R. K. Palshikar (Huf)

Vs

Commissioner of Income Tax, M. P., Nagpur

Civil Appeals Nos. 613-15 of 1975

(CJI R.S. Pathak, K.N. Singh JJ)

05.05.1988

JUDGMENT

KANIA J. –

1. This is an appeal against the judgment of a Division Bench of the High Court of Madhya Pradesh on a reference made to the High Court under Section 66(1) of the Indian Income Tax Act, 1922 (referred to hereinafter as "the said Act"). The appeal has been preferred on a certificate of fitness granted by the High Court under Section 66-A(2) of the said Act read with Article 133(1) of the Constitution of India.

2. The relevant facts are as follows :

> The assessee is a Hindu Undivided Family represented by its Karta one R. K. Palshikar. The years of assessment with which we are concerned are the assessment year 1959-60 to 1961-62. The assessee is the owner of what is known at present as 'Palshikar Colony' at Indore. This colony covers an area of 36.62 acres. The said land originally belonged to an ancestor of the present Karta as agricultural land. The land was in the possession of the tenants and crops like wheat, gram and so on were grown on the said land by the tenants. The present Karta wished to develop the land into a housing colony and took steps to evict the tenants. For this purpose he filed a suit in the High Court and on September 24, 1957 that suit was decreed. The assessee got plans drawn up for the laying out of the said land as a housing colony in the year 1952 after the assessee was permitted to develop the land into a housing colony. In 1958, the Executive Engineer of Indore approved the revised lay out plan. The assessee then divided the land into plots and developed the land for making it suitable as building sites. The assessee also constructed some roads, sewages and water pipelines and spent large amount for developing the land. This expenditure was incurred in the accounting period 1958-59 and the subsequent years. The assessee started leasing building sites to various parties from May 1958. The first lease was granted by the assessee, demising plot No. 12 on May 24, 1958. That lease was for a periods of 99 years. It was agreed under the lease deed that on the expiration of the said period of lease, the lessor or his legal heirs will execute a new lease deed in favour of the lessee or his legal heirs on terms and conditions as would be settled later. The 'salami' or premium for the said lease was fixed at Rs. 10,312, out of which amount Rs. 501 was paid in advance and the balance amount of Rs. 9,811 was agreed to be paid before the grant of lease. The agreement of lease was executed on September 15, 1959. The annual lease rent of the plot was fixed at Rs. 75 which was

to be paid by the lessee in advance. The lessor reserved his right to take back possession of the land leased if the rent was not paid for two consecutive years and to recover the rent. We are not concerned with the other terms of the lease. In the years 1959-60, 1960-61 and 1961-62 with which we are concerned, the assessee leased out respectively 3.29 acres, 4.41 acres and 5.68 acres divided into many plots out of the aforesaid land and he received by way of 'salami' or premium Rs. 1,45,190, Rs. 2,06,475 and Rs. 2,54,341 respectively in the said years. The terms and conditions of the other leases were in pari materia with the aforesaid lease dated May 24, 1958 in that the leases were for a period of 99 years and provided for the payment of premium or 'salami'. The question arose whether the assessee was liable to pay capital gains tax on the amounts of 'salami' or premium received as aforesaid. The contention of the assessee before the Income Tax Officer concerned was that no capital gains tax could be levied in respect of the said leases as the land was agricultural land and secondly that Section 12-B of the said Act which provided for the levy of tax on the sale, exchange, relinquishment or transfer of a capital asset did not come into play as only leasehold rights had been conveyed by the assessee to the lessees under the said leases. Both these contentions were rejected by the Income Tax Officer as well as by the Appellate Assistant Commissioner. The assessee preferred an appeal to the Income Tax Appellate Tribunal and urged the same contentions which the Tribunal also rejected. Arising from the said decision of the Tribunal, two questions were referred to the High Court for determination. These questions are as follows :

(1) Whether on the facts and in the circumstances of the case, the land sold by the assessee constituted a capital asset within the meaning of Section 12-B of the Indian Income Tax Act or was agricultural land as defined in Section 2(4-A) of the Act ?

(2) Whether the transaction of lease effected by the assessee amounted to a transfer within the meaning of Section 12-B so as to attract liability for capital gains tax ?

3. The first contention urged by the assessee before the High Court was that no capital gains tax could be levied on the said transactions for the lease of the land as the land was agricultural land, and the second contention was that Section 12-B of the said Act did not come into play as only the leasehold rights in the said lands had been conveyed. As far as the first contention is concerned, it was conceded before the High Court that as the land was diverted to non-agricultural purposes several years ago, that contention could not be pressed and it was not disputed that the lands in question constituted a capital assets within the meaning of Section 2(4-A) of the said Act. In support of the second contention of the assessee, it was urged on behalf of the assessee that the word "transfer" under Section 12-B of the said Act must be interpreted in a limited and restricted sense and the principle of ejusdim generis should be applied in construing the said word as used in Section 12-B. This contention was rejected by the High Court which took the view that, as the lease was for a long period of 99 years, the agreement of lease would amount to a transfer of a capital asset within the meaning of Section 12-B of the said Act read with Section 2(4-A) thereof. The High Court answered both the questions referred in the affirmative and against the assessee. On an application made by the assessee, leave was granted by the High Court, as aforesaid, to appeal to this Court but only in respect of second question.

4. Before setting out the contentions of the respective parties it will be useful to take note of the relevant portion of Section 12-B of the said Act would provides for the levy of tax on capital gains

runs thus :

> The tax shall be payable by an assessee under the head "Capital gains" in respect of any profits or gains arising from the sale, exchange, relinquishment or transfer of a capital asset effected after the 31st day of March, 1956, and such profits and gains shall be deemed to be income of the previous year in which the sale, exchange, relinquishment or transfer tool place.

