

आयकर अपीलीय अधिकरण, “बी” न्यायपीठ, चेन्नई
IN THE INCOME-TAX APPELLATE TRIBUNAL ‘B’ BENCH, CHENNAI
श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य एवं श्री एस जयरामन, लेखा सदस्य के समक्ष
Before Shri Duvvuru RL Reddy, Judicial Member &
Shri S. Jayaraman, Accountant Member

आयकर अपील सं./I.T.A. No. 791/Chny/2019
निर्धारण वर्ष/**Assessment Years:2013-14**

Shri Deep David,
C/o R. Bupathy & Co., “Vibgyor”
No. 139, 1st Floor, Kodambakkam
High Road, Chennai 600 034.
[PAN:BORPD3357R]

The Income Tax Officer,
Vs. International Taxation 1(1),
Chennai 600 034.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

आयकर अपील सं./I.T.A. No. 792/Chny/2019
निर्धारण वर्ष/**Assessment Years:2013-14**

Shri Roshan David,
C/o R. Bupathy & Co., “Vibgyor”
No. 139, 1st Floor, Kodambakkam
High Road, Chennai 600 034.
[PAN:BORPD3355P]

The Income Tax Officer,
Vs. International Taxation 1(1),
Chennai 600 034.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by : Shri G. Baskar, Advocate
प्रत्यर्थी की ओर से/Respondent by : Shri G. Johnson, Addl. CIT
सुनवाई की तारीख/ Date of hearing : 29.07.2021
घोषणा की तारीख /Date of Pronouncement : 17.09.2021

आदेश /O R D E R

PER DUVVURU RL REDDY, JUDICIAL MEMBER:

Both the appeals filed by different assesseees are directed against common order of the Id. Commissioner of Income Tax (Appeals) 16, Chennai, dated 14.02.2019 relevant to the assessment year 2013-14. Since

the issues raised in both the appeals are common in nature, clubbed together, heard and being disposed of by this common order for the sake of convenience. The common grounds raised in both the appeals are reproduced as under:

- 1.1 *The order of the Commissioner of Income-Tax (Appeals) is wrong, illegal and opposed to facts, law and in violation of the principles of natural justice.*
- 1.2 *The Commissioner of Income Tax (Appeals) erred in enhancing the assessment without issuing a notice of enhancement.*
- 2.1 *The Commissioner of Income Tax (Appeals) ought to have followed the directions of the Hon'ble Tribunal's Order dated 19.04.2017, wherein the matter was remitted back for "de novo" consideration, which clearly mandates him to apply his mind independently without being influenced by the earlier Order dated 03.10.2016.*
- 2.2 *The action of the Commissioner of Income Tax (Appeals) in merely repeating the earlier order of the CIT(A), has completely invalidated the purpose for which this Hon'ble Tribunal remanded the matter back.*
- 2.3 *The Commissioner of Income Tax (Appeals) ought to have independently adjudicated the issues regarding indexation of cost and the exemptions u/ss. 54 and 54EC instead of merely agreeing with the conclusions of his predecessor.*
- 3.1 *The Commissioner of Income Tax (Appeals) erred in holding that what was transferred by the assessee is only a short-term capital asset.*
- 3.2 *The Commissioner of Income Tax (Appeals) failed to note that the property having been acquired by one of the modes covered under s. 49(1) of the Act, the period of holding of the previous owner is also to be considered.*
- 4.1 *The Commissioner of Income Tax (Appeals) erred in withdrawing the benefit of indexation and deduction u/ss. 54F and 54EC of the Income-tax Act, without considering the issues in light of s.46 of the Transfer of Property Act, 1882, despite the categorical directions of this Hon'ble Tribunal.*
- 4.2 *The Commissioner of Income Tax (Appeals) failed to note that the Assessee acquired the said property as per the terms of the Deed of Settlement dated 10.10.2005 and hence is entitled for benefit of indexation from the day the previous owner acquired it.*

