

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं

श्री डि.एस. सुन्दर सिंह, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.442/Mds/2013

निर्धारण वर्ष / Assessment Year : 2009-10

Shri P. Sukumar,
Bangalore Auto Diesel Works,
Omalar Main Road,
Salem – 636 004.

v. The Income Tax Officer,
Ward – I(1),
Salem.

PAN : AGUPS 0835 P

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri S. Sridhar, Advocate

प्रत्यर्थी की ओर से/Respondent by : Shri R. Durai Pandian, JCIT

सुनवाई की तारीख/Date of Hearing : 29.12.2016

घोषणा की तारीख/Date of Pronouncement : 17.03.2017

आदेश /ORDER

PER N.R.S. GANESAN, JUDICIAL MEMBER:

This appeal of the assessee is directed against the order of the Commissioner of Income Tax (Appeals), Salem, dated 04.01.2013 and pertains to assessment year 2009-10.

2. The only issue arises for consideration is assessment of capital gain on sale of property by the bank.

3. Shri S. Sridhar, the Ld.counsel for the assessee, submitted that the assessee is a director in a company by name Associated Business Credits Ltd. The company Associated Business Credits Ltd. availed a loan from Karnataka Bank Ltd. on mortgage of property belonging to the assessee. The Ld.counsel clarified that the loan was not availed by the assessee. The property belonging to the assessee which was given as a security for availing the loan by the company. Since the company could not repay the money, the property was sold by the bank and the sale consideration was not received by the assessee. Since the assessee has not received any sale consideration, according to the Ld. counsel, there cannot be any assessment of capital gain in the hands of the assessee. The Ld.counsel submitted that capital gain was received by the bank, which is a diversion of income by overriding title. Therefore, the capital gain cannot be assessed in the hands of the assessee at all. The Ld.counsel placed his reliance on the unreported order of this Tribunal in Sivanandha Mills Ltd. v. ACIT in I.T.A. Nos.1216 & 2106/Mds/2013 dated 17.06.2016, a copy of which has been filed by the Ld.counsel for the assessee.

4. On the contrary, Shri R. Durai Pandian, the Ld. Departmental Representative, submitted that the property in question belongs to

the assessee in his individual capacity. The assessee gave the property as security / mortgage for the loan availed by the company, namely, Associated Business Credits Ltd. Now the company could not repay the amount, therefore, the property was sold by the bank and the sale proceeds were adjusted towards bank loan. Therefore, the assessee has not received any money on sale of property. Now the assessee claims before this Tribunal that the capital gain on sale of property was diverted to the bank by overriding title. Therefore, there cannot be any assessment in its hand. The Ld. D.R. placed his reliance on the order of this Tribunal in Sivanandha Mills Ltd. (supra). Referring to the order of this Tribunal, the Ld. D.R. submitted that the order of this Tribunal was passed ignoring the judgment of Apex Court in CIT v. Attili N. Rao (2001) 252 ITR 880. The Ld. D.R. further submitted that the judgment of Madras High Court has also been misquoted by the Tribunal in Sivanandha Mills Ltd. (supra). Therefore, the order of this Tribunal is not applicable to the facts of the case. According to the Ld. D.R., there cannot be any overriding title on sale of property. At the best, it can be said that it is an application of income by the assessee. The voluntary act of creating security or encumbrance of property after purchase cannot be construed as overriding title. According to the Ld. D.R., if the property was subject to mortgage at the time of

purchase/acquisition/inheritance and the assessee received the property subject to loan/charge/mortgage, we may say that repayment of such loan was by overriding the title. In this case, the property was mortgaged subsequent to its acquisition for the purpose of availing loan by the company. It is not a pre-existing loan/charge. Therefore, according to the Ld. D.R., it cannot be a case of overriding title, it can only be an application of income. Therefore, the capital gain on sale of property is liable to be assessed to tax.

