



IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 25TH DAY OF SEPTEMBER 2012

PRESENT

THE HON'BLE MR. JUSTICE K.SREEDHAR RAO

AND

THE HON'BLE MR. JUSTICE B.MANO HAR

ITA No.1183/2006 c/w ITA Nos.781/2009,
1095/2008, 1094/2008 and 782/2009

ITA No.1183/2006:

BETWEEN :

1 THE COMMISSIONER OF
INCOME TAX
C R BUILDING,
QUEENS ROAD
BANGALORE.

2 THE INCOME TAX OFFICER
WARD-12(1), BANGALORE.

APPELLANTS

(By Sri. M THIRUMALESH, ADV.)

AND :

M/S MONARCH CITADEL
PVT LTD, NO.67,
INFANTRY ROAD
BANGALORE.

RESPONDENT

(By Sri K P KUMAR, Sr.Cl. FOR M/S KING & PARTRIDGE)

This ITA is filed under Section 260A of the Income Tax Act,
1961, praying to set aside the order dated 21.4.2006 passed in ITA

No.1658/Bang/2005 by the Income Tax Appellate Tribunal, Bangalore confirming the order of the Appellate Commissioner and confirm the order passed by the Income Tax Officer, Ward-12(1), Bangalore.

ITA No.781/2009:

BETWEEN :

1 THE COMMISSIONER OF
INCOME TAX
C R BLDNG,
QUEENS ROAD
BANGALORE.

2 THE INCOME TAX OFFICER
WARD-12(1), BANGALORE.

APPELLANTS

(By Sri. K V ARAVIND, ADV.)

AND :

M/S MONARCH CITADEL PVT LTD
NO.54,BRIGADE ROAD,
BANGALORE.

RESPONDENT

(By Sri K P KUMAR, Sr.Cl. For M/S KING & PARTRIDGE)

This ITA is filed under Section 260A of the Income Tax Act, 1961, praying to set aside the order dated 17.7.2009 passed in ITA No.341/Bang/2009 by the Income Tax Appellate Tribunal, Bangalore confirming the order of the Appellate Commissioner and confirm the order passed by the Income Tax Officer, Ward-12(1) , Bangalore.

ITA No.1095/2008:

BETWEEN :

1 THE COMMISSIONER OF
INCOME TAX, C R BLDNG,
QUEENS ROAD, BANGALORE.

2 THE INCOME TAX OFFICER
WARD-12(1), C R BUILDING
QUEENS ROAD,
BANGALORE.

APPELLANTS

(By Sri. K V ARAVIND, ADV.)

AND :

M/S MONARCH CITADEL PVT LTD
NO.54, BRIGADE ROAD,
BANGALORE.

RESPONDENT

(By Sri K P KUMAR, Sr.Cl. For M/S KING & PARTRIDGE)

This ITA is filed under Section 260A of the Income Tax Act, 1961, praying to set aside the order dated 30.6.2008 passed in ITA No.1089/Bang/2007 by the Income Tax Appellate Tribunal, Bangalore confirming the order of the Appellate Commissioner and confirm the order passed by the Income Tax Officer, Ward-12(1) , Bangalore.

ITA No.1094/2008:

BETWEEN :

1 THE COMMISSIONER OF
INCOME TAX, C R BLDNG,
QUEENS ROAD
BANGALORE.

2 THE INCOME TAX OFFICER
WARD-12(1), C R BUILDING
QUEENS ROAD,
BANGALORE..

APPELLANTS

(By Sri. K V ARAVIND, ADV.)

AND :

M/S MONARCH CITADEL PVT LTD
NO.54, BRIGADE ROAD,
BANGALORE.

RESPONDENT

(By Sri K P KUMAR, Sr.Cl. For M/S KING & PARTRIDGE)

This ITA is filed under Section 260A of the Income Tax Act, 1961, praying to set aside the order dated 30.6.2008 passed in ITA No.1088/Bang/2007 by the Income Tax Appellate Tribunal, Bangalore confirming the order of the Appellate Commissioner and confirm the order passed by the Income Tax Officer, Ward-12(1) , Bangalore.

ITA No.782/2009:

BETWEEN :

- 1 THE COMMISSIONER OF
INCOME TAX, C R BLDNG,
QUEENS ROAD
BANGALORE.
- 2 THE INCOME TAX OFFICER
WARD-12(1), C R BUILDING
QUEENS ROAD,
BANGALORE.BANGALORE.

