

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

ITA No.62 of 2011

Date of decision: 14.1.2016

**M/s Guru Dashmesh Rice & General Mills, Moga through its partner
Daljit Singh**

.....Appellant

Vs.

Commissioner of Income Tax III, Ludhiana

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MRS. JUSTICE RAJ RAHUL GARG**

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporters or not?

YES

3. Whether the judgment should be reported in the Digest?

Present: Mr. Ravish Sood, Advocate for the appellant-assessee.

Mr. Rajesh Katoch, Advocate for the respondent-revenue.

Ajay Kumar Mittal,J.

1. This appeal has been preferred by the appellant-assessee Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 30.4.2010, Annexure A.3 passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (in short, "the Tribunal") in ITA No.471 (ASR)/2009 for the assessment year 2006-07. It was admitted on 17.7.2012 to consider following substantial question of law:-

“Whether the Tribunal has erred in law by failing to appreciate that as the 'Pre-amended' deeming provisions of Section 50C of the Income Tax Act, 1961 (i.e. those as were available on the statute upto 30.9.2009) did not take within its purview 'Agreement to Sell', therefore the authorities below were in error in computing the 'Capital gains' in the hands of the appellant firm by applying the provisions of Section 50C?”

2. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The appellant firm was running a rice mill at Moga under the name and style of M/s Guru Dashmesh Rice and General Mills. It executed an agreement to sell dated 3.11.2004 in the financial year 2004-05 with regard to land measuring 24 kanals 4 marlas, 6 Sarsai for a total sale consideration of ₹ 12,80,000/-. Earnest money of ₹ 2 lacs was received while balance was to be received at the time of execution of the registered deed by not later than 30.5.2005. As per the said agreement to sell, the appellant firm was to vest the legal title of whole of the aforesaid property vide two sale deeds in favour of the purchaser. Pursuant to the said agreement, the appellant firm executed sale deed as on 27.12.2004 in the financial year 2004-05 and pursuant whereto absolute internal and external rights, right to passage alongwith title as regards part of the land measuring 6 kanals 1 marla 4 sarsai out of the said land stood vested in favour of the purchaser. During the financial year 2005-06 relevant to the assessment year 2006-07, the appellant executed another sale deed on 10.5.2005 in respect of the balance land measuring 18 kanals 3 marlas 2 Sarsai against a pre-settled sale consideration of ₹ 9,30,000/- as per the terms of the agreement. Thus, long term capital gain of ₹ 2,72,925/- was calculated by the assessee and taxes were paid on the

same. Aggrieved by the order, the assessee filed appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. Vide order dated 21.8.2009, Annexure A.2, the CIT(A) partly allowed the appeal sustaining the findings of the Assessing Officer with regard to applicability of the provisions of section 50C of the Act to the appellant firm. Still not satisfied the assessee filed appeal before the Tribunal. The Tribunal vide order dated 30.4.2010, Annexure A.3 partly allowed the appeal upholding the findings recorded by the CIT(A). Hence the instant appeal by the assessee.

3. Learned counsel for the appellant assessee raised two-fold submissions to assail the order of the Tribunal. Firstly, it was contended that Section 50C of the Act cannot be made applicable on the basis of sale deed dated 10.5.2005. It was further submitted that agreement to sell is dated 3.11.2004 and therefore by virtue of Explanation 2 to Section 2(47) of the Act, it could not be taxed in the assessment year 2006-07.

4. On the other hand, learned counsel for the revenue besides supporting the order of the Tribunal submitted that the rate of registering authority was much more.

5. We have heard learned counsel for the parties. We do not find any infirmity in the order of the Tribunal and as a consequence there is no merit in the submissions of learned counsel for the assessee-appellant.

6. Finance Act, 2002 effective from 1.4.2003 inserted Section 50C in the Act. The said section as inserted at the relevant time reads thus:-

“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 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 shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

(2) Without prejudice to the provisions of sub-section (1), where—

(a) the assessee claims before any Assessing Officer that the value adopted or assessed 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 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,

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-sections (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.—xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

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

7. Sub section (1) of Section 50C of the Act envisages a situation where the consideration received or accruing as a result of the transfer of a capital asset by an assessee in the case of land or building or both, is less than the value adopted or assessed by any Stamp Valuation Authority of the State Government for the purposes of payment of stamp duty in respect of such transfer. The value as assessed or adopted by the said authority shall be deemed to be the full value of the consideration in terms of Section 48 of the Act.