- 4.3 *The Commissioner of Income Tax (Appeals) erred in rejecting the applicability of s. 46 of the Transfer of Property Act, 1882 on the untenable ground that the Assessee had not shown that his father had offered his share of sale consideration to tax.*
- 4.4 *The Commissioner of Income Tax (Appeals) failed to note that it is amply evident from the sale deed and other supportive documents, that the assessee's father had received a share in the sale consideration, which is more than sufficient for the CIT(A) for applying the provisions of section 46 of the Transfer of Property Act, 1882.*
- 5.1 *The Commissioner of Income Tax (Appeals) erred in withdrawing the benefit of exemption u/ss. 54F and 54EC of the Income-tax Act. without considering the issues in light of s.46 of the Transfer of Property Act, 1882, despite the categorical directions of this Hon'ble Tribunal.*
- 5.2 *The Commissioner of Income Tax (Appeals) ought to have seen that there is no reason to deny exemption u/ss. 54F and 54EC of the Income-tax Act, as all the conditions for exemption stand complied with.*
6. *Any other ground that may be raised at the time of hearing.*

2. Brief facts of the case are that in both the above assessee's case, the assessee's grandfather Mr. JA David acquired property from TNHB through allotment on 31.10.1969 and constructed a residential building with his own funds in 1985-86. On 10.10.2005, Mr. JA David executed a settlement deed in favour of his younger son Roopan Rajnookant David (assessee's father) as per which:

- a) The assessee's father can enjoy all benefits derived from the property without power of alienation.
- b) The assessee and his brother (Deep David) can enjoy all benefit derived from the property along with power of alienation after the life time of their father.
- c) The assessee and his brother however sold the property with the consent of their father on 12.09.2012 for ₹.4.57 crores and sale consideration was offered in their hands as follows:-

| | | |
|--------------|---|----------------|
| Roopan David | : | ₹. 49.98 lakhs |
| Roshan David | : | ₹. 2.03 crores |
| Deep David | : | ₹. 2.03 crores |

While computing the capital gains, the assessee took the benefit of cost of asset to the previous owner and indexed cost of asset to the previous owner and also claimed deduction under sections 54 & 54EC of the Act. The Assessing Officer examined the settlement deed and observed that the settlement deed dated 10.10.2005 was made by the Settlor JA David, assessee's grandfather, who was made a settlement in favour of his younger son Shri Roopan Rajnookant David, the settlee whereas his elder son Shri Charles Vinukant David will have no right over the property. The settler Shri J A David reserve his right saying that after the lifetime of the Settlor and his wife, Shri Roopan Rajnookant David can take possession of the said property and can enjoy the property during his lifetime without any power of alienation. Further after the lifetime of Shri Roopan Rajnookant David, the Settlee, Shri Deep David and Shri Roshan David (sons of Settlee and the grandsons of Settlor) can jointly take possession of the subject property and can enjoy the property in equal share absolutely with all powers of alienation. However, during the lifetime of Shri Roopan Rajnookant David the property was sold by Shri Deep David and Shri Roshan David. While doing so, the consent of Shri Roopan Rajnookant David was also taken. AO by considering the fact that Shri Roopan Rajnookant David had no right to

alienate the property, therefore, sale consideration taken by the assessee in the name of Shri Roopan Rajnookant David at 10.94% not acceptable. Therefore, the AO considered the 50% of sale consideration equally in the hands of Shri Deep David and Shri Roshan David. The AO relied on Explanation (iii) to proviso of section 48 of the Act denying the assessee's claim for cost of indexation to the previous owner, i.e. as on 01.04.1981. The AO relying on Explanation (iii) to proviso of section 48 of the Act allowed index cost of acquisition to that of F.Y 2005-06, i.e. the date of Settlement deed dt. 10.10.2005 and calculated LTCG at ₹.2,18,17,142/-. The assessee has made an investment into purchase of residential properties in the name of himself along with father Shri Roopan Rajnookant David and brother Shri Roshan David for total of ₹.2,09,98,430/-. The Assessing Officer considered 50% ₹.2,18,17,142/- of such investment amounting to ₹.1,04,99,215/- as deduction and assessee has also made investment u/s 54EC of the Act for ₹.50,00,000/-. The same was allowed and arrived to a taxable LTCG at ₹.63,17,927/-. Aggrieved, the assessee carried the appeal before the Id. CIT(A).