APPELLANTS

(By Sri. K V ARAVIND, ADV.)

AND :

M/S MONARCH CITADEL PVT LTD
NO.54, BRIGADE ROAD,
BANGALORE.

RESPONDENT

(By Sri K P KUMAR, Sr.Cl. For M/S KING & PARTRIDGE)

This ITA is filed under Section 260A of the Income Tax Act, 1961, praying to set aside the order dated 17.7.2009 passed in ITA

No.342/Bang/2009 by the Income Tax Appellate Tribunal, Bangalore confirming the order of the Appellate Commissioner and confirm the order passed by the Income Tax Officer, Ward-12(1) , Bangalore.

These ITAs coming on for dictating judgment today, K.SREEDHAR RAO, J delivered the following:

JUDGMENT

The respondent/assessee is a private limited company.

An erstwhile partnership firm owned a landed property and shares of the company contributed by the partners. The firm was reconstituted as private limited company. The commercial buildings were constructed on the land. Later on, specific portions of the building were allotted to the shareholders, who are eight in numbers. The respondent/company leased the entire premises to Samsung Company by a registered lease deed. The rental advance amount received by the respondent/company was proportionately distributed to the shareholders. So also, monthly rent collected was distributed to the shareholders after deduction made towards maintenance and taxes. The shareholders, who are also assesseees, had filed separate

individual returns, in which, the income earned from the building allotted to the respective shareholders was also disclosed and accordingly taxed.

2. The respondent/company filed a nil returns. The AO held that the rental income derived is an attributable to the respondent/company and accordingly levied the tax. The respondent/company aggrieved by the said order filed an appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) rejected the appeal. The Appellate Tribunal allowed the appeal and set aside the order of the Appellate Authority. The revenue aggrieved by the said order has filed the above appeals.

3. The following substantial questions of law are formulated for consideration in these appeals:

- 1) Whether the Tribunal was correct in holding that the share holders of the assessee company being deemed owners of the property as per section 22 read with section 27(iii) of the Act the rental income cannot be taxed in the

hands of the assessee?

2. Whether the Tribunal was correct in holding that there is no dividend paid to the share holders and consequently no tax under section 115-O of the Act cannot be levied as the dividends should be treated as rental paid to the share holders?

3. Whether the Tribunal was correct in holding the amount received from Samsung cannot be treated as the income?

4. In the first instance, this Court answered the questions of law in favour of the revenue and allowed the appeal. The Supreme Court set aside the order in SLP (Civil) No.11252/2010 by granting liberty to move the High Court for rectification of the order. The respondent/company filed a review petition, which came to be allowed. The earlier order of this Court was set aside and the appeal came to be restored for fresh consideration.

5. Learned Senior Counsel, Sri K P Kumar, appearing for the respondent/company referred to the provisions of Sections 22 and 27(iii) of the Income Tax Act, 1961 (for

short 'Act'). It brings home the point that the said provisions of the Act make a departure from the common understanding of ownership and title in respect of an immoveable property under the Transfer of Property Act. Provisions of Sections 22 and 27(iii) of the Act are extracted hereunder for reference and convenience:

“22. The annual value of property consisting of any buildings or lands appurportions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income tax, shall be chargeable to income-tax under the head “Income from house property”.

27(iii) a member of a co-operative society, company or other association of persons to whom a building or part thereof is allotted or leased under a house building scheme of the society, company or association, as the case may be, shall be deemed to be the owner of that building or part thereof;”

6. It is submitted that the income from the house property envisaged under Section 22 of the Act and ownership of such house property envisaged under Section 27(iii) of the Act would pertain to both residential and

commercial buildings without distinction. In contradistinction, the learned Senior Counsel referred to provision under Section 54 of the Act, where the expression of residential house is defined.

7. Provision of Section 27(iii) of the Act declares that the assessee or a co-operative society can allot or lease a house building to its members. A member, who is so allotted, would be construed as the owner of such building allotted or leased to them. In such a case, there would be registered a conveyance deed executed in favour of the member by the company, society etc. The allotment by resolution would be a sufficient for investment of right over such property in favour of the member. The Memorandum of Association and Articles of Association of the respondent/company are part of the records before the Appellate Tribunal.

8. Paras-3 & 11 of the objects of company in the

Memorandum of Association are as follows:

“3. To carry on business as proprietors of flats and buildings and to let on lease or otherwise apartments therein and to provide for the conveniences commonly provided in flats, suites and residential and business quarters.