5. We have considered the rival submissions on either side and perused the relevant material available on record. The property in question is belonged to the assessee. The same was given as security for the purpose of availing loan by the company, Associated Business Credits Ltd. Now the property was sold by the bank and sale proceeds were adjusted by the bank towards loan outstanding in the hands of Associated Business Credits Ltd. The question arises for consideration is whether the sale consideration appropriately by the loan towards the outstanding loan assessed can be considered application of income by overriding title?

6. We have carefully gone through the judgment of Madras High Court in CIT v. Bradford Trading Company Pvt. Ltd. (261 ITR

222). In the case before Madras High Court, the assessee-company purchased a plot of land for the purpose of constructing a star hotel. The assessee became heavily indebted to Indian Overseas Bank and in need of further finance and also expertise to complete the construction of hotel so as to make it a commercial venture. Accordingly, the assessee approached one hotelier by name Shri A.M. Buhari to participate in the venture and take over the management of the hotel. Shri A.M. Buhari agreed to advance a sum of ₹5 lakhs to the assessee-company and he was allotted 2500 shares in the assessee-company. Accordingly, there was an agreement that the hotel should be sold to Shri A.M. Buhari for a sum of ₹43 lakhs and he should be made as Managing Director. In the meantime, the Chairman of the assessee-company Shri Abdul Aziz entered into negotiations with India Tobacco Company Ltd. for sale of entire undertaking for a total consideration of ₹46 lakhs and an agreement was also entered into that effect. Shri A.M. Buhari dissented the agreement and he filed a company petition before the High Court to set aside the agreement between the Chairman of the assessee-company and India Tobacco Company Ltd. on the ground that the decision to transfer the undertaking was taken behind his back and if the transfer takes place, it would affect his rights as a minority shareholder and his interest in the company would be

seriously jeopardized. The said Shri A.M. Buhari also filed an application for temporary injunction restraining the Chairman of the company from implementing the agreement with India Tobacco Company Ltd. India Tobacco Company Ltd. submitted before the High Court that it was prepared to go through the sale transaction subject to all risks in the proceeding initiated by Shri A.M. Buhari. On the basis of said submission made by India Tobacco Company Ltd., the Ld. Single Judge of High Court dismissed the company petition. Shri A.M. Buhari subsequently filed appeal before Division Bench of the High Court. During pendency of appeal, the parties to the proceeding settled the difference between themselves and entered into a compromise. A compromise memo was filed before the High Court praying for decree in terms of the compromise entered into. In the compromise, Shri A.M. Buhari was required to transfer 2500 shares held by him to the wife of Shri Abdul Aziz for consideration of ₹2,50,000/- and the assessee-company should repay a sum of ₹2,50,000/- to Shri A.M. Buhari. In consideration of that, Shri A.M. Buhari withdrew the company petition filed in the appeal proceeding. In fact, the assessee-company paid ₹2 lakhs to Shri A.M. Buhari in full and final settlement of all claims, demands and outstandings against all the respondents including the assessee-company. India Tobacco Company Ltd. agreed to

reimburse ₹1,50,000/- to the assessee for the payment of ₹2 lakhs to be made to Shri A.M. Buhari. Shri A.M. Buhari has confirmed that on receipt of payment, he would not make any claim against the shares of the assessee-company or its assets. In those factual circumstances, the High Court found that the payment of ₹2 lakhs to Shri A.M. Buhari by the assessee-company is an expenditure incurred in connection with transfer of undertaking. In the case before the High Court, admittedly, the property of the assessee-company was transferred and Shri A.M. Buhari is a shareholder, therefore, in order to relinquish that transfer, the payment was made so that the property can be transferred by the Chairman of company to India Tobacco Company Ltd. It is not a case of giving the property on mortgage by landlords for the loan availed by a third party company. Therefore, the judgment of Madras High Court in Bardford Trading Co. Pvt. Ltd. (supra) is not at all applicable to the facts of the case. The factual difference arose in the case before Madras High Court was not brought to the notice of the Bench of this Tribunal which decided case in Sivanandha Mills Ltd. (supra). Therefore, this Tribunal is of the considered opinion that the judgment of Madras High Court in Bradford Trading Co. Pvt. Ltd. (supra) is not at all applicable to the facts of the present case.

