$~R-72

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 2nd September, 2014

\+ **ITA 146/2002**

COMMISSIONER OF INCOME TAX ..... Appellant
Through Mr. Kamal Sawhney, Sr. Standing Counsel with Mr. Sanjay Kumar, Jr. Standing Counsel.

versus

FRICK INDIA LTD. .... Respondent
Through Mr. Mayank Nagi, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL)

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act', for short) relates to assessment year 1997-98 and was admitted for hearing vide order dated 28th November, 2002, on the following substantial question of law:-

> "Whether on the facts and in the circumstances of the case the Tribunal was correct in law in holding that the capital asset transferred was a long term capital asset?"

2. The respondent-assessee, a company, in their return for the

assessment year in question had declared long-term capital gains Rs.6.78 crores on account of surrender of tenancy rights, which were acquired during the financial year 1972-73 in Jeevan Vihar Building, Parliament Street, New Delhi. The said tenancy right was acquired by way of a written lease executed by the landlord-Life Insurance Corporation of India (LIC) for a period of 3 years commencing from 15th March, 1973. After the end of the said term of 3 years, the respondent assessee continued to occupy the premises as a tenant, but no fresh written document was executed. On 24th January, 1997, the respondent-assessee entered into a Memorandum of Understanding ('MoU') with Bank of Tokyo, Mitsubishi and received Rs.6.78 crores upon fulfilling the following conditions, (a) they shall deliver to the LIC a letter, draft of which was enclosed with the MOU, informing their decision to vacate the tenanted area; (b) they shall surrender the tenancy of the tenanted area on or before 18th February, 1997; and, (c) they shall provide to the bank a duly certified copy of the resolution adopted by them as stipulated in draft enclosed as Annexure-B to the MOU. There were certain other stipulations also. On fulfilling the said stipulations, the respondent assessee vacated the tenanted premises and received the aforesaid payment. As noticed above, the payment was offered to be taxed as long-term capital gain.

3. The Assessing Officer held that the tenancy rights of the

respondent-assessee were a capital asset and there was also a transf of the asset on surrender of the tenanted premises but the transfer should be treated as a short-term capital gain and not as a long-term capital gain. The logic behind the aforesaid finding of the Assessing Officer was that the tenancy after the initial period of 3 years by of a written instrument, was month-to-month. Thus, tenancy rights extinguished on the last day of each month and a fresh or new tenancy was created. A fresh tenancy had begun on 1st February, 1997 and was relinquished on 18th February, 1997. Therefore, the period of holding of the tenancy rights was only 18 days and thus, less than 36 months.

4. The Commissioner of Income Tax (Appeals) dismissed the appeal of the respondent-assessee agreeing with the reasons of the Assessing Officer that at the beginning of every month, a new tenancy was created and thus a new capital asset had come into existence on 1st February, 1997. This new tenancy was relinquished on 18th February, 1997, which meant that the period of holding was less than 36 months. The Commissioner of Income Tax (Appeals) further observed that unless the respondent-assessee had paid rent for each month, possession of the property would not have continued.

5. The Tribunal, however, reversed the said finding and decided the issue in favour of the respondent-assessee observing that lease of an

immoveable property deemed to be a month-to-month lease terminable by either the lessor or lessee, but this fiction cannot be extended. It was further observed that month-to-month tenancy does not come to an end by a mere afflux of time and in such cases demand of possession or intimation determining tenancy was pre-requisite before filing a suit for ejectment. Reference was made to the judgments of the Bombay High Court and the Supreme Court in which Sections 106 and 107 of the Act and Section 116 of the Transfer of Property Act, 1882 were examined and elucidated.

6. It is apparent from the facts of the present case that the respondent-assessee came into possession of the premises under a written agreement on 15th March, 1973. The tenancy period specified therein was till 14th March, 1976. Thereafter, the respondent-assessee continued to use and occupy the premises as a tenant. The rent for the premises was paid and accepted by the landlord. On 18th February, 1997, the tenancy rights were surrendered and consideration of Rs.6.78 crores was received from a third party. The payment was for surrender of the said tenancy rights.

7. Under Section 107 of the Transfer of Property Act, lease of an immoveable property can be created either by a registered instrument or by an oral agreement accompanied by delivery of possession. In the present case, we do not have the original agreement dated 15th March,

1973 on record and we are not aware whether the original agreeme was by way of registered instrument or not. In the absence of a registered instrument, it would have resulted in creation of month-to-month tenancy. The said tenancy could be determined by issue of notice under Section 106 of the Transfer of Property Act.

8. Assuming that there was a registered instrument under which the lease was first created on 15th March, 1973, the assessee upon end of the term of the lease would be a tenant by holding over under Section 116 of the Transfer of Property Act. The said section provides that where a tenant after end or determination of the lease, remains in possession of the property and rent is accepted by the lessor (the landlord), in the absence of an agreement to the contrary, the lease is treated as renewed from year to year or from month to month, as the case may be. In such cases also when rent is paid and accepted, Section 106 of the Transfer of Property Act would apply and notice of termination has to be issued. Section 116 of the Transfer of Property Act also, therefore, makes Section 106 applicable once rent is accepted after determination or end of the tenure of the lease. The effect thereof on applicability of Section 106 of the Transfer of Property Act is the same in either case. Month-to-month tenancy cannot be confused with the right to occupy as a tenant as a notice under Section 106 of the Transfer of Property Act is required to be issued before ejectment

proceedings are initiated.

