
(2018) 07 RAJ CK 0092

Rajasthan High Court (Jaipur Bench)

Case No: Income Tax Appeal No. 49 of 2018

Sh. Sharvan Kumar
Sharma
@APPELLANT@Hash
Income Tax Officer

APPELLANT

Vs

RESPONDENT

Date of Decision: July 3, 2018

Acts Referred:

Income Tax Act, 1961 " Section 50C, 53A# Land Acquisition Act, 1894 " Section 4,
6#Wealth Tax Act, 1957 " Section 16A(1), 24(5), 34AA, 35, 37

Citation: (2018) 07 RAJ CK 0092

Hon'ble Judges: KALPESH SATYENDRA JHAVERI, J; VIJAY KUMAR VYAS, J

Bench: Division Bench

Advocate: Udai Singh Sidhu

Final Decision: Dismissed

Judgement

1. By way of this appeal, the appellant has assailed the judgment and order of the Tribunal whereby tribunal has allowed the appeal of the assessee

for statistical purposes only.

2. Counsel for the appellant has framed following substantial questions of law:-

(A) Whether in facts and circumstances of the present case, the Hon'ble Income Tax Appellate Tribunal erred in upholding the order dt.

17.3.2017 passed by Commissioner of Income Tax and action of Income Tax Officer vide order dt. 29.2.2016 in upholding the sale of right in

land/contingent right as sale of land and applying Section 50C of the Income Tax Act, 1961 without appreciating the fact of the case that:

a. The Possession and ownership of the land vest with the RIICO/Government.

b. The transfer documents i.e. sale deed, POA etc. contains a special provision that litigations are going and the possession is with the

RIICO/Government. The buyer will only be entitled to claim compensation from the Government. Due to this fact, the seller will not be liable to pay

anything to buyer due to the outcome of litigation and the buyer is only entitled to claim compensation from the government.

c. The Transfer of Property Act Section 52 specifically says that when a court case is pending, any transfer pending litigation will be subjected to the

outcome of such litigation failed to appreciate that in view of the judgment passed by Hon'ble Supreme Court, the subject land was not de-notified

and possession in favour of RIICO by the State Government was upheld, therefore, vide sale deed dt. 2.2.2008 appellant had just sold the limited right

in land which also had gone after the aforesaid judgment passed by the Hon'ble Supreme Court, and there cannot be transfer of land or building.

And as per section 53A, unless the possession is handed over to transferee there cannot be any transfer of property.

d. The chain of transfer shows that it was an agriculture land and allotted by the society in small pieces without any conversion/approval. When a

property (Agriculture Land: cultivation rights) which originally was a "right in nature" based on various judicial pronouncements and allotted in

piece without any approval from the government/authorities and further transfer to other persons can be automatically change as an assets (Freehold

land). This is the violation of rules that no one can pass better title than he himself has. "Nemo dat quod non habet"

(e) Whether Id. Tribunals below and Income Tax Officer was justified in applying Section 50C of the Act, 1961 on the transaction pertaining to

contingent right/right to sue.

(B) Whether Tribunals below and Income Tax Officer was justified overlooking the fact finding of the Hon'ble Supreme Court in the case of

RSIDIC vs. Subhash Sindhi Cooperative Housing Society Ltd. Jaipur & ors., observing the acquisition of subject land by RIICO prior to

agreement to sell executed between assessee and buyer?

3. Against the common judgment in the case of Sh. Ram Ji Lal Meena vs. Income Tax Officer, ITA No.53/2018, coordinate bench of this court on

1.5.2018 passed the following order:-

"By this appeal, a challenge is made to the order dated 4th October, 2017, passed by the Income Tax Appellate Tribunal, Jaipur Bench, Jaipur (in

short "the Tribunal), dismissing the appeal preferred by the assessee.

The facts of the case are narrated in brief. It is a case where a land was sold by the assessee-appellant under a registered sale deed on consideration.

The Assessing Authority made addition of Rs.41,80,805/- under the head of capital gain. The aforesaid was questioned by the assessee in reference to

Section 50C of the Income Tax Act, 1961 (in short "the Act of 1961").

It was submitted that Section 50C of the Act of 1961 was not applicable to the facts of this case. It was not a transfer of capital asset but the rights. It

was for the reason that land in question was under acquisition for RIICO. The land was sold by the khatedar to a Co-operative Society. A writ petition

for regularisation of land was filed by the Co-operative Society. It was allowed by this court. The Apex Court reversed the judgment on an appeal

preferred by the RIICO. In view of the above and due to acquisition, land vested in the State Government. The possession of it remained with the

RIICO and not with the assessee. The sale deed was wrongly taken to be a transfer of capital asset, rather, it was only of rights. In view of the

above, Section 50C of the Act of 1961 was not applicable yet covering the case by the aforesaid provision, additions were made.