7. We have also carefully gone through the judgment of Apex Court in CIT v. Attili N. Rao (supra). In the case before Apex Court, the assessee carried on Abkari business. The assessee mortgaged immovable property to the Excise Department of the State of Andhra Pradesh as security for the amounts of 'kist' due to the State. The State Government sold the immovable property by auction and a sum of ₹5,62,980/- was realized. From and out of sale proceeds of ₹5,62,980/-, the State Government deducted a sum of ₹1,29,020/- due towards 'kist' and repaid balance to the assessee. In computing the capital gain from the sale of property, the assessee sought deduction of ₹1,29,020/-. The Appellate Tribunal upheld the claim of the assessee on the ground that the mortgage over the property and amount realized never reached the assessee, but reached to State Government by overriding title. Therefore, the assessee cannot be assessed to capital gain. On a reference to High Court, the High Court found that by mortgage, the interest was created in favour of State Government. When the property was sold by auction, its value had to be reduced to that effect and created in favour of State Government. On further appeal before the Apex Court, it was held what was sold on auction was the immovable property belonged to the assessee and out of

the price belonged to the assessee, the State deducted its dues towards 'kist'. Therefore, capital gain has to be computed on full price. In fact, the Apex Court held at page 883 as follows:-

“We are of the view that the Tribunal and the High Court were in error. What was sold by the State at the auction was the immovable property that belonged to the assessee. The price that was realised therefor belonged to the assessee. From out of that price, the State deducted its dues towards “kist” and interest due from the assessee and paid over the balance to him. The capital gain that the assessee made was on the immovable property that belonged to him. Therefore, it is on the full price realised (less admitted deductions) that the capital gain and the tax thereon has to be computed.”

8. This judgment of Apex Court in *Attili N. Rao* (supra) presumably was not brought to the notice of Division Bench of this Tribunal while deciding the case in *Sivanandha Mills Ltd.* (supra). In view of this judgment of Apex Court in *Attili N. Rao* (supra), the decision of this Tribunal in *Sivanandha Mills Ltd.* (supra) cannot be said to be applicable to the case of the present assessee. In fact, the decision of this Bench of the Tribunal in *Sivanandha Mills Ltd.* (supra) runs totally contrary to the judgment of Apex Court in *Attili N. Rao* (supra).

9. The Apex Court had an occasion to consider identical facts in *V.S.M.R. Jagdishchandran (Decd.) v. CIT* (1997) 227 ITR 240 as

well. The Apex Court found that where the mortgage was created by the assessee himself, then the expenditure incurred by the assessee to repay the mortgage debt cannot be held to be the cost of acquisition or cost of improvement allowable under Section 48(ii) of the Act. Therefore, it is obvious that wherever there was repayment of mortgage debt, it cannot be allowed either as expenditure for improvement or cost of acquisition. The entire capital gain in such case is assessable to tax. This judgment of the Apex Court in V.S.M.R. Jagdishchandran (supra) was also not brought to the notice of the Tribunal in Sivanandha Mills Ltd. (supra). In view of the judgment of Apex Court in Attili N. Rao (supra) and V.S.M.R. Jagdishchandran (supra), this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

10. In the result, the appeal filed by the assessee is dismissed.

Order pronounced on 17th March, 2017 at Chennai.

sd/-

(डि.एस. सुन्दर सिंह)

(D.S. Sunder Singh)

लेखा सदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated, the 17th March, 2017.

Kri.

sd/-

(एन.आर.एस. गणेशन)

(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A), Salem
4. आयकर आयुक्त/CIT, Salem
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.