9. "Long-term asset" has been defined in Section 2(29b) of the Act as an asset which is not a short-term capital asset and the expression "short-term capital asset" has been defined in Section 2(42A) of the Act to mean the capital asset held by an assessee for not more than 36 months immediately preceding the date of its transfer. The expression "held by the assessee" means the date from when the assessee acquired the right, got hold of and started enjoying the said asset. In the present case, the assessee had acquired tenancy rights on 15th March, 1973 and since then they had held the said tenancy rights till the surrender was made on 18th February, 1997. The transfer of tenancy had taken place on 18th February, 1977 and not before. The period of holding, therefore, was from 15th March, 1973 till 18th February, 1997. No third person, who had come into possession of the property during the period and it is not a case of the Revenue that respondent-assessee did not hold the property during the entire period of over 14 years.

10. We would like to elucidate and explain the expression, "held by the assessee" in some detail. General words should normally receive plain and ordinary construction but this principle is subject to the context in which the words are used as the words reflect the intention of the Legislature. The words have to be construed and interpreted to effectuate the object and purpose of the provision, when they are

capable of multiple meanings or are ambiguous. Isolated reading words can on occasions negate the very purpose. Lord Diplock had referred to the term, "business" as an 'etymological chameleon', which suits its meaning to the context in which it is found. The background, therefore, has to be given due regard and not to be ignored, to avoid absurdities. This principle is applicable when we interpret the word, "held" in Section 2(42A) of the Act, for the said word is capable of divergent and different connotations and understanding.

11. The word, 'held' as used in Section 2(42A) of the Act is with reference to a capital asset and the term, 'capital asset' is not confined and restricted to ownership of a property or an asset. Capital assets can consist of rights other than ownership right in an asset, like leasehold rights, allotment rights, etc. The sequitur, therefore, is that the word 'held' or 'hold' is not synonymous with right over the asset as an owner and has to be given a broader and wider meaning. In Black's Law Dictionary, Sixth Edition, the word 'hold' has been given a variety of meanings under nine different headings. Four of them, i.e, 1, 4, 8 and 9 read as under:

> "1. To possess in virtue of a lawful title; as in the expression, common in grants, "to have and to hold," or in that applied to notes, "the owner and holder."
> xxx
> 4. To maintain or sustain; to be under the necessity or duty of sustaining or proving; as when it is said that a party "holds the affirmative" or negative of an issue

> in a cause.
> xxx
> 8. To possess; to occupy; to be in possession and administration of; as to hold office.
> 9. To keep; to retain; to maintain possession of or authority over."

As per clause 8, the word 'hold' means to possesss or occupy, to be in possession and would also include to keep, retain and maintain possession or authority over an asset.

12. The word 'held' thus can be interpreted to embrace the idea of actual possession of the assessee. In ***Budhan Singh versus Babi Bux***, AIR 1970 SC 1880 (at page 1884) the word 'held' was interpreted to mean "lawfully held, to possess by legal title". The term 'legal title' here not only includes ownership, but also title or right of a tenant, which will mean actual possession of the land and a right to hold the same and claim possession thereof as a tenant (we are not examining rights of a rank trespasser in the present decision and we express no opinion in that regard).

13. The Tribunal in our opinion has rightly relied upon the decision of the Punjab and Haryana High Court in ***CIT versus Ved Prakash & Sons (HUF)***, (1994) 207 ITR 148 (P&H) in which it has been held as under:-

> "As is clear from a bare reading of Section 2(42A) of the Act, the word "owner" has designedly not been used by the Legislature. The word "hold", as per

> dictionary meaning, means to possess, be the owner, holder or tenant of (property, stock, land.). Thus, a person can be said to be holding the property as an owner, as a lessee, as a mortgagee or on account of part performance of an agreement, etc. Conversely, all such other persons who may be termed as lessees, mortgagees with possession or persons in possession as part performance of the contract would not in strict parlance come within the purview of "owner". As per the Shorter Oxford Dictionary. Edition 1985, "owner" means one who owns or holds something; one who has the right to claim title to a thing"
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> (emphasis supplied)

14. The said decision was followed by the Punjab and Haryana High Court subsequently in ***Madhu Kaul versus CIT & Another***, (2014) 363 ITR 54 (P&H). The Delhi High Court in ***Commissioner of Income Tax versus K. Ramakrishnan***, (2014) 209 DLT 14 has held that for the purpose of calculating period of holding we have to look and take into account the date since the assessee got 'beneficial interest' in the property. The Allahabad High Court in ***CIT versus Rama Rani Kalia***, (2013) 358 ITR 499 (All) has drawn distinction between holding of an asset and the nature of title over the property and it has been observed that period of holding will determine whether the consideration should be taxed as a short-term capital gains or long-term capital gains. Thus, conversion of leasehold right into freehold by way of improving the title over the property would not affect the taxability of the gain from such property, which is relatable to the period over which the property is held. Thus the asset, i.e. the tenancy rights were held for nearly 14

years and consideration received on surrender has been rightly treat as a long term capital gain.

15. In view of the aforesaid discussion, the question of law is answered in favour of the assessee and against the appellant-Revenue. Costs will be payable by the appellant as per the Delhi High Court Rules.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

SEPTEMBER 2, 2014
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