



HIGH COURT OF DELHI : NEW DELHI

ITA No.391/2007

% Judgment reserved on: 25th February, 2008

Judgment delivered on: 11th March, 2008

J.K.Kashyap Appellant
Through: Mr.Krishan Mahajan
with Mr.K.Sampath, Advocates.

Versus.

A.C.I.T.Respondent
Through: Mr.Sanjiv Sabharwal,
Advocate.

Coram:

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

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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.

The present appeal has been filed under Section 260-A of the Income Tax Act, 1961 (for short as 'Act')



challenging the impugned order dated 21st July, 2006, passed by the Income Tax Appellate Tribunal (for short as 'Tribunal'), Delhi Bench (B) in ITA No.4970/DEL/1999 for the Assessment Year 1996-1997 vide which the Tribunal had reversed the order of Commissioner of Income Tax (Appeal) {for short as CIT(A)} in Appeal No.75/1999-2000 and upheld order dated 26th March, 1999, passed by the Assessing Officer holding the Assessee is liable to pay capital gain tax under Section 45 of the Act read with Section 2(47) of the Act.

2. The Assessee, who is engaged in real estate business filed his return of income on 24th December, 1996 declaring an income of Rs.3,24,930 (rupees three lakh twenty four thousand nine hundred and thirty). During the course of assessment proceedings it was noted by the Assessing Officer that apart from the



profit declared by the Assessee in the real estate business for the previous year relevant to the assessment year under consideration the Assessee received a sum of Rs.2.34 crores in pursuance of an agreement signed by him at London on 26th September, 1995 for extinguishing his rights in the property – 13, Golf Links, New Delhi.

3. The sequence of events which are relevant for appreciating the facts of the present case have been mentioned in the assessment order as follows:-

“The property under reference located at 13-Golf Links, New Delhi measuring 171 sq.yds was originally obtained by Dr.BC Guha since deceased vide deed of Perpetual lease dated 8.8.1995 from the President of India acting through the Land Development Office of the Govt. of India, thereafter a double storied structure was built upon this land after getting sanction from the Municipal authorities.

The said Dr.BC Guha transferred his rights in the said property in favour



of his wife Smt.Leela Guha, son Dr.PK Guha and daughter Smt.Santona Guha by way of gift deed dated 26.1.1958.

The shares of Smt.Leela and Smt.Santona Guha were subsequently inherited by Smt.Ina Guha and Shri JK Guha on 8.2.1984 and 8.1.69 on the death of these two parties as per their separately executed wills, thus Dr.PK Guha, Smt. Ina Guha and Shri JK Guha became 1/3rd owner of the undivided share in the property.

The third party Shri JK Guha filed a suit entitled JK Guha Vs. PK Guha and others in the High Court of Delhi vide Civil Suit No.3104 of 1989 for partition claiming separation of his 1/3rd undivided share in the said property. Subsequently the claim was amended to 1/2 share instead of 1/3rd Share.

During the pendency of these proceedings the assessee Shri JK Kashyap, moved an application under order 1 Rule 10 CPC seeking to be made party to the proceedings on the averments that Shri JK Guha had entered into an agreement with him to sell his 1/3rd share in the said property, the assessee also filed a suit for specific performance against Shri JK Guha being Civil Suit No.2312 of 1990,



entitled JK Jashyap Vs. JK Guha and others in the High Court of Delhi claiming that Shri JK Guha had agreed to sell and transfer his share to the assessee for a consideration of Rs.25,00,000/- out of which an amount of Rs.3.7 lakhs had been already paid as part payment.

However, this claim of the assessee was denied by Shri JK Guha and subsequently he entered into an agreement with one Shri Singh Chauhan S/o Shri Shanker Singh Chauhan to sell his rights in the said property for a sum of Rs.One Crore. Shri Ram Singh Chauhan made some advances and payments and obtained some documents including General Power of Attorney, will and affidavit by virtue of which Shri JK Guha created rights and interest in the property in favour of Shri Ram Singh Chauhan.