Learned counsel for petitioner has made reference of various orders passed by the Tribunal and also of the High Court. It is also submitted that

Section 50C of the Act of 1961 cannot be invoked if property is lease hold and not free hold and also when there exist khatedari rights, if it is a

revenue land. The ownership vest in the State Government in both the cases. The Bombay High Court in the case of Commissioner of Income Tax

Central II, Mumbai Vs. M/s. Greenfield Hotels & Estates Pvt. Ltd., reported in (2016) 389 ITR 68 (Bom) held that Section 50C of the Act of 1961

would not be applicable when there is a transfer of lease hold rights of the land.

In the instant case, the agriculture land was sold by the khatedar having rights like possessed by a lease holder. Taking into consideration the

aforesaid, the order passed by the Tribunal may be interfered.

We have heard learned counsel for the appellant and perused the record.

The appeal has been filed against the order passed by the Tribunal where addition made by the assessing authority by invoking Section 50C of the Act

of 1961, has not been interfered. The CIT (Appeals) held addition to be justified. The appeal filed by the assessee before the Tribunal was thus

dismissed.

The appellant has raised manifold issues for our consideration and, out of it, first is about nature of transfer of land. It is submitted that possession of

land was lying with the RIICO thus right in the property was transferred and not the capital asset, thereby, Section 50C of the Act of 1961 would not

be applicable. For ready reference, aforesaid provision is quoted hereunder:

Section 50C. Special provision for full value of consideration in certain cases. (1) Where the consideration received or accruing as a result of the transfer by

an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed [or assessable] by any authority of a State

Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such

transfer, the value so adopted or assessed [or assessable] shall, for the purpose of section 48, be deemed to be the full value of the consideration

received or accruing as a result of such transfer: Provided that where the date of the agreement fixing the amount of consideration and the date of

registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the

date of agreement may be taken for the purpose of computing full value of consideration for such transfer:

Provided further that the first proviso shall apply only in a case where the amount of consideration, or a part thereof, has been received by way of an

account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account, on or before the date of the

agreement for transfer.

(2) Without prejudice to the provisions of subsection (1), where- (a) the assessee claims before any Assessing Officer that the value adopted or

assessed [or assessable] by the stamp valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of

transfer;

(b) the value so adopted or assessed [or assessable] by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or

revision or no reference has been made before any other authority, court or the High Court, then, the Assessing Officer may refer the valuation of the

capital asset to a Valuation Officer and where any such reference is made, the provisions of sub-section (2), (3), (4), (5) and (6) of section 16A,

clause (i) of sub-section (1) and sub-sections (6) and (7) of section 23A, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the

Wealth-tax Act, 1957 (27 of 1957), shall, with necessary modifications, apply in relation to such reference as they apply in relation to a reference

made by the Assessing Officer under sub-section (1) of section 16A of that Act.

Explanation 1.-For the purposes of this section, the term "Valuation

Officer" shall have the same meaning as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957).

Explanation 2.-For the purposes of this section, the expression "assessable" means the price which the stamp valuation authority would have, notwithstanding anything to the contrary contained in any other law for the time being in force, adopted or assessed, if it were referred to such authority for the purposes of the payment of stamp duty.]

(3) Subject to the provisions contained in subsection (2), where the value ascertained under subsection (2) exceeds the value adopted or assessed [or assessable] by the stamp valuation authority referred to in sub-section (1), the value so adopted or assessed [or assessable] by such authority shall be taken as the full value of the consideration received or accruing as a result of the transfer.

The provision aforesaid applies in the circumstances explained therein. If facts of this case are taken into consideration, a sale deed was executed for

sale of the land. The appellant has received consideration. The sale deed was registered by the Sub-Registrar-IV, Jaipur.

The transfer of capital asset exists, that too, on consideration. The dispute has been raised about possession of the property. According to the revenue,

the possession of property lies with the assessee, whereas, according to the assessee, it lies with the RIICO. The material available on record does not

show possession of RIICO as copy of award for acquisition of land and the "fard" possession are not on record. The documents show issuance

of Notification under Sections 4 and 6 of the Land Acquisition Act, 1894 and not the award. The judgment of the Apex Court was also on challenge to

the Notification under Sections 4 and 6 of the Act of 1894.

Section 50C of the Act of 1961 has been invoked for the reasons explained by the Tribunal inasmuch as sale deed was made on consideration of

Rs.11,70,000/-, whereas, value of the property taken by the Sub-Registrar IV, Jaipur for registration of sale deed was at Rs.53,11,367/- and,

accordingly, it was stamped. In those circumstances, the question was whether Section 50C of the Act of 1961 would apply or not. According to CIT

(Appeals) and the Tribunal, addition was rightly made by the Assessing Officer by applying Section 50C of the Act of 1961.