2.1 On appeal, the Id. CIT(A) has observed that the settlement deed becomes abundantly clear that the assessee's father has no right or power to alienate the property. Further, the Id. CIT(A) has observed that in the life time of the father, property cannot pass to the son through inheritance. Thus,

the assessee is not able to prove the claim that property is conveyed to through inheritance. The assessee relied on the case laws like Bombay High Court, CIT Vs. Manujula J Shah in 16 Taxmann.com.42(2011) and other case laws will not be applicable as in this case, the transfer of asset from grandfather to father and to grandson is not through inheritance. And on such sale of asset, where asset is not acquired by inheritance, the benefit of section 49(l) of the Act will not be available. Thus, the asset is owned by Deep David and Roshan David which was acquired by them, not through inheritance without incurring any cost to the asset. Hence, in this case, the transfer of property will not be covered by section 49(1) of the Act. Therefore, the Id. CIT(A) has held that the assessee will not be eligible to cost of asset to that of the previous owner in view of Explanation 1, to section 2(42A)(b) of the Act. Further, according to Id. CIT(A), the property in question has been sold by the Shri Deep David and Shri Roshan David by taking consent of their father, the benefit of cost to the previous owner will be lost and for Shri Deep David and Shri Roshan David the cost of acquisition will be NIL. Moreover, as the provision of section 49(1) r.w.s. 2(42A) the period of only Shri Deep David and Shri Roshan David will be a short term period as the transfer of asset does not get the benefit of period of holding to that of previous owner in view of section 49(1) as the asset is not inherited to Shri Deep David and Shri Roshan David. Considering this factual aspect,

father of Shri Deep David and Shri Roshan David had no right to alienate the property. Therefore, though he is shown as confirming party in the sale deed, do not get share in the property. Accordingly, the sale consideration of the property becomes taxable only in the hands of Shri Deep David and Shri Roshan David in the ratio of 50% of ₹.4,57,00,000/-. The impugned asset loses the correct term as to that of the previous owner, because the property is not conveyed to Shri Deep David and Shri Roshan David by way of inheritance. The Ld. CIT(A) further observed that the period of holding is not a long term period and therefore it will be treated as short term period. Hence, the Assessing Officer was directed to calculate the capital gain arising on such property as short term capital gain only.

2.2 The Id. CIT(A) has arrived at a conclusion that as the period of holding is treated as short term period, the benefit of indexed cost and inflation cost to the asset to the previous owner is not applicable because the transfer of asset is not covered by section 49(1) r.w.s. 2(42A) of the Act. The Assessing Officer was accordingly, directed to withdraw the cost of indexation given in the assessment order.

2.3 Further, the Id. CIT(A) has observed that as per section 54 of the Act, the benefit will be available only if the asset is happened to be a Long Term Capital Asset since in view of the above fact finding, the asset is treated as

short term capital asset. Therefore, deduction under section 54 of the Act will not be available to the assessee. Therefore, Ld. CIT(A) directed the Assessing Officer to withdraw the deduction granted to the assessee under section 54 of the Act.

2.4 Similarly, the Id. CIT(A) has further observed that as per section 54EC of the Act, the benefit will be available only if the asset is happened to be a Long Term Capital Asset since in view of the above fact finding, the asset is treated as "short term capital asset". Therefore, deduction under section 54EC of the Act will not be available to the assessee. In view of the above, Assessing Officer is directed to withdraw the deduction granted to the assessee under section 54EC of the Act.

