporate Circle 3(2),
Nungambakkam, Chennai-600 034.

2.The Joint Commissioner of Income tax,
Business Range XV, Chennai.

3.The Commissioner of Income Tax (Appeals)-XII,
121, Mahatma Gandhi Road, Chennai-600 034.

4.The Income Tax Appellate Tribunal 'A' Bench, Chennai.

+1cc to Mr.M.Swaminathan, Advocate SR.No. 45283
+1cc to M/s.Subbaraya Aiyar , Advocate SR.No. 45227

T.C.A.No.289 of 2019

A.SK(19/07/2019)