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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.126 OF 2011

WITH

CROSS OBJECTION (LODGING) NO.2 OF 2012
IN
INCOME TAX APPEAL NO.126 OF 2011

The Commissioner of Income Tax-18, MumbaiAppellant

V/s.

Ms.Janhavi S. DesaiRespondent

Mr.D.K. Kamwal for the Appellant in ITXA No.126 of 2011 and Respondent in CROLL No.2 of 2012.

Mr.Keshav B. Bhujle i/b Mr.U.B. Bhujle & Mr.P.V. Bhujle for the Respondent in ITXA No.126 of 2011 and Applicant/Cross Objector in CROLL No.2 of 2012.

CORAM : S.J. VAZIFDAR AND
M.S. SANKLECHA, JJ.
DATE : 5TH JULY, 2012.

ORAL JUDGMENT (PER S.J. VAZIFDAR, J.) :-

1. With the consent of the parties, we proceed to hear the appeal filed under section 260A of the Income Tax Act, 1961 and the

cross-objections finally.

2. The appeal is admitted on the following substantial question of law :-

“Whether on the facts and circumstances of the case the ITAT was right in directing the A.O. to calculate the long term capital gain without appreciating that section 2(42A) of the Act explanation 1 only determines the holding period of an asset for the purpose of short term capital gains and has no application to long term capital gain for which the assessee gets the benefit of indexation ?”

The cross-objections are admitted on the following substantial question of law :-

“Whether, on the facts and in the circumstances of the case the Tribunal erred in holding that in respect of the 50% of the property inherited by the respondent from his mother the period of holding will start from 21.08.1988 and not from 01.04.1981 ?

3. In or about the year 1942, the respondent's father acquired the entire immovable property from his father i.e. the respondent's grand-father. The respondent's father expired in the year 1988, leaving behind a will bequeathing the property to his wife and the respondent in equal shares.

The respondent's mother expired on 21.02.2000 leaving behind a will bequeathing her 50% share in the property to the

respondent.

4. The respondent sold the property during the assessment year 2005-2006 for Rs.9.50 corers and declared a long term capital gain of Rs.38,44,247/-. The respondent considered the date of acquisition of the property for the purpose of calculating the capital gains to be prior to 1.4.1981.

The AO however, held that the actual date of acquisition must be considered for calculating the capital gains. He held the date on which the respondent inherited the property to be the relevant date and accordingly recomputed the capital gains. The re-computation was on the basis of 50% of the property having been inherited by the respondent from his father on 21.8.1988 and the other 50% thereof having been inherited by him from his mother on 21.2.2000 and accordingly applied the cost inflation index.

5. The CIT (A) allowed the respondent's appeal by an order dated 23.6.2008. It was held in the respondent's favour that the period of holding for determining the long term capital gain included the period for which the original owner held the assets that devolved upon the legal heir.

6. The appellant challenged the order of the CIT (A) before the Income Tax Appellate Tribunal (ITAT). The ITAT held that the period for holding 50% of the property inherited by the respondent

from his father would start from 1.4.1981, whereas in respect of 50% of the property inherited by the respondent from his mother, the period for holding would start from 21.8.1988, as she became the owner of her 50% share in the property only from that date. The Tribunal ordered accordingly.

7. The respondent's grievance is only with regard to the finding of the Tribunal that the period of holding in respect of 50% of the property inherited by him from his mother would start from 21.8.1988 and not from 1.4.1981.

8. Section 2(42A) of the Income Tax Act, 1961 reads as under :-

“2. Definitions — In this Act, unless the context otherwise requires,—

(42-A) “short-term capital asset” means a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer:

Provided that in the case of a share held in a company [or any other security listed in a recognised stock exchange in India or a unit of the Unit Trust of India established under the Unit Trust of India Act, 1963 or a unit of a Mutual Fund specified under clause (23-D) of Section 10] [or a zero coupon bond], the provisions of this clause shall have effect as if for the words “thirty-six months”, the words “twelve months” had been substituted.

(Explanation 1.) - (i) In determining the period for which any capital asset is held by the assessee -

(a)

(b) in the case of a capital asset which becomes the property of the assessee in the circumstances mentioned in [sub-section (1)] of section 49, there shall be included the period for which the asset was held by the previous owner referred to in the said section .“

Section 49(1) of the said Act in so far as it is relevant reads as under :-

“49. Cost with reference to certain modes of acquisition.—(1) Where the capital asset became the property of the assessee—

(i)

(ii) under a gift or will;

(iii)(a) by succession, inheritance or devolution, or

(iv)

the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be.

