

OD-21

IA NO.GA/2/2021
ITAT 162/2021

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME
TAX - I, KOLKATA

-Versus-

SMT. SHIKHA ROY

Appearance:
Mr. Smarajit Roy Chowdhury, Adv.
Mr. Arunava Ganguly, Adv.
...for the appellant.

Mr. J.P. Khaitan, Sr. Adv.
Mr. Saumya Kejriwal, Adv.
Mr. G.S. Gupta, Adv.
...for the respondent.

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 8th February, 2022.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' in brevity) is directed challenging the order dated 25th November, 2020 passed by the Income Tax Appellate Tribunal, "B" Bench, Kolkata (the 'Tribunal' in short) in ITA No.1915/Kol/2019 for the assessment year 2016-17.

The revenue has raised the following substantial question of law:

- (i) *Whether on the facts and circumstances of the case the Learned Income Tax Appellate Tribunal is justified in treating the receipts of compensation of Rs.10,00,00,000/- for vacating tenancy to be assessable as "Capital Gains" instead of income under the head "Profit and Gains of Business or Profession?"*

We have heard Mr. Smarajit Roy Chowdhury, learned standing counsel appearing for the appellant/revenue and Mr. J.P. Khaitan, learned senior standing counsel, assisted by Mr. Saumya Kejriwal, learned Counsel, appearing for the respondent/assessee.

The assessee, an individual, filed a return of income for the assessment year under consideration, AY - 2016-17 declaring a total income of Rs.6,21,37,340/-. The case was selected for scrutiny and after issuance of notices under Section 143(2) and 142(1), the case was discussed with the authorised representative of the assessee. The assessing officer noted that the assessee had shown income from rent from house property and long-term capital gains (LTCG) on sale of tenancy right and interest from fixed deposits during the year. The assessing officer noted that the assessee sold a tenancy right for a total consideration of Rs.10 crores out of which she had claimed deduction under Section 54EC to the tune of Rs.50 lakhs and deduction under Section 54F to the tune of Rs.4,77,95,168/-. The assessee was called upon to produce necessary documents and an agreement dated 8th December, 1994 was

executed by the assessee and her son with the landlord was produced. The agreement pertains to a flat in Juhu, Maharashtra, Mumbai. This flat was let out to the assessee on a monthly rent of Rs.2,650/- and as per the agreement, the assessee was required to pay a sum of Rs.8 lakhs by way of construction loan to the landlord which loan was repayable with interest at the rate of 4 per cent on the expiry of ten years from the date of commencement of the tenancy. By supplementary agreement dated 8th December, 1994 the assessee/tenant was permitted to sub-let the said flat and also to transfer the tenancy and also permitted to assign the tenancy to any other person and the landlord was not entitled to terminate the tenancy on any ground except non-payment of rent. The assessee by agreement dated 18th February, 2016 transferred the flat in favour of any or other person and received a total consideration of Rs.10 crores. The assessee claimed benefit of LTCG. The assessing officer while completing the assessment by order dated 23rd December, 2018 rejected the claim of the assessee on the ground that the assessee could not furnish any evidence of rental payment regarding the claim of tenancy and she did not furnish details of interest income on the amount of Rs.8 lakhs paid as construction loan. The assessing officer further held that the assessee had not paid any price for purchasing the tenancy right neither she could furnish old records as evidence of rental payment. The supplementary agreement dated 8th December, 1994 was

not a registered document. Further, the assessing officer held that the tenancy right was not purchased by the assessee nor any consideration was given for the purchase of tenancy right and a sum of Rs.8 lakhs was given as a loan to the landlord for the construction which was refundable to the assessee with interest and, therefore, could not be taken as cost of acquisition of the said flat. Therefore, the assessing officer concluded that the amount of Rs.10 crores paid has to be treated as compensation for vacating the tenancy.

The assessee filed an appeal before the Principal Commissioner of Income Tax (PCIT). The PCIT noted that certain documents could not be produced by the assessee at the time of completing the assessment owing to the fact that they are old documents and, therefore, called for a remand report. The assessing officer did not submit the remand report within the time permitted and, therefore, the PCIT admitted the documents to be placed before it for consideration. After taking note of the agreement and the various conditions and covenants contained therein, in paragraph 7 of the order dated 1st May, 2019, the PCIT has noted the following facts :

"7. I have gone through the order of the ld. A.O. and the submissions made by our ld. A.R. of the assessee. There is no dispute that the assessee had surrendered tenancy rights during the year for a consideration of Rs.10,00,00,000/-. This income was shown as Capital Gains.