8. Sub section (2) of Section 50C of the Act provides that without prejudice to the provisions of sub section (1) and in a situation where the assessee claims before the Assessing Officer that the value adopted or assessed by the Stamp Valuation authority under Section 50C(1) exceeds the fair market value of the property as on the date of the transfer; and the value so adopted or assessed by the Stamp Valuation authority under Section 50C (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, the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer. Wherever any reference is made to the Valuation Officer, the various provisions of the Wealth Tax Act, 1957 enumerated thereunder shall apply.

9. Sub section (3) of Section 50C of the Act is subject to the provisions contained in Section 50C(2) and enacts that where the value determined under Section 50C(2) exceeds the value adopted or assessed by the Stamp Valuation authority referred under Section 50C(1), in that eventuality, the value so adopted or assessed by such authority shall be taken as the full value of the consideration received or accruing as a result

of the transfer.

10. The provisions of Section 50C of the Act are deeming provisions for the purposes of taxing the difference between the apparent consideration in the instrument of transfer and the valuation done for the purpose of Section 50C of the Act under the head capital gains. The purpose of incorporating this provision is to prevent undervaluation of the real value of the property in the instrument of transfer so as to defraud the revenue of its legitimate claim to capital gain tax thereon.

11. The scope and effect of Section 50C of the Act was elaborately discussed in Circular No.8 of 2002 dated 27th August 2002 as under:-

“37. Computation of capital gains in real estate transactions

– **37.1** The Finance Act, 2002 has inserted a new Section 50C in the Income Tax Act to make a special provision for determining the full value of consideration in cases of transfer of immovable property.

37.2 It provides that where the consideration declared to be received or accruing as a result of the transfer of land or building or both, is less than the value adopted or assessed by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall be deemed to be the full value of the consideration and capital gains shall be computed accordingly under section 48 of the Income tax Act.

37.3 It is further provided that where the assessee claims that the value adopted or assessed for stamp duty purposes exceeds the fair market value of the property as on the date of transfer and he has not disputed the value so adopted or assessed in any appeal or revision or reference before any authority or court, the Assessing Officer may refer the valuation of the relevant asset to a Valuation Officer in accordance with section 55A of the

Income tax Act. If the fair market value determined by the Valuation Officer is less than the value adopted for stamp duty purposes, the Assessing Officer may take such fair market value to be the full value of consideration. However, if the fair market value determined by the Valuation Officer is more than the value adopted or assessed for stamp duty purposes, the Assessing Officer shall not adopt such fair market value and shall take the full value of consideration to be the value adopted or assessed for stamp duty purposes.

37.4 This amendment will take effect from 1st April 2003, and will accordingly, apply in relation to the assessment year 2003-04 and subsequent years (section 24)”

12. Adverting to the factual matrix herein, a perusal of the findings recorded by the authorities below shows that the Assessing Officer computed the capital gains in respect of the appellant firm by invoking the deeming provisions of section 50C of the Act by adopting the segment rate of ₹ 22 lacs i.e. rates adopted by the stamp valuation authority at the time of executing the sale deed as the deemed sale consideration and calculated that the capital gains was shown short by an amount of ₹ 17,64,189/-. On appeal, the CIT(A) held that as per provisions of Section 50C of the Act, if the value estimated by the Assistant Valuation Officer (AVO) is more than that as per the collector rates, the latter should be taken to be the full value of consideration. However, if the value estimated by the AVO is less than that as per the collector rates, that lesser value is to be taken into account. Consequently, the fair market value as on 10.5.2005 estimated by the AVO at ₹ 18,16,250/- was taken to be the full value of consideration as against ₹ 22 lacs considered by the Assessing Officer for computing long term capital gain. The Tribunal upheld the findings recorded by the CIT(A). The

relevant findings recorded by the Tribunal read thus:-

“11(10) A bare perusal of the above reproduced documents clearly reveals that a single agreement to sell was executed on 3.11.2004 in respect of sale deeds executed by the assessee in respect of $\frac{1}{4}$ share and $\frac{1}{4}$ share on 27.12.2004 and 10.5.2005 respectively. A perusal of the conveyance deed registered on 10.5.2005 reveals the possession of the land in question has been handed over to the vendee on 10.5.2005 i.e. the date of registration of the sale deed. Thus, the vendee was not handed over possession of the said land earlier to this specified date. This factum is further established as no possession had been given to the vendee vide single agreement to sale dated 3.11.2004. Thus, the finding of the AO as reproduced above, on the date of handing over the possession on 10.5.2005, is factually correct. In view of this, the transfer of the said land does not fall under section 2(47)(v) of the Act as contended by the assessee.