11. To distributed among the members any of the properties of the company, in specie or in proceeds of sale or disposal of any property, subject to section 205 of the Companies Act.”

9. Paras-51 to 55 of the Articles of Association are as follows:

“51. The Company may by a resolution passed at a General meeting frame the rule and regulations relating to construction allocation or allotment of constructed area to Members of the company by way of residential apartment, commercial apartment, office premises, shop, garage, car parking unit and the like (hereinafter referred to as such constructed area) and frame the scheme (hereinafter called the said scheme) for such construction, allotment or allocation of such constructed area. Such scheme may stipulate the number of share to be held/or the deposit to be kept by a member where by such member becomes entitled to such allotment and allocation of such constructed area.

52. The Board of Directors from time may determine the cost and value of such

construction or constructed area under any such scheme and the number of shares a member shall acquire and the deposit to be maintained by such member with the company for enabling such member to be allotted such constructed area.

53. A person becoming shareholder of the company shall be entitled to be allotted such constructed area by way of residential apartment, shop, commercial apartment, office space, garage, car parking unit in the property belonging to the company as the Board may deem fit under the said scheme from time to time and such member shall be entitled to possess, exploit and enjoy the usufruct therefrom in accordance with such a scheme, so long as such member hold such number of case and deposit as the Board may specify in accordance with the aforesaid scheme. Each allottee of the constructed area shall be entitled to the possession and enjoyment of the constructed area so allotted and to the common premises and common area available in the said building in accordance with the said scheme.

54. A member shall be entitled to lease, letout or mortgage, hypothecate or create charge or lien over the share and deposit otherwise dispose off in any manner right over the constructed area allotted to such member and also shall be entitled to all income usufruct and other benefits derived therefrom by way of rent or otherwise, subject to the provisions as laid down in Articles 8, 9 and 10.

55. A member shall be entitled to mortgage, hypothecate or create charge or lien over the shares and deposit belonging to such member and the consequent right vested in respect of any constructed area allotted to such member without causing any prejudice or detriment to the company or to the other shareholders. The company and Board of Directors shall recognise such mortgage and charge subject to the provisions laid down in articles 8, 9 and 10, and in the event of transfer or sale of shares, deposit and the rights vested in the constructed area allotted to such Member by such mortgagee or creditor for realisation of monies advanced, the Board shall register such transferee as a Member and the holder of such shares and deposit and the consequent rights in respect of constructed area attached thereto.”

10. The resolution of the company dated 30th July, 1998, which allotted the specific portion of the building in favour of the shareholders reads thus:

“Resolved that the Scheme of Allotment of Shares for the Units be implemented in terms of Memorandum of Association and Articles of Association of the Company with regards to its property bearing No.6671, 6672, 6673 and 67 etc..., Infantry Road, Bangalore.”

11. With reference to the above materials, it is

vehemently argued that there is allotment of specific portion in the building to each of the shareholders is in accordance with the Memorandum of Association and Articles of Association.

12. Learned Senior Counsel referred to the observations of the Supreme Court in the case of Commissioner of Income-Tax -vs- Podar Cement Pvt. Ltd. and others reported in 1997 Volume 226 ITR Page 625. The following observations read thus:

“Enlarging the meaning of `owner of house property

27. Under the existing provision of section 22 of the Income-tax Act, any income from house property is chargeable to tax only in the hands of the legal owner. As per section 27 of the Income-tax Act, certain persons who are not otherwise legal owners are deemed to be the owners for the purposes of these provisions.

Under the Transfer of Property Act, the transfer of ownership can be effected only by means of a registered instrument. However, in recent times various other devices are sought to be employed for transferring one's ownership in

property. As a result, there are situations in which the actual owner, say, of an apartment in a multi-storeyed building, or a holder of a power of attorney is not the legal owner of a property. In some cases, pending resolution of disputes, the legal as well as the beneficial owners are assessed to tax in respect of the same income.

As a measure of rationalisation, the Bill seeks to enlarge further the meaning of the expression 'owner of house property', given in clause (iii) of section 27 by providing that a person who come to have control over the property by virtue of such transaction as are referred to in clause (f) of section 269UA will also be deemed to be the owner of the property. The amendment also seeks to enlarge the applicability of this clause to a member of a company or other Association of persons.

Corresponding amendment have also been proposed in regard to the definition of "transfer" in section 2(47) of the Income Tax Act, section 2(m) of the Wealth Tax Act defining "net wealth" and section 2(xii) of the Gift Tax Act defining "gift".

