



* **HIGH COURT OF DELHI : NEW DELHI**

+ **ITR No.53/1994**

% Judgment reserved on: 9th April, 2008

Judgment delivered on: 25th April, 2008

Shri. A.S. Chhachhi
D-74, Gulmohar Park, New Delhi. Petitioner.

Through: Mr. P.S. Patwalia, Sr. Adv. with
Mr. Arvind Nayar, Adv.

vs.

Commissioner of Income Tax,
Delhi-IX, New Delhi. Respondent

Through: Ms. Rashmi Chopra, Adv.

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE V.B. GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

V.B.Gupta,J.

This reference has been made to this Court under Section 256(1) of the Income Tax Act, 1961 (for short as 'Act') by the Income Tax Appellate Tribunal, Delhi Bench 'E' in ITA No.3112/Del/91 relevant for the assessment year 1989-90.



2. The Tribunal has referred the following question for the opinion of this Court:-

“Whether, on the facts and in the circumstances of the case, the Tribunal was right in upholding order of Assessing Officer computing taxable gain at Rs.6,60,000/- for the assessment year 1989-90?”

3. The brief facts of this case as they appear from the paper book are that the assessee in the period relevant to assessment year 1989-90 owned a house at Jorbagh, New Delhi. He sold the ground floor of that house for a consideration of Rs.30,00,000/- The cost of construction of the ground floor was shown to be Rs.1,25,000/- and the expense for brokerage were claimed at Rs.45,000/-. Thus, the transaction resulted in a capital gains of Rs. 28,30,000/-. The assessee also purchased a residential house for a consideration of Rs.8,90,000/- and also invested a sum of Rs.6,00,000/- in I.D.B.I. Bonds. The question before the Assessing Officer was whether deduction under section 48(2) of the Act should be first allowed from the gross capital gain of Rs.28,30,000/- or it should be allowed after making deductions for investment in the purchase of new flat and I.D.B.I. Bonds. The assessee claimed that the



deductions under sec.48(2) of the Act should be first allowed to the extent of Rs.14,20,000/- and thereafter, the cost of the new residential flat and the bonds should be made deductible. As per the assessee's computation, the capital gain came to nil. The Assessing Officer, however, declined to accept the formula suggested by the assessee and proceeded to first deduct the amount of investment made by the assessee in the purchase of flat and bonds amounting to Rs.15,00,000/- in the aggregate. The assessee returned capital gain 'nil' as per the following calculation:-

	Rs.
"Sale Price	30,00,000
Less:	
Cost Price	1,25,000
Brokerage	45,000
	<u>1,70,000</u>
	28,30,000
Less: Deductions u/s 48	<u>14,20,000</u>
	14,10,000
Less: Cost of flat purchased	<u>9,00,000</u>
	5,10,000
Less: Investment in IDBI Bonds	<u>6,00,000</u>
	-nil"

The Assessing Officer, however, did not accept this and worked out the capital gains as under:-

	Rs.
"Sale Consideration	30,00,000



Less:		
Cost as on 1-1-74	1,25,000	
Brokerage	45,000	<u>1,70,000</u>
Long Term Capital Gains		28,30,000
Less: Investments in purchase of flat		<u>9,00,000</u>
		19,30,000
Less: Invested in purchase of IDBI Bonds		<u>6,00,000</u>
		13,30,000
Less: Deductions u/s 48(2)		<u>6,70,000</u>
		6,60,000"

4. The assessee challenged the above computation before CIT(A) who considered in details the relevant provisions and concluded that first deductions under sec.48 of the Act are to be made and then provisions of sections 53 and 54 of the Act are to be applied. She accordingly accepted the claim of the assessee.

5. The Revenue then brought the issue in appeal before the Appellate Tribunal. The Appellate Tribunal after consideration of the rival submissions of parties and relevant statutory provisions agreed with the view taken by the Assessing Officer. Consequently, it allowed appeal of the Revenue and referred the above question for opinion of this Court.

6. In response to the question of law, learned counsel for the assessee contended that while calculating the



deduction under section 48(2) of the Act, no restriction has been imposed in the Act that the deduction should be given only after working out the exemption under section 54 of the Act. Further, he pointed out that specific explanation has been inserted after section 53 of the Act that the deduction under section 53 and 54 of the Act will be given on the gross capital gains calculated under section 48 (1) of the Act. Thus, the deduction under section 48(2) of the Act is only reference to the gross capital gains arrived at as per the provisions of section 48(1) of the Act and nowhere in the Act, it is stated that this will be restricted to the amount arrived at after giving the deduction under section 53 and 54 of the Act. Therefore, the assessee is entitled for deduction under section 48 (2) of the Act before giving the deduction under section 53 & 54 of the Act. Ld. Counsel also cited **Commissioner of Income Tax v. V.V.George, (1997) 227 ITR 893** in support of its contentions.

