

(2003) 07 KL CK 0073

High Court Of Kerala**Case No:** IT Appeal No. 97 of 1999, IT Reference No. 9 of 2001 14 July 2003

Commissioner of Income Tax

APPELLANT

Vs

Smt. Chandra Balakrishnan

RESPONDENT

Date of Decision: July 14, 2003**Acts Referred:**

- Income Tax Act, 1961 - Section 112, 113, 158BC, 256

Citation: (2003) 132 TAXMAN 235**Hon'ble Judges:** Kurian Joseph, J; G. Sivarajan, J**Bench:** Full Bench**Advocate:** P.K.R. Menon and George K. George, for the Revenue P. Balachandran and K. Kittu, for the Assessee, for the Appellant;

Judgement

Both the appeal and the reference are at the instance of the revenue in respect of two different assesseees. The Tribunal in the order impugned in I.T.A. No. 97 of 1999 has followed its earlier decision which is the subject-matter of ITR No. 9/2001. In ITR No. 9/2001 the Income Tax Appellate Tribunal has referred the following question of law u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as the "Act"):

"Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that it is true that the long-term capital gains arising on the sale of the property has to be taxed at the rate of 20 per cent as provided in section 112(1)(a)(ii) of the Income Tax Act and not at the rate of 60 per cent as provided in section 113 of the Income Tax Act?"

In I.T.A. No. 97 of 1999 notice was ordered on the following two questions of law :

"1. Whether, on the facts and in the circumstances of the case, and in the light of the finding that the capital gains arising on the sale of the property has been rightly included in the undisclosed income of the block period, the Tribunal is right in law in holding that the tax rate to be applied on the capital gains is at 20 per cent as

provided in section 112(1)(a)(ii) of the Income Tax Act and not at the rate of 60 per cent as provided u/s 113 of the Income Tax Act as assessed by the officer ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that if the income for any year was below the taxable limit the same should not have been included in the undisclosed income of the block period ?"

Virtually the question that arises for consideration in both these cases is the same as to what should be the rate of tax on the capital gains in a block assessment made u/s 158BC of the Act.

2. In this case the Income Tax Appellate Tribunal had decided the appeal filed by the respondent-assessee in ITR No. 9 of 2001 evidenced by Annexure B order. The Tribunal did not decide the rate of tax applicable to capital gains in the block assessment made u/s 158BC of the Act in the appellate order. The assessee, therefore, filed a miscellaneous petition M.P. No. 119 (Coch) of 1997 in the appeal IT (S & S) A. No. 6 (Coch) of 1996. The Tribunal, by its order dated 8-12-1997, allowed the miscellaneous petition and ordered that the correct rate of tax applicable to long-term capital gains is at the rate of 20 per cent only u/s 112(1)(a)(ii) of the Act and not at the rate of 60 per cent as provided u/s 113 of the Act. It would appear from paragraph 3 of the said order that the departmental representative agreed to the above view being taken.

3. As already noted the Tribunal in I.T. (S&S) A. No. 51/Coch/97, which is the subject matter of I.T.A. No. 97 of 1999 has only followed its earlier decision in the miscellaneous petition mentioned above.

4. Sri P.K.R. Menon, learned Senior counsel (Government of India) Taxes appearing for the revenue in both the cases submitted that the Tribunal did not consider the question regarding the rate of tax applicable on long-term capital gains in a block assessment under section 158BC of the Act. Counsel also pointed out that the Tribunal had clearly stated that the revenue had contended that the rate of tax on long-term capital gains in a block assessment u/s 158BC is 60 per cent u/s 113 of the Act. The senior counsel accordingly submitted that the Tribunal must be directed to consider the question afresh.

5. We have also heard Sri P. Balachandran, learned counsel appearing for the respondent in both these cases. He submitted that the Tribunal did not pointedly consider this question only because of the admission made by the counsel for the revenue before the Tribunal that the rate of tax applicable to long-term capital gains in a block assessment u/s 158BC is only at 20 per cent u/s 112(1)(a)(ii) of the Act. After considering the rival submissions we are of the view that the question regarding the rate of tax applicable to long-term capital gains in a block assessment u/s 158BC of the Act has to be considered by the Tribunal on merits. Since, the Tribunal did not have occasion to consider the same while passing the order in the miscellaneous petition, which is the subject-matter of ITR No. 9 of 2001, we set aside

the orders of the Tribunal on this question in both these cases and direct the Tribunal to pass fresh orders on this question in accordance with law. In the circumstances we decline to answer the question of law referred to in ITR No. 9 of 2001 as also the question of law on which notice is ordered in I.T.A. No. 97 to 1999.

6. Question No. 2 in I.T.A. No. 97 of 1999 relates to the assessability of income of an assessment year covered by a block period where the total income is below the taxable limit. We find that this question is covered by the judgment dated 8-7-2003 in ITR No, 57 of 2000 where it was held that undisclosed income below the taxable limit for any assessment year covered by the block period is not liable to be included in the undisclosed income for the block period. in the light of the said decision we answer the second question in I.T.A. No. 97 of 1999 in favour of the assessee and against the revenue. We make it clear that the Tribunal has to decide only the question with regard to the rate of tax applicable to capital gains in the block assessment u/s 158BC of the Act.