These amendments will take effect from April 1 , 1988, and will, accordingly, apply in relation to the assessment year 1988-89 and subsequent years"

If this much is clear, the next thing to be considered is what is the effect of the

amendment.

In Crawford's statutory construction, at page 107, paragraph 74, reads as:

“74 Declaratory Statutes – Generally speaking, declaratory statutes can be divided into two classes: (i) those declaratory of the common law and (ii) those declaring the meaning of an existing statute. Obviously, those declaratory of the common law should be construed as intended to lay down a rule for future cases and to act retrospectively. They closely resemble interpretation clauses, and their paramount purpose is to remove doubt as to the meaning of existing law, or to correct a construction considered erroneous by the legislature:(emphasis *supplied).

In Francis Bennion's Statutory interpretation (second edition 1992) page 105, the learned Author say “declaratory act – A declaratory Act or enactment declare what the law is on a particular point, often “for the avoidance of doubt”.

In Justice G P Singh's (sixth edition 1996) “Principles of statutory interpretation”, under the heading “declaratory statutes”, the learned Authority has summed up as follows:

Declaratory statutes :

The presumption against retrospective operation is not applicable to declaratory

statute. As stated in Craies and approved by the Supreme Court : “for modern purposes a declaratory Act may defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Act or usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statute. Usually, if not invariably, such an Act contains a preamble, and also the word “declared” as well as the word “enacted”. But the use of the word “it is declared” is not conclusive that the Act is declaratory for these words may, at times, be used to introduce new Rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is “to explain” an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language “shall be deemed always to have meant” is declaratory, and is in plain terms retrospective. In the absence of clear word indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous.

An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act, which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the constitution came to force, the amending Act also will be part of the existing law”.

The above summing up is factually based on the judgment of this Court as well as English decision.”

13. To explain the purport and object, the incorporation of Section 27(iii) by amending in the Act reads as follows:

“[[Explanation 1].- A building or part thereof referred to in clause (iii), clause (iiia) or clause (iiib) of section 27 of the Income-tax Act shall be includible in the net wealth of the person who is deemed under the said clause to be the owner of that building or part thereof.]

[Explanation 2.- Where a debt falling under sub-clause (ii) is secured on, or has been incurred in relation to, any asset which is not to be included wholly or partly in the net wealth by virtue of the provisions of sub-section (IA) of section 5, the amount of such debt shall, for the purposes of the said sub-clause, be limited to the value of the said asset which is not includible in the net wealth under sub-section (IA) of section 5;]”

14. Learned Senior Counsel relied upon the decision of Patna High Court in the case of Commissioner of Wealth-Tax -vs- Smt.Shushila Devi Tamakuwala reported in [Vol.212 1995] ITR PAGE 203. In the said decision, the circular issued by the CBDT is extracted hereunder:

“In this connection, attention is invited to sections 22 to 27 of the Income-tax Act, 1961, which refer to income from house property. These sections are applicable to income from house property whether the house property is residential or it is used for business. In the circumstances, it is presumed that the exemption to house property under section 5(1) (iv) is available both to residential as well as business premises whether used by the association or let out.”

The above circular instructions become relevant for consideration of both under the Wealth Tax Act and Income Tax Act, wherein it is explained that the house property under Section 5(1)(iv) and that the Wealth Tax Act and Sections 22 to 27 of the IT Act would include residential as well as business premises whether used by the association or let out.

15. In view of the above provisions of law and circular instructions of CBDT, the company is only an ostensible owner. The execution of the lease deed in favour of the allottees on behalf of the shareholders to be construed as done under implied agency. The company which does not retain any part of the rent or rent advance is not liable for tax. The shareholders who receive rent or rent advance have filed returns and paid the taxes. Therefore, argued that the levy of tax on the respondent company does not arise and order of the appellate authority in that regard is sound and proper.

16. It is submitted that the decision of the Supreme Court discloses that the amendment is clarifactory in nature. The member who is an allottee or lessee by the company or co-operative society etc., by legal fiction deemed to be the owner for the purpose of I.T.Act despite ostensible title may vested with the company or society.

17. Sri K.V. Aravind and Sri M. Thirumalesh, learned counsel for the revenue submitted the following points to assail the order of Appellate Tribunal:

1) The resolution of allotment of specific portion of the building by the respondent/company to shareholders is vague even before the building was constructed.

2) The said document is concocted and does not fulfill the requirement under Section 193 of the Company Act. Because each of the objects and resolutions is to be signed by the directors on the last page and put the date. In the last page of the resolution, there is no mentioning of date. Therefore, the said document is a concocted document.