11(11). In this context, the relevant para 4 of the assessment order is reproduced hereunder, wherein the AO recorded the findings that possession of the land was given to the purchaser on 10.5.2005:

“4. I have carefully gone through the written submissions filed by the assessee and the various judgments cited therein. The judgments cited by the assessee relate to the period when the provisions of section 50C of the Income Tax Act were not applicable and as such these judgments are not applicable to the facts of the present case. The assessee himself stated that Section 50C was effective w.e.f 1.4.2003. The provision of section 50C is deeming provision and capital gain is leviable as per law and that is the valuation adopted by stamp duty authorities of the state government. Moreover, other contention raised by the assessee is also not applicable as per registration deed dated 10.5.2005 which itself says that possession of land

to the purchaser has been given today i.e. 10.5.2005 and it is not the case of the assessee that the possession has earlier been given to the purchaser. The fact that only some advance money has been received as per agreement dated 3.11.2004 have no effect. Thus, the provision of section 50C is clearly applicable to the facts of the case and valuation adopted by the State Government is the value of consideration received. The assessee has not produced any evidence regarding the dispute of valuation adopted by the registering authority of the State Government. Hence the valuation so adopted i.e. at ₹ 22 lacs has been accepted by the nearby people as the correct value, hence the same is adopted. As regards the copy of agreement dated 3.11.2004 filed by the assessee at a lesser sale value is concerned, it is pertinent to mention here that this agreement by the Notary Public attached with the return bears the same date on which the registration has been made i.e. 10.5.2005. Hence this evidence is created after thought and it has no value in the eyes of law so far as the value of property sold vide registration deed 10.5.2005, for a consideration of ₹22,00,000/- on account of deeming provisions as per section 50C of the Income Tax Act, 1961 although the sale rate was shown at ₹ 12,00,000/- as per registry. Therefore, the contention of the assessee has no force and is not acceptable.”

11(12). From the above, it is clear that the AO recorded finding that the possession of the said land was handed over to the purchaser on 10.5.2005. In view of the above discussion, it is amply clear that the registered sale deed certified that the possession of the said land was given to the vendee, on 10.5.2005. Thus, the transfer for the purpose of charging capital gain has become effective and concluded, on the date of registration of said sale deed as on this date, the possession of the land was handed over to the vendee. In view of this, the plea of the assessee that land in question stands transferred within the meaning of section 2(47)(v) of the Act is not legally and

factually tenable. The land in question does not fall within the definition of transfer as contemplated under section 2(47) of the Act. Accordingly, the capital gain is to be charged from the date of registration of the said deed, as the possession was given to the vendee only on that date.

11(13) The learned counsel for the assessee placed reliance on the judgment of Hon'ble Supreme Court in the case of ***CIT vs. Podar Cement Pvt. Limited and others***, (1997) 226 ITR 625. The decision has been rendered by the Hon'ble Supreme Court, in the context of section 22 of the Income Tax Act, 1961. In this case, it was held that the 'owner' is a person who receives income from the property, in his own right. It was held by the Hon'ble Supreme Court that for the purpose of section 22 of the Act, the 'owner' is a person, who is entitled to receive income in his own right and as such where the house property is handed over to purchaser to enjoy fruits of that property by the contractor/builder, the purchaser is to be treated as 'owner' of the property for the purpose of section 22 even though no registered documents as required under Section 54 of the Transfer of Property Act or the Registration Act are executed. In the present case as discussed earlier, the assessee has not handed over the possession, to the purchaser, as is evident from the sale agreement dated 3.11.2004, reproduced above. The possession was handed over to the purchaser vide registered sale deed dated 10.5.2005, as is evident from the reproduction of the said registered sale deed and findings of the revenue authorities. In view of this, the purchaser, in the present case has not been handed over any possession of the land in question prior to this date. Hence, he is not in possession of the land, to enjoy the fruits of the property, as he is neither beneficial owner nor legal owner. Legal owner in this case vested in the purchaser of the land, on the registration of the sale deeds on 10.5.2005. Further, the sale agreement does not speak handing over of the possession to the purchaser of the land. In view of this, facts of the case

relied upon by the learned counsel for the assessee, in the case of **CIT vs. Podar Cement Pvt. Limited** (supra) are different and distinguishable. Thus, ratio of this case is not applicable to the facts of the present case. Moreover, the Hon'ble Supreme Court, has rendered the decision in the context of charging of income under section 22 of the Act and has never dealt with the definition of 'transfer of asset', as contemplated under section 2(47)(v) of the Act. For the purpose of proper appreciation of the decision of the Hon'ble Supreme Court, in the case of **CIT vs. Podar Cement Pvt. Limited** (supra), the relevant part of the decision is reproduced hereunder:-