During the pendency of these proceedings, the assessee along with one Mr.Parveen Nayyar entered into an agreement on 9.11.1993 to purchase the undivided 2/3rd share of Dr.PK Guha & his wife Mrs.Ina Guha for a total sale consideration of Rs.2 crores and an amount of Rs.20 lakhs was paid as earnest money. Necessary permission from the Appropriate Authority in form



37-I was duly obtained for purchase the said 2/3rd share for Rs.2 crores.

Thus it became evident that the three co-owners Dr.PK Guha, Smt.Ina Guha and Shri JK Guha had subsequently created rights and interest in the property in favour of the assessee Shri JK Kashyap and Shri Praveen Nayyar and Shri Ram Singh Chauhan. The above six parties mutually agreed that in view of the litigation, engagement claims and counter claims between themselves it was not possible to give effect to their said agreement executed previously and therefore, subsequently on 26.9.95 an agreement as mentioned earlier, between the following parties was signed (1) the vendors, Dr.PK Guha, Ina Guha & JK Guha and (ii) the assignors Shri JK Kashyap, Sh.Praveen Nauuar and Sh.Ram Singh Chauhan and (iii) the vendee FMI Investment Pvt.Ltd. It was signed in London, U.K. wherein the vendee M/s FMI Investment Pvt.Ltd, was to purchase the property at 13-Golf Links, New Delhi.

As per this agreement it was mutually decided that the 1st, 2nd and 3rd parties (vendors) shall sell their ownership and proprietary rights in the property and the 4th, 5th & 6th parties



(assignors) shall assign all and whatever rights they claim. All the previous agreements claims and counter claims in respect of the said property were to come to an end and resolved.

In consideration of this offer, representations & assurances, the 7th party (vendee) was to pay a sum of Rs. 10 crores, which was to be divided between 1st to 6th parties. Out of this amount, Rs.9 crores 45 lacs, was to be paid as part payment, on application for compromise/withdrawal being moved in the High Court and orders being passed thereon and all other necessary documents being executed. Out of this amount, the assessee, Shri J.K.Kashyap, was to receive a sum of Rs.2.24 crores. The Balance Rs.55 lakhs, which included the assessee's share of Rs.10 lacs, was to be paid on execution of the sale deed before the Sub-Registrar, New Delhi.

As per this agreement, the assessee received banker's cheque dated 22.9.95 for Rs.2.24 crores drawn on Banque Nationale de-Paris, and then he withdrew the suit filed before the High Court (vide order No.IA 9384/94 in S 2312/90) on 28.9.95. Moreover, as per the said agreement, a Power of Attorney, was issued by the assessee in the name of Mr.Rakesh Kumar Jain,



who was nominated as the trustee/caretaker of the property on behalf of the vendors.”

4. The Assessing Officer after examining the provisions of the agreement dated 26th September, 1995 concluded that it is immaterial - whether the agreement has been completed or not; whether the vendee has taken the possession of the property or not. According to the Assessing Officer what is relevant in the case of the Assessee is that he has relinquished his rights in the said property for a consideration and this transfer has taken place as per Section 2(47) of the Act and thus he is liable to capital gain tax under Section 45 of the Act.
5. The order of Assessing Officer was challenged by the Assessee before CIT(A).
6. CIT(A) in his order held that since the possession of the property has not been given to the buyer and the



transfer has not taken place as such the transactions are not complete, so there cannot be any liability to charge of capital gains, either short term or long term. Therefore, the addition made by the Assessing Officer was deleted by CIT(A).

7. Aggrieved with the order of CIT(A), Revenue filed an appeal before the Tribunal and the Tribunal vide impugned order, set aside the order passed by CIT(A) and allowed the appeal filed by Revenue.

8. It has been contended by learned counsel for the Assessee that under Section 2(47) of the Act, a person cannot be held liable to pay capital gains tax for a payment received in the context of property transactions, without a finding as to what is the precise right in the property of the Assessee that has been extinguished and which extinguishment is sought to be made the basis of fastening the capital gains tax



liability on the Assessee, since the transfer of the property has not yet taken place. Further, the Assessee is not the owner of the property and he is only a confirming party to the sale if at all the sale finally takes place between the vendor and the vendee. The property is still in dispute and the amount received by the Assessee for relinquishing his interest in property was only an advance and if ultimately the agreement dated 26th June, 1995 was not implemented, the Assessee was required to refund the whole amount.

