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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

INCOME TAX APPEAL No. 63 of 2005

C I T UDAIPUR

V/S

M/S THE LAKE PALACE HOTELS AND MOTELS

Mr. K K Bissa, for the appellant

Mr. N.M. Ranka, Sr. Advocate, assisted by Mr. N.K. Jain, and Mr. S. Johari, for the respondent

Date of Order : 23.4.2008

HON'BLE SHRI N P GUPTA, J.

HON'BLE SHRI KISHAN SWAROOP CHAUDHARI, J.

ORDER

REPORTABLE

BY THE COURT : (PER HON'BLE GUPTA, J.)

This appeal by revenue, has been filed against the judgment of the Tribunal dated 23rd March 2004. The learned Commissioner has allowed the appeal of the assessee, and set aside the order of the learned Assessing Officer, assessing capital gain at an amount of Rs. 51,39,366/-, on the ground of treating it to be the income, derived by the assessee by way of capital gain, as the difference in the rate of interest, on the security amount, deposited with

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the assessee, which interest was stipulated to at the rate of 9%, while according to the assessing authority, interest rate was 18%, therefore, this difference between 9 to 18 percent, has been taken to be capital gain.

The appeal was admitted on 7th November 2005, by framing the following substantial question of law:-

"Whether capital value of such deemed interest to the extent it has been charged lesser than the market rate can be considered as consideration for grant of lease in respect of which the capital gains has to be computed?

In very brief, the facts are, that the assessee had leased out certain property, i.e. land, to one East India Hotels Limited, for a period of 72 years, and a proper lease deed was executed in that regard, stipulating annual rent at a gradually increasing rate, and also stipulating that a sum of Rs.2.5 crores shall remain as deposit with the lessor, which shall be received by the lessor, on the dates, and in the manner, stipulated in Clause 15 of the Lease Deed, which was repayable by the lessor in 10 yearly instalments of Rs.25 lacks each, to start from 1st May 2055, and the amount was to bear simple interest @ 9% per annum, with effect from the date of

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receipt of the amount. After the assessment was complete, by serving a notice under Sec.148, on 06.03.1996, and then again on 28.11.1997, under Sec. 143(2), assessment was reopened under Sec.147(1)(a), and after such reopening, the assessing authority found, that during the accounting year 1992-93, the market rate of interest was clearly between 18 to 24 percent. However, the rate at which the loans were normally advanced by the banks during that period was 18%, therefore, 18% interest rate was considered as most reasonable rate, as the assessing officer "did not see that any person was ready to part with the money at a lesser rate than 18% during the relevant time", therefore, the benefit by way of concessional rate of interest to the assessee company, on the deposit made by the lessee, must be computed at the rate of 9% per annum, and accordingly the assessment was made as above.

It may be observed here, that in the assessment order, many things were considered, and decided, but then, since the present appeal is confined only to the question, as referred to above, we need not go into other aspects of the matter.

The learned Commissioner, in his judgment dated 08.10.1998 found, that there is nothing to

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suggest, that consideration in the rent is low, or the consideration is understated. The necessity, and rationale, of such deposit is not questioned.

Reasonableness of amount deposited has also not been doubted, the transaction has also been not held to be in-genuine, and significantly, it was also found, that inadequacy of annual rent consideration, stipulated in the agreement, or other material evidence, indicating passing on of disguise consideration, or best

consideration to the assessee, has not been established by the AO, which is prerequisite to arrive at a logical conclusion, for substituting the full value of consideration, for such transaction. It was found, that there was no specific finding about

adequacy, or otherwise, of the lease rent, and if it is held to be not insufficient consideration, the concept of full value of consideration, does not come into picture. Then regarding lower rate of interest, if any, agreed between the parties, cannot by itself cause evidence, as well as effect result, for

resorting to the provisions of Sec.45/48 of the Act.

Thus it was found, that there appears to be no basis to assume, and compute, both consideration for

transfer, and cost of acquisition of leasehold rights, without any evidence. Then it was found, that

provisions of Sec.45 and 48 are specific, and cannot

be invoked by presumption and assumption. The deeming

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provision for capital gain, have specifically been provided for, under different sections like 45(2), 45(3), 45(4) etc., and the charging section 45(1) cannot be construed to be a deeming provision, rather it should be strictly interpreted, to charge the capital gain tax. Then Sec.48 was considered, being providing the mode of computation, under the head capital gain; wherein it is provided, that unless otherwise provided, the consideration shown in the document of transfer should be adopted, being binding, as per standing provisions of law, in absence of appropriate material. Thus, the full value of consideration, which has not been shown actually to have been received, or agreed to be received, cannot be computed. It was held, that it is always the price bargain by the parties, and not the full market value of the asset, on the date of transfer, which is to be considered for the purpose of computing long term gain.

Against this order, the revenue went in appeal before the Tribunal, and the learned Tribunal has found, that to charge capital gains under Sec.45 & 48, four conditions are required to be fulfilled, being as under:

1. There should be a capital asset,
2. Capital asset should be transferred,

3. Consideration has been received in lieu of transfer, and

4. There was cost of acquisition and cost of improvement.

All the four conditions were found to be conditions precedent, and in case of any of the requirements remaining unfulfilled, there is no question of charging any capital gain. Then it was found, that in the case in hand, the assessee has not received any consideration, in lieu of transfer of capital asset, because the land has been given on lease, and the assessee received lease rent, year after year, and on that lease rent, the tax has been paid. Regarding security deposit, it was found to be refundable, and regarding assessing officer having worked out the value, by taking into consideration the present value factor of 18%, i.e. deemed interest, as against the rate of interest shown by the assessee being 9% to be actual rate of interest, and therefore assessing officer was not found justified, in assessing the rate of interest to 18%. It was found, that differential interest, if any, cannot be considered as value of consideration for transfer of capital asset. Thus, the appeal was dismissed.