5. There are two proviso to the aforesaid sub-section, but they are not relevant for our purposes. Rest of the provisions of Section 12-B are also sub-section (4-A) of Section 2 of the said Act, as follows :

> "Capital asset" means property of any kind held by an assessee, whether or not connected with his business, profession or vocation, but does not include :
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> (i) any stock-in-trade, consumable stores or raw materials held for the purposes of his business, profession or vocation;
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> (ii) personal effects, that is to say, movable property (including wearing apparel, jewellery, and furniture) held for personal use by the assessee or any member of his family dependent on him;
>
> (iii) any land from which the income derived as agricultural income;

6. The first contention which was urged before us by Mr Desai, learned counsel for the appellant-assessee is that, in the present case, Section 12-B of the said Act can have no application as the land in question was inam land which must have been granted as a pure gift to the ancestor of the assessee. It was submitted by him that the facts on record show that the land was granted by the Maharaja of Indore as inam to the concerned ancestor of the present Karta and it was urged by him that in accordance with the usual practice, the Maharaja must have given it free. It was submitted that Section 12-B of the said Act is applicable only in case of assets where there was a cost of acquisition. In support of this contention of Mr Desai cited some judgments including the decision of this Court in CIT v. B. C. Srinivasa Setty [(1981) 2 SCC 460 : (1981) 128 ITR 294 : 1981 SCC (Tax) 119 : AIR 1981 SC 972] which was a case pertaining to goodwill. It was, on the other hand, submitted by Mr Manchanda, that it was not open to Mr Desai to raise this contention at all as it did not arise out of the decision of the Tribunal and was not reflected in the questions referred by the Tribunal, and particularly in the question in respect of which certificate of fitness has been granted, clearly relates to one controversy, namely, whether the provisions of Section 12-B of the said Act can be brought to play in this case as the transfer is of leasehold interest in immovable property for 99 years and not an outright sale or transfer of the complete interest of the transferor in the immovable property. The question as to whether Section 12-B of can be brought into play where the property sold has not cost anything to acquire as it was gifted was not urged before any of the income tax authorities nor before the Tribunal or even before the High Court. That question has not in any way been covered by the decision of the Tribunal or the High Court. In CIT v. Scindia Steam Navigation Co. Ltd. [(1961) 42 ITR 589 : AIR 1961 SC 1633], four propositions have been laid down by this Court in this connection and they are as follows :

> (1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.

(2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is, therefore, one arising out of its order.

(3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.

(4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.

7. In our view, the present case falls squarely within the fourth category, namely, of cases where a question of law is neither raised before the Tribunal nor considered by it and the aforesaid decision clearly lays down that in such a case, the question would not be a question arising out of the order of the Tribunal notwithstanding that it may arise on the findings given by it. Mr Desai sought to rely on the observations in that judgment to the effect that a question of law might be a simple one, having its impact at one point or it may be a complex one, trenching over an area with approaches leading to different points therein and that such a question might involve more than one aspect but that would not, by itself, be sufficient to prevent the party concerned from raising it under Section 66(1) of the said Act. In our view, these observations are of no relevance in the case before us, as the question sought to be raised by Mr Desai was neither raised before the Tribunal nor considered by it nor does it arise on the judgment of the Tribunal. Merely because a question of law might arise on the facts found by the Tribunal this would not render it a question arising out of the decision of the Tribunal. Moreover, it is interesting to note that, in the present case, there is no finding of fact that the inam was originally given without consideration, although, we agree that it must almost certainly have been so. However, what the assessee sold was not the agricultural land which was given to the assessee's ancestor under the inam but land which was developed as housing sites on which development the assessee had spent considerable amounts of money. In our view, therefore, it is not open to Mr Desai to raise this question at all.

8. The next question which we have to consider is whether the provisions of Sections 12-B of the said Act can be brought into play, although, what was transferred was only leasehold interest in the lands in question. In this connection, it is significant that the leases are for a long period of 99 years and in all the transactions of lease premium has been charged by the assessee for the grant of the lease concerned. In Traders and Miners Ltd. v. CIT [(1955) 27 ITR 341 (Pat HC)], a case decided by a Division Bench of the Patna High Court, the assessee let on lease for 99 years a portion of a zamindari acquired by it. The lease related to the surface right together with nine mica mines located in that area. The consideration for the lease was the payment of a 'salami' and a reserve rent per year. The Income Tax Officer determined the cost to the assessee of the mineral rights and after deducting this amount from the salami, he assessed the balance to tax as capital gains under Section 12-B of the said Act. It was held by the Patna High Court that the gains arising from the said transaction were rightly taxed. This decision has been cited without comment by Kanga and Palkhivala in their commentary on the Law of Income Tax (7th edn.) at page 550 and no contrary case has been cited in the said text book or has been brought to our attention. It is true that the decision of the Patna High Court, relates to a case of mining lease, but to our mind, the principle laid down in that case can well be applied to the case before us. In the first place, the lease is for long period, namely, 99 years, hence it would appear that under the leases in question the assessee has parted with an asset of an enduring nature, namely, the rights to possession and enjoyment of the properties leased for a period of 99 years subject to certain conditions on which the respective leases

could be terminated. A premium has been charged by the assessee in all the leases. In these circumstances, we fail to see how it could be said that the provisions of Section 12-B of the said Act cannot be brought into play. The grant of the leases in question, in our view, amounts to a transfer of capital assets as contemplated under Section 12-B of the said Act.

9. In the result, we find that there is no substance in the appeal and dismiss the same with costs.

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