9. According to Section 45(1) of the Act, any profits or gains arising from the transfer of capital asset effected in the previous year are to 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.



10. The term “capital asset” has been defined in Section 2(14) of the Act, so as to mean property of any kind held by an Assessee, whether or not connected with his business or profession. It excludes certain properties such as stock-in-trade, personal effects, agricultural land etc.

11. Section 2(47) of the Act gives an inclusive definition of transfer in relation to capital asset and extinguishment of any right in the capital asset is also considered to be a transfer for the purpose of the Act.

12. The combined reading of the above provisions of law makes it clear that transfer of capital asset is not confined to the transfer of immovable property only but its scope is much wider for the purpose of the Act. Section 45(1) of the Act would apply even if the consideration is received from a party other than the one in whose favour the transfer is effected.



13. The word transfer under Section 2(47) has a very wide meaning and its meaning cannot be narrowed down by referring to the provisions of other statutes.

14. In the present case, the Assessee in the year 1990 paid a sum of Rs.3.7 lacs as part payment to Sh.J.K.Guha out of total consideration of Rs. 25 lacs for acquiring 1/3rd share in the property. In the year 1993 further payments were made for purchase of undivided interest of other owners of the property. However, due to litigation, the sale could not be materialised and subsequently on 26th September, 1995 an agreement was entered with new vendee namely M/s FMI Investment Pvt. Ltd. Since the property had not yet been transferred in the name of the Assessee, so the Assessee became a party to this agreement as a confirming party having acquired interest in the property by virtue of earlier agreement. Even if the



Assessee has not become the owner of the property due to litigation, the fact remains that he received consideration for acquiring interest in the property and that interest was ultimately relinquished by him in favour of new vender by virtue of an agreement dated 16th September, 1995 and the consideration received by him for relinquishing his right in the property, thus, attracts the provisions of Section 45(1) of the Act, making him liable to capital gains tax.

15. In this respect, it would be relevant to quote the averments made by the Assessee in a civil suit filed by him in this very Court against Mr.J.K.Guha and others where the Assessee has stated in the petition that “the plaintiff has a vital interest in the said property being the purchaser under agreement to sell of 1/3rd in the suit premises which was agreed to be partitioned and thereafter to be sold to the plaintiff.”



16. Moreover in the agreement to sell dated 26th September, 1995 in which the Assessee is the fourth party and he along with Fifth party, has entered into an agreement to purchase the undivided 2/3rd rights and undivided shares of first and second parties for a total consideration of Rs. 2 crore.

17. The Assessee has also placed on record copy of his statement recorded in suit No.2312/90 filed in this Court, which reads as under:-

“ Statement of Mr.J.K.Kashyap, Plaintiff on S.A. and of counsel for the parties:

The parties have arrived at a settlement an agreement of sale has been entered into M/s FMI Investment Pvt. Ltd. Has today handed over a Bankers cheque No.217252 dated 22nd September, 1995 for a sum of Rupees Two Crores twenty four lakhs to the plaintiff Mr.J.K.Kashyap drawn on 'Banque Nationale Paris'. All the original documents relating to the suit property and in possession of the plaintiff have been handed over to the intending purchaser. The plaintiff has no other document left with him. The claim of the plaintiff stands



satisfied. The suit be dismissed as withdrawn leaving the parties to bear their own costs.”

18. So, it is clear from the record that by way of first agreement which was entered in the year 1990, the Assessee had acquired right in the property and this right he has relinquished in favour of new vendor in 1995. Thus, we are of the considered opinion that the Assessee is liable to long term capital gain and not to short term capital gain.

19. Under the circumstances, we do not find any infirmity in the impugned order passed by the Tribunal and since it is a finding of fact given by the Tribunal that the Assessee acquired right in the property at the time of execution of first agreement in the year 1990 and had relinquished his rights in favour of new vendor in 1995, no substantial question of law arises for our consideration.



20. Accordingly, the appeal is dismissed.

V.B. GUPTA, J

March 11, 2008
bp/Bisht

MADAN B. LOKUR, J