“House property – owner – meaning of “owner” - in the context of section 22 “owner” is person who is entitled to receive income in his own right – Section 22 does not require registration of sale deed – Amendment of section 27 by Finance Act of 1987 is classificatory in nature – Income Tax Act, 1961 – ss 22, 27 – Indian Income Tax Act, 1922.

Interpretation of taxing statutes – Construction which takes into account changes since provision was enacted – Construction beneficial to assessee in case of ambiguity – Rule against retrospectivity not applicable to declaratory provisions.

12. In view of the above detailed discussion, we are of the considered opinion that the provisions of section 50C are attracted to the sale of land in question made by the assessee. Thus, the findings of the CIT(A) on this issue are upheld and consequently, the grounds of appeal bearing No.2, 3 and 4 raised by the assessee are dismissed.”

13. Examining the next contention, Explanation 2 to Section 2(47) of the Act was inserted by the Finance Act 2012 with retrospective effect from 1.4.1962. According to the said explanation, the term “transfer” is defined to include and shall be deemed to have always included disposing

of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.

14. Elaborating his submission on this aspect, learned counsel for the appellant-assessee submitted that the appeal was decided by the Tribunal on 30.4.2010 whereas Finance Act, 2012 retrospectively effective from 1.4.1962 had inserted Explanation 2 to Section 2(47) of the Act, according to which the case of the assessee was covered under the expression “transfer” as envisaged under Section 2(47) of the Act. On the said premises, it was urged that the agreement of sale was executed on 3.11.2004 in the financial year 2004-05 relating to assessment year 2005-06 and therefore, no addition could be made for the assessment year in question i.e. 2006-07. It may be noticed that as the assessee itself had claimed capital gains in the return filed for the assessment year 2006-07 on the basis of the sale deed dated 10.5.2005, it would not be open for the assessee to now challenge its assessability in the assessment year 2006-07 by contending that it was taxable in the assessment year 2005-06 on the basis of retrospective amendment by incorporating Explanation 2 to Section 2(47) by Finance Act, 2012 which is made effective from 1.4.1962. Learned counsel for the assessee-appellant was unable to substantiate that on the basis of sale deed dated 10.5.2005, the capital gains could not be taxed in

the assessment year 2006-07 and equally had failed to demonstrate that the provisions of section 50C of the Act were not applicable particularly when the AVO had assessed the fair market value at ₹ 18,16,250/-. The assessee itself having chosen to discharge capital gain tax liability in the assessment year 2006-07 cannot now rely upon Explanation 2 to Section 2(47) inserted retrospectively from 1.4.1962.

15. Learned counsel for the appellant has not been able to show any illegality or perversity in the findings recorded by the authorities below warranting interference by this Court. Learned counsel for the appellant-assessee relied upon judgments in *CIT vs. India Discount Co. Limited*, (1970) 75 ITR 191 and *Navin Jindal and others vs. Assistant Commissioner of Income Tax*, (2010) 320 ITR 708. In *India Discount Co. Limited's* case (supra), it was held that arrears of dividend received by dealer of shares after the purchase of shares alongwith such arrears is of capital nature and the same cannot be assessed to tax under section 10 or section 12 of the Income Tax Act, 1922. It was further held that a receipt which in law cannot be regarded as income cannot become so merely because the assessee erroneously credited it to the profit and loss account. In *Navin Jindal's* case (supra), it was held that right to subscribe for additional offer of shares/debentures on rights basis comes into existence when the company decides to come out with the rights offer and therefore, in order to determine the nature of the capital gains/loss on renunciation of right to subscribe for additional shares/debentures, the crucial date is the date on which such right to subscribe for additional shares/debentures comes into existence and the date of transfer i.e. renunciation of such right.

The said judgments being based on individual fact situation involved therein do not come to the rescue of the appellant. Consequently, the substantial question of law is answered against the assessee. The appeal stands dismissed.

(Ajay Kumar Mittal)
Judge

January 14, 2016
'gs'

(Raj Rahul Garg)
Judge