The ld. A.O. has treated the said income as business income. It may be recalled that vide an Agreement dated 13.05.1992, the assessee Smt. Shikha Roy had obtained tenancy rights, copy of the agreement given during the course of hearing, which stated that the Article of Agreement would be read as 08.12.1994 from Mr. Naresh H. Thanawala, who was the landlord. The assessee, Smt. Shikha Roy, and her son Shri Jayanta Roy had obtained the tenancy rights of flat no.1 in Jai Hind Co-operative Housing Society Limited at Juhu for a monthly rent of Rs.2,650/-. As per the Tenancy Agreement, the Tenant was required to pay a sum of Rs.8,00,000/- for acquisition of tenancy rights by way of construction loan to the Landlord. The said amount was payable by the Teant with interest of 4 per cent per annum on the expiry of 10 years from the date of commencement of the tenancy of the said flat. BY a Supplemental Agreement dated 08.12.1994 a copy of which was enclosed during hearing, the Tenant was permitted by the Landlord to sub-let the said Flat at such rent as agreed upon. The Tenant, i.e. the assessee was also permitted to assign the tenancy of the said Flat to any other person. Furthermore, by an Agreement dated 08.02.2016, a cpy of which was enclosed, between Smt. Shikha Roy and Shri Jayanta Roy of the one part and Vaishali Arpan Thanawala on the other part, the tenancy rights over the said Juhu Flat was transferred to the later for a total consideration of Rs.10,00,00,000/-. The assessee took and filed the Return of Income in respect of the Juhu Flat. Of the proceeds received among others, the same was invested in REC Bonds to the tune of Rs.50,00,000/- and exemption/deduction was claimed u/s. 54EC of the Income-tax Act, 1961. Further, a sum of Rs.50,00,000/- invested in Capital Accounts Scheme to claim the exemption u/s. 54EC of the Income-tax Act, 1961".

After noting the factual position, the PCIT proceeded to decide the question as to whether the surrender of tenancy right is in the nature of trade or it is a capital asset and whether it would be assessed to tax under profits and gains of profession or would be assessed to tax under capital gains. After noting the terms and conditions of the agreement, the PCIT concluded that the consideration received by the assessee against the surrender of tenancy right is assessable as capital gain and, accordingly, allowed the appeal and reversed the order passed by the assessing officer.

The revenue carried the matter in appeal before the Tribunal. The Tribunal on its part re-examined the conditions of the agreement and as to how the parties understood the nature of transaction and found that the payment of Rs.8 lakhs was rightly claimed as cost of acquisition in computation of capital gain and the finding of the assessing officer that the assessee had not paid any price for purchasing the tenancy right is false. The Tribunal noted the decision of this Court in the case A. Gasper Vs. CIT 1979 (117) ITR 581 (Cal) wherein it was held that the monthly tenancy of the assessee was a capital asset as defined under Section 2(14) of the Act. Further, it was held that the assessee's monthly tenancy right or the leasehold right is a capital asset and on such transfer his rights in it stood extinguished and the amount received by the assessee must be held

to be assessable to tax as capital gains in the hands of the assessee. In the decision of CIT Vs. D.P. Sandu Bros. Chembur (P) Ltd. (2005) 142 Taxman 713 (SC) it was held that the tenancy right was a capital asset, surrender of tenancy right was a transfer and the consideration received thereof was a capital receipt within the meaning of Section 45 of the Act. Further, the Court noted the decision in the case of CIT Vs. B.C. Srinivasa Setty [1981] 128 ITR 294 (SC) which was followed by several High Courts and held that if the cost of acquisition of tenancy right cannot be determined, the consideration received by reason of surrender of such tenancy right could not be subjected to capital gains tax. Further, the Court took note of the circular issued by the CBDT being Circular No. 684 dated 10th June, 1994, which was issued to meet the situation created by the decision in B. C. Srinivasa Setty (supra). By Finance Act, 1994, Section 55(2) was amended to provide the cost of acquisition, inter alia, the tenancy right could be taken as nil. By this amendment the judicial interpretation put on capital assets for the purposes of the provisions relating to capital gains was met.

In the light of the above discussion, we hold that the Tribunal rightly dismissed the appeal filed by the revenue and the we find no grounds to interfere with the same.

Accordingly, the appeal [ITAT/162/2021] filed by the revenue is dismissed and the substantial question of law is answered against the revenue.

With the dismissal of this appeal, the stay application (IA No.GA/2/2021) stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)