*Explanation.—*In this sub-section the expression “previous owner of the property” in relation to any capital asset owned by an assessee means the last previous owner of the capital asset who acquired it by a mode of acquisition other than that referred to in clause (i) or clause (ii) or clause (iii) or clause (iv) of this sub-section. “ (emphasis supplied)

9. Two issues arise. Firstly the determination of the cost of

acquisition. Secondly a computation of the period for which the asset is held by the assessee.

10. Section 49 deals with the determination of the cost of acquisition. Where a capital asset becomes the property of the assessee under a will or by inheritance, the cost of acquisition thereof is deemed to be the cost for which the previous owner of the property acquired it. The previous owner of the property is not necessarily the immediate previous owner from whom it is acquired by the assessee irrespective of the manner in which such person acquired the property.

The Explanation to section 49(1) defines the expression “previous owner of the property” to be the last previous owner thereof who acquired it by a mode of acquisition “other than that referred to in clauses (i) to (iv) of sub section (1)”. Thus the ambit of the words “previous owner of the property” does not include a person who acquired the property by a mode of acquisition referred to in sub-clauses (i) to (iv) of section 49(1). If therefore, the person from whom the assessee had acquired the property had himself acquired it by a mode referred to in clauses (i) to (iv) of section 49(1), he would not be the “previous owner of the property” for the purpose of sections 2(42A) and 49.

11. The last previous owner of the property, who acquired the

property by a mode of acquisition other than those referred to in clauses (i) to (iv), was the respondent's grand-father. The respondent's father admittedly acquired the property in 1942 from his father i.e. the respondent's grand-father. It would in this case make no difference even whether or not the respondent's father had acquired the property in a mode referred to in clauses (i) to (iv) of section 49(1) for he admittedly acquired it prior to 1.4.1981 and indexation is granted at the earliest only from 1.4.1981. The respondent admittedly acquired the property under his father's will and therefore by a mode of acquisition referred to in clause (ii) of section 49(1).

12. Thus as far as the 50% portion of the property acquired by the respondent from his father is concerned, the cost of acquisition must be determined to be the cost at which the respondent's grandfather or in any event the respondent's father acquired the property and not the date on which the respondent acquired it. The Tribunal does not hold otherwise either.

13. The Tribunal however held that in respect of 50% of the property inherited by the respondent from his mother, the period for holding would start from 21.8.1988, as she became the owner of her 50% share in the property only from that date under the will made by her husband who died on 21.8.1988.

14. This requires a consideration of the second issue viz. a computation of the period for which the respondent held that 50% portion of the property he acquires from his mother.

15. The respondent's mother also acquired the property under her husband's will. She therefore, acquired the property by a mode of acquisition referred to in section 49(1)(ii). In other words, the respondent's mother did not become the owner of the asset by a mode of acquisition other than that referred to in section 49(1). Thus the date of the acquisition of her share in the property is not relevant. The last previous owner of her share was therefore her husband's father and at the highest her husband.

16. Section 2(42A) defines "short term capital asset" to mean a capital asset held by an assessee for the stipulated period immediately preceding the date of its transfer. Explanation (1)(b) sets out the factors to be taken into consideration while determining the period for which the capital asset is held. In respect of a capital asset, which became the property of the assessee in the circumstances mentioned in section 49(1), it is provided that there shall be included the period for which the asset was held by the "previous owner referred to in the said section". The said section is section 49(1). Thus the definition of "previous owner" in the Explanation to section 49(1) is incorporated in Explanation (1)(i)(b) to

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section 2(42A). If therefore a capital asset becomes the property of the assessee in the circumstances mentioned in section 49(1) and the period for which it is held as determined by section 49(1) read with section 2(42A) is more than the period stipulated in section 2(42A), the case would not fall within the ambit of a short term capital asset.

17. The last previous owner of the respondent's mother's 50% share in the property was therefore her husband's father and at the highest her husband. Thus the respondent must be deemed to have held this 50% share in the property also from 1.4.1981.

18. In the circumstances, the questions are answered in favour of the respondent. The period of holding shall be from 1.4.1981 in respect of the entire property.

19. In the result, the appeal is dismissed and the cross-objections are disposed of accordingly.

No order as to costs.

(M.S. SANKLECHA, J.)

(S.J. VAZIFDAR, J.)