7. The learned Counsel for Revenue, on the other hand, supported the order of the assessing officer on the ground that the scheme of sections 45 & 48 of the Act clearly



makes it a case that deductions under sections 54 & 54E of the Act shall be made in the beginning of the computation.

8. Capital gains have been made chargeable to income tax under section 45 of the Act. Section 45 (1) of the Act provides:

“Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 53, 54, 54B, 54D, 54E, 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.”

9. Section 48 of the Act refers to the mode of computation and deduction for the income chargeable under the head ‘capital gains’. Section 48 of the Act lays down:

“(1) The income chargeable under the head "Capital Gains" shall be computed;

*(a)*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 a transfer;

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



(b) where the capital gain arises from the transfer of a long-term capital asset (hereafter in this section referred to, respectively as long-term capital gain and long-term capital asset) by making the further deductions specified in sub-section (2).

(2) The deductions referred to in clause (b) of sub-section (1) are the following namely:

(a) where the amount of long-term capital gain arrived at after making the deductions under clause (a) of sub-section (1) does not exceed ten thousand rupees, the whole of such amount;

(b) in any other case, ten thousand rupees as increased by a sum equal to:

(i) in respect of long-term capital gain so arrived at relating to capital assets, being buildings or lands or any rights in buildings or lands or gold, bullion or jewellery,-

(A) in the case of a company, ten percent of the amount of such gain in excess of ten thousand rupees;

(B) in the case of any other assessee, fifty percent of the amount of such gain in excess of ten thousand rupees.

(ii) in respect of long term capital gain so arrived at relating to capital assets, -

(A) in the case of a company, thirty percent of the amount of such gain in excess of ten thousand rupees;



(B) in any other case, sixty percent of the amount of such gain in excess of ten thousand rupees;"

10. The explanation to section 53 of the Act provides:

"In this section and in sections 54, 54B, 54D, 54E, 54F and 54G references to capital gain shall be construed as references to the amount of capital gains as computed under clause (a) of sub-section (1) of section 48."

11. In **Commissioner of Income Tax v. V.V.George, (1997) 227 ITR 893**, the Kerala High Court held that;

"Capital gains" basically relate to a situation of transfer of a capital asset, resulting into either profits or gains as a result thereof. Section 45 of the Act itself makes it clear that even though this is the ordinary position, the statutory provisions of sections 53, 54, 54B, 54D, 54E, 54F and 54G are in the nature of exceptions thereto. We are concerned with section 54E which is in the nature of an exception from the plain language of the statute."

Further, the Court held:-

"Section 48(1)(a) of the Act speaks of the ways of computation and the first aspect is in the process of computation by deduction from the full value of the consideration received, two items, viz., expenditure incurred wholly and exclusively and the cost of acquisition in regard thereto. Incidentally section 48(1)(b) of the Act speaks of the statutory provision relating to the transfer of a long-term capital asset providing for further deductions specified in section 48(2)."

Further held:-



"It is in the statutory provision of Section 53 of the Act, the *Explanation* under consideration comes on the statute as a result of the Finance Act, 1987, with effect from April 1, 1987. The said *Explanation* is reproduced herein below:

"In this section and in Sections 54, 54B, 54D, 54E, 54F and 54G, references to capital gain shall be construed as references to the amount of capital gain as computed under Clause (a) of Sub-section (1) of Section 48."

Therefore, in computing Capital gains the provisions of section 48(2) of the Act should be given effect to before giving effect to the provisions of section 54E of the Act."

12. The deductions specified under sub-section (2) of sec.48 of the Act is with reference to the gross capital gains calculated under clause (a) of sub-section (1) only. Nowhere in the Act is it specified that this deduction is subject and restricted to the deductions to be allowed under section 53 & 54 of the Act.

13. This is so in order that the assessee would get the full benefit of the deduction on the gross capital gains as otherwise, the deduction would be allowed only after the capital gains have been computed as per section 48 of the Act i.e. both sub-section (1) and (2).



14. However no such explanation or proviso is given in section 48 of the Act, that the deduction to be allowed under sub-clause (b) of sub-section (1) of section 48 of the Act is subject to the deduction allowed under section 53 and 54 of the Act.

15. When the deduction is calculated under section 48 of the Act, it has to be calculated under both sub-section (1) (a) and (1) (b) of the same section.

16. Under the circumstances, deduction under section 48(2) of the Act will have to allowed on the amount calculated under sec.48 (1)(a) of the Act and before giving deduction under section 53 and 54 of the Act.

17. In view of the clear position in law, we answer the question in the negative, in favour of the Assessee and against the Revenue.

18. Thus, the reference stands disposed of as above.

V.B. GUPTA, J

APRIL 25, 2008

MADAN B. LOKUR, J

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