2.5 Against the above order of the Id. CIT(A), the assessee preferred further appeal before Tribunal. Before ITAT, the assessee made a plea that provisions of the section 46 of Transfer of Property Act, 1882 is applicable in this case and as such, the Id. CIT(A) was not justified in enhancing the assessment by withdrawing the cost of indexation to the previous owner and exemption under section 54 of the Act. Further, it was the submissions of the Id. A.R. that the computation of capital gains as short term capital gains and also withdrawal of the exemption under section 54EC of the Act was not justified. However, Id. DR submitted that the assessee took a new plea with

regard to applicability of section 46 of Transfer of Property Act, 1882, which was not raised before the lower authorities. Hence, it may be remitted to the file of the Id. CIT(A) for fresh consideration.

2.6 After considering the submissions of the both sides, the Coordinate Benches of the Tribunal has observed that the issue of applicability of section 46 of Transfer of Property Act, 1882 was raised before the Tribunal for the first time and it was not raised before the authorities below and accordingly remitted the matter back to the file of the Id. CIT(A) for de novo consideration and decide the issue after giving an opportunity of hearing to the assessee.

3. Upon the directions of the Tribunal in its order in I.T.A. Nos. 43 & 44/Mds/2017 dated 19.04.2017 and considering the submissions of the assessee, the Id. CIT(A) has observed and held as under:

“4.4 The above extract from the Assessment Order establishes that - Although Section 46 of the Transfer of Property Act was not specifically referred, yet the issue involved was examined during the assessment proceedings and the A.R of the assessee agreed to tax the Roopan Rajnookant David's share of sale consideration (Rs 49,98,000/-) in the hands of Shri Deep David and Shri Roshan David in equal proportion (50:50).

Accordingly, the A.O. taxed the Roopan Rajnookant David's share of sale consideration (Rs.49,98,000/-) in the hands of Shri Deep David and Shri Roshan David in equal proportion (50: 50) and did not tax the same in the hands of Shri Roopan Rajnookant David.

Now the A. R of the assessee is contesting that Roopan Rajnookant David's share of sale consideration (Rs.49,98,000/-) may not be assessed in the hands of Shri Deep David and Shri Roshan David in view of section 46 of

the Transfer of Property Act. However the A. R did not bring any material on record to establish that Roopan Rajnookant David's share of sale consideration (Rs.49,98,000/-) was offered to tax in his hands.

For the above stated reasons the contention of the assessee that section 46 of the Transfer of Property Act may be applied is dismissed.

4.5 Indexation:

With respect to Indexation, I agree with the conclusion of the ld. CIT(A) in ITA No 88/CIT(A)-16/2013-14 dated 03.10.2016 that as the period of holding is treated as short term period, the benefit of indexed cost and inflation cost to the asset to the previous owner is not applicable because the transfer of asset is not covered by see 49(1) r. W.S 2(42A).

Hence the AO is directed to withdraw the cost of indexation given in the assessment order.

4.6 Exemption u/s 54EC:

With respect to Indexation, I agree with the conclusion of the ld. CIT(A) in ITA No 88/CIT(A)-16/2013-14 dated 03.10.2016 that as the asset is treated as short term capital asset, deduction u/s.54 of the Act will not be available to the assessee.

Hence, the AO is directed to withdraw the deduction granted to the assessee u/s 54 of the Act.

4.7 Exemption u/s. 54:

With respect to Indexation, I agree with the conclusion of the ld. CIT(A) in ITA No 88/CIT(A)-16/2013-14 dated 03.10.2016 that as the asset is treated as short term capital asset, deduction u/s 54EC of the Act will not be available to the assessee.

Hence the AO is directed to withdraw the deduction granted to the assessee u/s.54EC of the Act.

