

Court No. - 3

Case :- INCOME TAX APPEAL No. - 37 of 2014

Appellant :- Commissioner Of Income Tax-I Aayakar Bhawan
Lucknow

Respondent :- Smt. Brigitta Soi S-7 Basera Plash New Hyderabad
Lko.

Counsel for Appellant :- Ghan Shyam Chaudhary

Counsel for Respondent :- Pradeep Agrawal

Hon'ble Sudhir Agarwal, J.

Hon'ble Ravindra Nath Mishra-II, J.

1. Heard Sri Ghan Shyam Chaudhary, learned counsel for appellant; and, Sri Pradeep Agrawal, Advocate, for respondents.

2. This appeal under Section 260A of Income Tax Act, 1961 (hereinafter referred to as "Act, 1961") has arisen from judgment and order dated 23.06.2014 passed by Income Tax Appellate Tribunal, Lucknow Bench, Lucknow (hereinafter referred to as "Tribunal") in Income Tax Appeal No. 08/LKW/2012 for the Assessment Year 2006-07. It was admitted on following substantial questions of law:

"I. Whether the learned Income Tax Appellate Tribunal has erred in law in upholding the order of CIT (A) without taking into account the fact that after conversion to freehold, superior right had accrued to the assessee.

II. Whether the learned Income Tax Appellate Tribunal was justified in law in dismissing the appeal of the revenue without taking into account the fact that the difference of period between the date of freehold and date of sale is only three months and, hence, tax is leviable on short term capital gain.

III. Whether the learned Income Tax Appellate Tribunal was justified in giving relief to the assessee without taking into account the decision of CIT Vs. Dr. V.V. Mody 281 ITR page 1.

IV. Whether the learned Income Tax Appellate Tribunal has erred in dismissing the appeal of the department while simply relying upon an order passed by the jurisdictional High Court

without establishing that the facts involved therein were identical the facts of the present case."

3. Both the learned counsels for parties, at the outset, stated that similar questions earlier came up for consideration before this Court in **Income Tax Appeal No. 36 of 2014 (Commissioner of Income Tax Vs. Late Vijay Kumar Soi and another)** and vide judgment dated 11.01.2017 the same have been answered in favour of Assessee and against revenue. The said judgment reads as under:

"1. Heard Sri Ghan Shyam Chaudhary, learned counsel for appellant. Vakalatnama has been filed by Sri Pradeep Agrawal, Advocate, appearing on behalf of respondent. Let the same be taken on record.

2. This appeal under Section 260-A of Income Tax Act, 1961 (hereinafter referred to as "Act 1961"), preferred by Revenue, relates to Assessment Year 2006-07 and has arisen from judgment and order dated 13.06.2014 passed by Income Tax Appellate Tribunal, Lucknow Bench "B" Lucknow (hereinafter referred to as "Tribunal") in Income Tax Appeal no. 278/LKW/2012. It was admitted on following substantial questions of law:

"1. Whether the learned Income Tax Appellate Tribunal has erred in law in upholding the order of CIT (A) without taking into account the fact that after conversion to freehold, superior right had accrued to the assessee.

2. Whether the learned Income Tax Appellate Tribunal was justified in law in dismissing the appeal of the revenue without taking into account the fact that the difference of period between the date of freehold and date of sale is only three months and, hence, tax is leviable on short term capital gain.

3. Whether the learned Income Tax Appellate Tribunal

was justified in giving relief to the assessee without taking into account the decision of CIT Vs. Dr. V.V. Mody 281 ITR page 1.

4. Whether the learned Income Tax Appellate Tribunal has erred in dismissing the appeal of the department while simply relying upon an order passed by the jurisdictional High Court without establishing that the facts involved therein were identical the facts of the present case."

3. Learned counsel for parties, at the outset pointed out that these very issues have been considered by this Court in **Commissioner of Income-Tax Vs Smt. Rama Rani Kalia, (2013) 358 ITR 499 (All)**, wherein this Court answered following questions formulated therein:-

"1. Whether the Income-Tax Appellate Tribunal has erred in law upholding the order of Commissioner of Income-Tax (Appeals) without taking into account the fact that after conversion to freehold superior rights accrued to the assessee?

2. Whether the Income-Tax Appellate Tribunal was justified in law in dismissing the appeal of the Revenue without taking into account the fact that the difference of period of between date of freehold and date of sale is only three days, therefore, short term capital gains are to be levied?

3. Whether the Income-Tax Appellate Tribunal was justified in giving relief to the assessee without taking into account the decision of CIT Vs. Dr. V.V. Modi (1996) 218 ITR 1 (Karn).

4. Whether the Income-Tax Appellate Tribunal was justified in law in ignoring the Departmental Valuation

Officer's report regarding the stamp valuation?"

4. *While answering the aforesaid questions this Court considered the meaning of short-term capital asset, short-term capital gain, long-term capital asset and long-term capital gain, and held as under:-*

"The terms 'short-term capital asset' & short-term capital gain' and 'long-term capital asset' & long-term capital gain' have been defined in the Act as follows.

"2 (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;

2 (42-B) "short term capital gain means capital gain arising from transfer of a short-term capital asset;

2 (29-A) "long term capital asset" means a capital asset which is not a short-term capital asset;

2 (29-B) "long term capital gain" means capital gain arising from the transfer of a long-term capital asset."

The difference between the 'short-term capital' asset and 'long-term capital asset' is the period over which the property has been held by the assessee and not the nature of title over the property. The lessee of the property has rights as owner of the property subject to covenants of the lease, for all purposes. He may, subject to covenants of the lease deed, transfer the lease hold rights of the property with the consent of the lessor. The conversion of the rights of the lessee in the property from having lease hold right into free hold is only by way of improvement of her rights over the property, which she enjoyed. It would

not have any effect on the taxability of gain from such property, which is related to the period over which the property is held. If the period is less than 36 months, the gain arising from such transfer would be of short-term capital gain.

In the present case, the property was held by the assessee as a lessee since 1984, and the same was transferred on 31.03.2004, after the lease hold rights were converted into free hold rights on the same property which was in her possession, in her favour on 29.03.2004. The conversion was by way of improvement of title, which would not have any effect on the taxability of profits as short term capital gains.

There is no error of law in the order of the Tribunal. The question Nos. 1 and 2, framed in the appeal, are thus decided in favour of the assessee and against the department."

*5. The aforesaid judgment is fully applicable to the issues raised in this appeal. In absence of any substantial argument advanced by learned counsel for appellant so as to pursue us to take a different view and in absence of any binding authority of superior Court having taken a different view, we find no hesitation in holding that in the light of discussion made and exposition of law laid down in **Commissioner of Income-Tax Vs Smt. Rama Rani Kalia (supra)** the questions formulated above in this appeal have to be answered against appellant and the view taken by Tribunal and other Revenue authorities have to be upheld.*

6. Accordingly the substantial questions of law raised in this appeal are answered in favour of Assessee and against Revenue.

7. Appeal is dismissed."

4. For the reasons stated in **Commissioner of Income Tax Vs. Late Vijay Kumar Soi and another (supra)** and following the same, we answer the substantial questions of law, formulated in this appeal, against Revenue and in favour of Assessee.

5. The appeal is, accordingly, dismissed.

Dt. 14.02.2017

PS