HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE P.KESHAVA RAO

I.T.T.A.No.97 of 2019

JUDGMENT: *(per V. Ramasubramanian, J)*

The Revenue has come up with the above appeal under Section 260A of the Income Tax Act, 1961 (in short 'the Act'), raising the following substantial questions of law:

1) In the facts and circumstances of the case, whether the order of the Hon'ble Tribunal (ITAT) in holding that the initial assessment order was not erroneous and exercise of jurisdiction by the learned Commissioner of Income Tax under Section 263 of the Income Tax Act, 1961, is bad in law, without due appreciation of relevant material facts and reasons mentioned in the order under Section 263 of the Act is not perverse, illegal and liable to be set aside?

2) In the facts and circumstances of the case, whether the Hon'ble Tribunal (ITAT) is justified in not appreciating the omission on the part of the Assessing Officer in not bringing the short term capital gains to tax in the event to sale of immovable property within three years from the date of purchase and that the sale consideration was received by the assessee in full?

3) In the facts and circumstances of the case, whether the Hon'ble Tribunal (ITAT) is justified in not considering that the transaction entered into by the assessee is squarely covered by Section 2(47)(v) of the Income Tax Act?

4) In the facts and circumstances of the case, whether the Hon'ble Tribunal (ITAT) is justified in holding that the provisions of Section 263 cannot be invoked even

when the Assessing Officer arrived at a wrong conclusion though the facts of the case clearly indicate that the Capital gain has to be taxed as Short Term Capital Gain for the AY 2009-10 with due application of Section 50C of the Income Tax Act, 1961?

2. Heard Mr.B.Narasimha Sarma, learned Senior Standing Counsel for the Department.

3. The respondent/assessee purchased an immovable property along with another person on 17.11.2007. Thereafter, he sold the same to a realtor under a sale deed, dated 18.11.2008, for a sale consideration of Rs.1.5 crores. According to the Revenue, the market value of the property was Rs.3,27,70,000/-

4. Since the assessee did not offer capital gains arising out of the sale of the property, in the return of income for the assessment year 2009-10, the case was re-opened by the Assessing Officer under Section 148 of the Act, after issuing notice under Section 147 of the Act.

5. The assessment proceedings were completed under Section 143(3) read with Section 147 of the Act

6. However, the jurisdictional Commissioner of Income Tax issued a show cause notice under Section 263 of the Act, dated 06.02.2017, claiming that the assessment order was erroneous and prejudicial to the interest of revenue and that it had resulted in an under-assessment of short term capital gains.

7. The assessee submitted a reply to the show cause notice. Thereafter, the Commissioner passed an order, dated 27.03.2017,

holding that the order of assessment, dated 27.03.2015, passed under Section 143(3) of the Act was erroneous and that since the same was prejudicial to the interest of the Revenue, the Assessing Officer would consider the applicability of the provisions of Section 50C of the Act while computing the capital gains.

8. As against the said order, the assessee filed an appeal to the Income Tax Appellate Tribunal. The Tribunal, by an order, dated 20.07.2018, allowed the appeal. It is against the said Order that the Revenue has come up with the above appeal.

9. It is seen from paragraph No.10 of the impugned Order of the Tribunal that the Tribunal recorded findings of fact to the effect that the Assessing Officer actually carried out an enquiry after the reopening of the proceedings and that once there was an application of mind, on the part of the Assessing Officer, it was not open to the Commissioner to invoke the jurisdiction under Section 263 of the Act. The said finding of fact does not give rise to any substantial question of law before us.

10. It is seen from the Order of the Commissioner under Section 263 of the Act that the Assessment was actually reopened on the ground that the assessee did not offer capital gains. The reopening was under Section 148 of the Act after issuing notice under Section 147 of the Act. Thereafter, the assessment was completed under Section 143(3) of the Act. In such circumstances, what the Commissioner attempted to do by invoking Section 263 of the Act was only to re-appreciate the facts. Since it is not permissible, the appeal does not give rise to any substantial question of law. Hence, it is dismissed.

Consequently, miscellaneous petitions if ay pending in the writ petition shall stand dismissed. No order as to costs.

V. RAMASUBRAMANIAN, J

P. KESHAVA RAO, J

March 15, 2019
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