3) The lease deed does not mention the specific portion of the building vis-a-vis the name of the shareholders. The lease deed discloses that the respondent/company has full pledged owner by entering into the transaction of lease. The fact that the company later on distributed the rentals and rental deposit to the shareholders does not absolve the

company of its tax liability.

4) Clause-3 of Memorandum of Association makes it explicit clear that the company should develop the properties, sale or lease them to others to make profits. The profits so earned shall have to be distributed as dividends to the members in terms of Section 205 of the Company Act. Sri K V Aravind cited a decision of the Supreme Court in the case of Calcutta Tramways Co. Ltd. -vs- Commissioner of Wealth Tax reported in 86 ITR 133 (SC).

5) Clause 11 also contemplates that distribution of the properties or sale proceeds should be subject to Section 205 of the Companies Act. Therefore, the respondent/company can only pay dividends to the members and could not have acted as an implied agent to lease properties and such a contention would be contrary to the objects of the company in the Memorandum of Association.

6) The respondent/company, if really, had allotted a specific portion of the building exclusively to the shareholders should have exercised their right and should have leased the properties in their own right.

It is impermissible on their behalf in the given situation for the respondent/company to execute the lease deed.

7) The lease deed explicitly shows that it is the respondent/company, who has leased the property and executed the lease deed. The contention that the execution of lease deed on behalf of the members is untenable and there is nothing suggested in the lease deed to that effect to substantiate the contention.

18. On thorough consideration of the facts and proposition of law putforth in the course of argument, it becomes evident that the Memorandum of Association of the respondent/company permits the respondent/company to construct a building, sell or lease them. Alternatively, Clause 11 of the Memorandum of Association permits the company to distribute its properties to its shareholders. Clauses-51 to 55 of the Articles of Association is corollary and consistent with the object of the company as envisaged in para-11 of the Memorandum of Association.

19. The fact that the resolution is made to allot a specific portion of the building to the shareholders even before it constructed is not a ground by itself to hold such an action is illegal. The fact that the last page of the resolution does not bear the date may not be a fatal aspect to hold that the resolution should fail as invalid for the purpose of Income-tax Act.

20. The consequence of resolution under the Companies Act may be different and the said aspects need not be imported while considering purport and implication of Section 27(iii) of the Act. The Supreme Court in the case of Commissioner of Income Tax -vs- Podar Cement (P) Ltd. has highlighted the purport and object of Section 27(iii) of the Act, which came to be incorporated by way of amendment for practical and economic convenience, taking into consideration the ground realities. Notwithstanding the fact that allotment of building by society or company may

not make the allottee, owner of the building in the context of TP Act. But nonetheless, the I.T. Act otherwise construe such an allottee as the owner.

21. In order to convey title in respect of immoveable property valuing more than Rs.100/-, Section 17 of the Registration Act requires registered conveyance deed. The stamp duty and registration expenses would be too burdensome. When a shareholder or a member of the society is allotted a building by society or company, the transfer would take place, which in a way, obviate the expenses of stamp duty and registration fee on the part of the transferee or the transferor.

22. The respondent/company has placed ample materials to show that a specific portion of the building allotted to the shareholders, circular dated 24.7.1973 in No.F No.317/23/73 issued by the CBDT would clarify the position that the building need not be necessarily a

residential building, under Section 27(iii) of the Act it can be a commercial building. The respondent/company has allotted a specific portion to the shareholders. Under the IT Act, shareholders are deemed to be the owner of the portion allotted to them and they would be liable for tax. However, the company, which owns the building, is an ostensible owner. Therefore, it cannot not be said that the company cannot effect the lease. The lease effected by the respondent/company should be construed as one executed on behalf of the shareholders. Notwithstanding the fact that the lease deed may not refer to that effect. Therefore, it is to be held that the shareholders are the owners of the specific portion of the building allotted to them and the company which executed the lease deed, has not retained any part of rent amount or rent deposit and after deducting the tax and maintenance has distributed the income to the shareholders proportionately to their shareholders. The shareholders have also filed returns disclosing the said

income and paid the tax. In the given situation, it cannot be argued that the respondent/company deemed to have derived the income from rental and rental deposit.

In that view of the matter, the first question of law is answered in favour of the assessee and as a consequence, the second and third questions of law would not arise for consideration.

Accordingly, the appeals are dismissed.

Sd/-
JUDGE

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