5. *In result the appeal of the assessee is dismissed.”*

4. On being aggrieved, the assessee is in appeal before the Tribunal. The ld. Counsel for the assessee has submitted the ld. CIT(A) has passed the appellate order erroneously by simply repeating the earlier appellate

order and not independently considered the submissions of the assessee without influencing the previous order with respect to application of section 46 of the Transfer of Property Act, 1882 as well as application of beneficial provision of section 54 of the Act. It was further submission that both the assessees have acquired the property in 2005 itself when the grandfather executed the settlement deed reserving right of residence for him and his spouse and enjoyment for his son. When life-interest was surrendered, that is also treated as a transfer, which can give rise to a gift tax assessment. The action of the Assessing Officer and the Id. CIT(A) in including the consideration received by the assessee's father in their hands is clearly untenable in the light of section 46 of the Transfer of Property act and the Schedule III to the Wealth Tax Act. By referring to the decision in the case of CIT v. Manjula J Shah 355 ITR 474 (Bom) and in the case of CIT v. Gautam Munabhai Amin 218 taxman 319 (Gujarat), the Id. Counsel for the assessee has submitted that the benefit of indexation would be available right from the day the predecessor in title acquired the property, wherever the acquisition is by a mode mentioned in section 49 of the Income Tax Act. Since the asset held was a long term capital asset, the exemption claimed under section 54 and section 54EC of the Act are allowable, as rightly allowed by the Assessing Officer in the assessment order, the Id. Counsel for the assessee prayed for reversion of appellate order passed by the Id. CIT(A). On the

other hand, the Id. DR strongly supported the appellate order passed by the Id. CIT(A).

5. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below including paper books filed by the assessee. The assessee's grandfather Shri J.A. David retained the right of residence for him and his wife Smt. Swarna David. Through a settlement deed, the assessee's father Shri Roopan Rajnookant David was given only right of enjoyment without any power of alienation and both the assessee's are remainder men who acquired the property to be possessed and enjoyed after the life-time of their father Shri Roopan Rajnookant David. Thus, it is clear from the settlement deed that both the assessee's have absolute right over the property, whereas, the assessee's father got only life-interest over the property. The first point at issue is whether, as per section 46 of Transfer of Property Act, the persons holding different interests can jointly transfer and agree among themselves regarding sharing of consideration. For better understanding, section 46 of Transfer of Property Act reads as under:

46. Transfer for consideration by persons having distinct interests.— Where immovable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

In this case, the assessee's father got lifetime enjoyment right over the property. By virtue of extinguishing lifetime enjoyment right over the property, the assessee's father along with his two sons [both the assessees] sold the scheduled property and the sale consideration was shared without any dispute. As per section 2(47)(ii) of the Income Tax Act, the "transfer", in relation to a capital asset, includes the extinguishment of any rights therein. Admittedly, the assessee's father has extinguished his lifetime enjoyment right over the property and if we conjointly read together the section 46 of the Transfer of Property Act as well as section 2(47)(ii) of the Income Tax Act, it would be clear that the assessee's father has lawfully extinguished his lifetime enjoyment right over the property.

5.1 The scheduled property was originally acquired by the grandfather of the assessees from the TNHB through allotment on 31.10.1969 and he had constructed a residential building with his own funds in 1985-86 and was under his possession. On 10.10.2005, Shri JA David [grandfather of the assessees] executed a settlement deed in favour of his younger son Shri Roopan David with lifetime enjoyment right over the property and both the assessees are absolute right over the property. The scheduled property was sold for a consideration of ₹.4.57 crores out of which against lifetime enjoyment right, the assessee's father got 10.94% and the balance amount of sale consideration was equally shared by both the assessees. However,

as per the Department, the share of 10.94% taken by the assessee's father was not accepted and Assessing Officer considered the 50% of sale consideration equally in the hands of both the assessees, which appears to be incorrect. As per the decision in the case of CIT v. Soundararajan 150 ITR 80 (Mad), the person holding right of residence could be deducted from the gross sale consideration. In the above decision, the Division Bench of the Hon'ble Jurisdictional High Court has observed and held as under:

“In this case, it is not in dispute that under the partition deed the mother had a right of residence in the house till her lifetime. It is also nit in dispute that a sum of ₹.60,000 has been paid to the mother for getting a relinquishment of her right of residence during her lifetime. In those circumstances, the question is, whether the sum of ₹.60,000 paid to the mother can be taken as a part of the consideration received by the sons. Admittedly, the assessees received only ₹.83,0000 each and they did not have the benefit of ₹.60,000 which in fact had been paid to the mother as consideration for relinquishing her life interest in the property. When the interest of the mother in the property in question had been purchased by getting a relinquishment for a consideration of ₹.60,000, the said sum could not be taken to be consideration paid in respect of the interest on the assessee-sons. The payment made to the sons towards their interest in the property is only ₹.83,000 each and that alone can be taken for the purpose of computation of the capital gains. Hence, the Tribunal in this case appears to be right in its conclusion that the sum of ₹.60,000 paid to the mother should be excluded.

We, therefore, see no justification to direct a reference on these cases. The reference petitions are accordingly rejected. There will be no order as to costs.”

In the present case also, out of total sale consideration, the share of 10.94% was legally and rightly given to the assessee's father, who held lifetime enjoyment right, which was relinquished and thereby both the assessees sold the said property. Thus, respectfully following the above decision of the Hon'ble Madras High Court, the Assessing Officer is directed to compute the

capital gains only for ₹.2.03 crores each in the hands of both the assessees and not the entire sale consideration.

6. So far as benefit of cost of indexation is concerned, both the assessees have acquired the scheduled property through settlement deed executed by the grandfather of the assessees'. To determine the cost, there are different modes of acquisition. Where the capital asset became the property of the assessee, the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it as per section 49 of the Income Tax Act, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be. In the present case, the assessees have acquired the property through settlement deed. The settlement deed duly executed becomes effective immediately during life time of all the parties. Moreover, the registered settlement deed executed mutually and jointly is legally final and irrefutable and non-revocable and more so, the property would be passed on to the beneficiary parties immediately. Therefore, from the date of registration of the settlement deed, the assessees have become the absolute beneficiaries having vested interest. As per section 2(42A) of the Act, in the case of a capital asset which becomes the property of the assessee in the circumstances mentioned in sub-section (1) of section 49 of the Act, there shall be included the period for which the asset was held by

the previous owner referred to in the said section. Thus, the period of holding by the assessee's grandfather, who was the previous owner of the said property, should be taken into account both for indexation and for long term capital asset. Both the assessees have acquired the property on 10.10.2005 and sold the property on 12.09.2012 and thus, both the assessees are eligible to avail the benefit under section 54 of the Act as the asset held by the assessees are long term capital asset. Therefore, the Assessing Officer has to assess the long term capital gain by taking into consideration of the period of holding of the property by the previous owner i.e. grandfather of the assessee as well as for indexation in view of the decision in the case of CIT v. Manjula J. Shah 355 ITR 474, wherein, the Hon'ble Bombay High Court has held that the benefit of indexation would be available right from the day the predecessor in title acquired the property, wherever, the acquisition is by a mode mentioned in section 49 of the Act. Since the asset held by the assessee is a long term capital asset, the Assessing Officer has rightly allowed the exemption claimed under section 54 & 54EC of the Act as per the assessment order and the Id. CIT(A) has erroneously rejected the claim of the assessee.

6.1 Under the above facts and circumstances, we set aside the appellate order and direct the Assessing Officer to take the sale consideration of the property after payment of ₹.49,98,000/- to the father of the assessees

towards lifetime enjoyment and to allow the claim for cost of indexation as well as deductions claimed under section 54 & 54EC of the Act after verification of the details as may be submitted for claiming such deduction.

7. In the result, both the appeals filed by the assessee are allowed.

Order pronounced on the 17th September, 2021 in Chennai.

Sd/-
(S. JAYARAMAN)
ACCOUNTANT MEMBER

Sd/-
(DUVVURU RL REDDY)
JUDICIAL MEMBER

Chennai, Dated, 17.09.2021

Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant, 2. प्रत्यर्थी/Respondent, 3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT, 5. विभागीय प्रतिनिधि/DR & 6. गार्ड फाईल/GF.