In view of the above, we do not find that a question of law is involved in this case. The dispute has been raised on facts. That cannot be a ground for

maintaining an appeal as it can be admitted only if question of law is involved. Taking into consideration the aforesaid, we do not find that appeal

preferred by the assessee against the order passed by the Tribunal can be admitted.

Learned counsel for appellant has made reference of certain orders passed by the Income Tax Appellant Tribunal, Jaipur Bench, Jaipur in the case of

Income Tax Officer, Ward 6(1), Jaipur Vs. Tara Chand Jain, 2/1, Malviya Nagar, Jaipur, reported in (2015) 155 ITO 956 (JP), SCC ITAT and of the

Income Tax Appellant Tribunal, Ahmedabad in the case of Smt. Devindraben I. Barot Vs. Income Tax Officer, reported in (2016) 159 ITD 162

(Ahm) apart from judgment of the Bombay High Court in the case of M/s. Greenfield Hotels & Estates Pvt. Ltd. (supra).

The perusal of order passed by the ITAT, Ahmedabad reveals change of tenor of transaction for sale of land. The sale therein was through a

registered sale deed for consideration but it was taken to be relinquishment of right. Without there being relinquishment deed and without examining

what is the difference between sale of the land and relinquishment of right in the property, case was decided. In view of the above, order passed by

the ITAT, Ahmedabad cannot be accepted. It failed to appreciate even legal provisions in reference to relinquishment of right vis a vis sale of the

property.

The another order has been passed by the ITAT, Jaipur Bench, Jaipur. In the aforesaid case, the Tribunal drawn its conclusion in Paras 6.9 and 6.11.

Both the paras are quoted hereunder for ready reference:

“6.9 Section 50C is a deeming provision and it is only applicable in respect of capital assets which are land or building or both. It is thus clear that

this deeming provision of section 50C will come into play only if the capital asset transferred by the assessee is a land or building or both. If, in the

absence of capital asset transferred is neither the land nor building nor both, this deeming provision shall not be applicable to such transfer.

6.11 In the opinion of the Bench, the rights in land cannot be equated with the land or building. Therefore, it is concluded that section 50C is applicable

to transfer of capital asset only in respect of land or building or both and is not applicable to right in land. In the present case, the assessee has only

transferred the right in land for a valuable consideration, therefore, in the opinion of the Bench, the long term capital gain cannot be calculated by

invoking the deeming provisions provided under section 50C. Therefore we hold that section 50C is not applicable to present case. This is also of view

of Mumbai Tribunal in the case of Atul G. Puranik v. ITO (2011) 11 ITR 120 (Trib.).

Learned Tribunal came to the conclusion that Section 50C of the Act of 1961 would apply if there is a transfer of land or building or both. It would not

apply in absence of transfer of capital asset. In Para 6.11, the Tribunal found that assessee has transferred only right in the land for valuable

consideration, thereby, did not transfer capital asset. The finding aforesaid has been recorded without proper scrutiny of facts. How the land and

building or both were disclosed by the assessee in the balancesheet has not been taken note of. It is also as to how it is not transfer of capital asset. If

it is reflected as capital asset, transfer thereupon for consideration would attract Section 50C of the Act of 1961 but the aforesaid aspect has not been

considered by the ITAT Tribunal, Jaipur Bench, Jaipur. It is nothing but an order without elaborate finding on the issue, that too, after taking into

consideration the requisite facts for its adjudication.

The appellant has referred judgment of Bombay High Court where it was held that Section 50C of the Act of 1961 would not be applicable on transfer

of lease hold rights of the land. Bare perusal of Section 50C of the Act of 1961 does not show that transfer of capital asset for consideration should be

other than of lease hold property or khatedari land. The court cannot rewrite the provision. If analogy taken by the Bombay High Court in the case

(supra) is applied in general then Section 50C of the Act of 1961 would not be applicable in majority of the cases as not it is allowed as lease hold

property. Section 50C of the Act of 1961 is applicable on transfer of capital assets for consideration. The Bombay High Court has not referred as how

the land was in the balancesheet. It is as a capital asset or not thus we are unable to apply the judgment of Bombay High Court in the case of M/s.

Greenfield Hotels & Estates Pvt. Ltd. (supra).

In view of the discussion made above, we do not find that any question of law is involved herein.

The appeal is, accordingly, dismissed.

4. In that view of the matter, no substantial question of law arises.

5. The appeal stands dismissed.