The question as framed by this Court while

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admitting the appeal, thus comprehends the aspect, as to whether the capital value of such deemed interest, to the extent, which is charged lesser than the market value, can be considered to be the consideration for grant of lease, in respect of which capital gain has to be computed.

Before proceeding further, we may gainfully quote the provisions of Sec.45(1) as well as Sec.48, which read as under:

45. (1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54E, 54EA, 54EB, 54F, 54G and 54H be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.

. . .

48. The income chargeable under the head "Capital gains" shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely:-

(i) expenditure incurred wholly and exclusively in connection with such transfer,

(ii) the cost of acquisition of the asset and the cost of any improvement thereto

.....”

Thus, according to Sec.45, any profit or gain, arising from transfer of capital asset, affected in the previous year, is deemed to be income of the previous year, in which transfer took place, and according to Sec.48, it is to be computed by deducting from the full value of consideration, received, or accruing, as a result of transfer of the capital asset, the amounts being expenditure incurred wholly and exclusively in connection with the transfer, and the cost of the acquisition of the asset, and the cost of any improvement thereto.

To be very specific, what is significant to note is, that even a combined reading of the two Sections, nowhere provide for any deemed profit, or deemed gain, or any hypothetical benefit, deemed to have been received, or to be deemed to be accruing to the transferor, as a result of the transfer of the capital asset. We may refer to a judgment of the Hon'ble Court, in CIT Vs. Infosys Technologies Ltd., reported in [2008] 297 ITR 167(SC), which has been relied upon by the learned counsel for the assessee, wherein it has been held, that unless the benefit is made taxable, it cannot be recorded as income. In

that case, during the relevant assessment years, there was no provision of law, which made the benefit of allotment of shares, with lock-in period, as taxable income, apart from the fact that the benefit was prospective, and it was found, that unless the benefit is in the nature of income, or specifically included by the legislature, as part of income, the same is not taxable. Thus, since Sec.45 & 48, unlike the provisions of Wealth Tax, do not make provision, providing for any deemed profit, or gain, to be taxable, as a capital gain, the mere fact that the assessing officer was of the view, that prevalent market interest rate was 18%, or was at any amount above 9%, could not render the assessee liable for being taxed, on the difference amount, as capital gain.

This is one aspect of the matter, which in our view is sufficient, to answer the question in favour of the assessee, and against revenue.

However, we may also observe, that Division Bench of this Court, in Shree Poongalia Jain Swetamber Mandir Vs. CIT, reported in 168 ITR page 517, relied upon by the counsel for the assessee, has also laid down as under:

"We find considerable force in the aforesaid submissions of Shri Jain. The Act does not lay down any criterion as regards determination of the adequacy of the interest paid on money lent by the trust. The rate of interest is dependent on various factors. The rate of interest is less where loan is with security and more where it is without security. The rate of interest for the purpose of deposit differs from the rate for the purposes of borrowing. For the purpose of judging the adequacy of the rate of interest in the present case, what is relevant to be considered is the rate prevalent in the market for the purpose of depositing money and the rate of interest for the purpose of borrowing money cannot be made the criterion for judging the adequacy of the rate of interest. The Appellate Assistant Commissioner as well as the Tribunal have held that the rate of interest paid by Sobhagmal Gokulchand was not adequate for the reasons that the banks were charging interest at the rate of 12 per cent to 15 per cent on money advanced by them. In our opinion, the rate of interest which is charged by the banks on money advanced by them cannot be used as a criterion for judging the adequacy of rate of interest paid on monies deposited by the assessee with Sobhagmal Gokulchand. The more appropriate criterion would be the rate of interest that was paid by the banks on deposits made with them. As noticed earlier, during the relevant period, the rate of interest which was being paid by the banks on fixed deposits for a period of 12 months was 5-1/2 per cent to 6 per cent which was the same as the interest paid by Sobhagmal Golulchand to the assessee.

Thus, this judgment is an authority, for the proposition, that the relevant market rate of interest, to be taken into account, could possibly be

the rate of interest payable on the deposits being made, and not the rate of interest on the borrowings. In the present case, the assessing officer has also not at all found, that 18% was the rate of interest on deposits. It is a different story, that even for whatever purposes, it has been considered by the assessing officer, there is no iota of evidence on record to show, that 18% was the bank rate of the interest at the relevant time, much less for the purpose, for which it could be considered against the assessee. In this regard, also we find support from the judgment of the Hon'ble Supreme Court, in CIT, Madras Vs. Shivakami Co. P. Ltd., reported in 159 ITR page 71, again relied by the learned counsel for the assessee, wherein it has been held by Hon'ble Supreme Court, that even in cases, where understatement of the value of a document is made, the burden is on the revenue to prove, by leading cogent, and reliable evidence, and by placing material, from which irresistible conclusion can be drawn, about such understatement of valuation. As against this, in the present case, no evidence is there, except the assessing authority's own perception, of his not being "able to see anyone ready to part with the money at a rate of interest lesser than 18% during the relevant period."

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Thus, the net result of the above discussion is, that we do not find any ground to interfere in the impugned order, in favour of revenue, and against the assessee. The question as framed is accordingly answered against the revenue and the appeal is dismissed.

(KISHAN SWAROOP CHAUDHARI), J.

(N P GUPTA), J.

jpa/