[2011] 15 taxmann.com 244 (Mumbai)/[2011] 48 SOT 385 (Mumbai)/[2011] 133 TTJ 640 (Mumbai)[22-09-2010]

[2011] 15 taxmann.com 244 (Mumbai)

IN THE ITAT MUMBAI BENCH 'B'

Balmukund P. Acharya

v.

Income-tax Officer*

PRAMOD KUMAR, ACCOUNTANT MEMBER AND
V. DURGA RAO, JUDICIAL MEMBER
IT APPEAL NO. 4628 (MUM.) OF 2009
[ASSESSMENT YEAR 1996-97]
SEPTEMBER 22, 2010

Section 48, of the Income-tax Act, 1961 - Capital gains - Computation of - Assessment year 1996-97 - Assessee held tenancy right in a property - In consideration of surrendering these tenancy rights, assessee was given certain premises by developer who had developed property in which assessee had tenancy rights in question - During relevant assessment year, assessee sold said premises - Assessee claimed that since premises was acquired without any cost of acquisition, income arising on sale thereof could not give rise to any taxable capital gains - Authorities below rejected assessee's claim - Whether on facts, market value of tenancy right as on time when it was surrendered, was to be regarded as cost of acquisition of premises and, thus, when said premises was sold subsequently, income arising from sale of it was to be brought to tax as capital gains - Held, yes [In favour of revenue]

FACTS

The assessee's father was sole proprietor of a unit namely LGSC which was a monthly tenant from 1952. The assessee was taken as a partner in LGSC in 1971, and, upon the death of his father in 1981, the assessee became proprietor of the LGSC. That was how the assessee was in possession of the premises rented out to LGSC. It was in consideration of surrendering these tenancy rights that the assessee was given certain premises by the developer who had developed the property in which the assessee had the tenancy rights in question. This property was sold by the assessee in year 1995. The assessee's submission was that since this property was acquired without any cost of acquisition, income arising on the sale thereof could not give rise to any taxable capital gains. The Assessing Officer rejected the assessee's claim. On appeal, the Commissioner (Appeals) was of the view that market value of tenancy right, *i.e.,* the date on which the assessee was given free premises by the developer, was the cost of acquisition in respect of the asset sold. The Commissioner (Appeals) thus dismissed the assessee's appeal.

On second appeal:

HELD

Merely because an asset does not have a cost of acquisition, this fact per se *cannot lead to the conclusion that the sale of such an asset will not lead to capital gains liable to be taxed. The only support for non-taxability of capital gains on sale of property, as admitted by the assessee, was the fact, as disclosed in the computation of income, that the asset did not have a cost of acquisition, but then there is an important distinction between an asset not having cost of acquisition and an asset cost of acquisition of which cannot be determined. The former could lead to taxable capital gains, the sale of latter cannot lead to taxable capital gains. On the basis of the fact that the asset did not have any cost of acquisition, the Assessing Officer, for the purposes of* prima facie *adjustments under section 143(1)(*a*), could not have come to the conclusion that the income on sale of such asset could not lead to taxable capital gains. The plea of the assessee was thus devoid of legally sustainable merits, and it was to be held that the Assessing Officer was justified in not excluding, in the course of processing under section 143(1)(*a *), capital gains from taxable income. The Commissioner (Appeals) was thus quite justified in dismissing the plea of the assessee. In the instant case, the asset sold was a property which was given free of cost to the assessee on surrender of tenancy right. The consideration for this asset was the market value of tenancy right as on the point of time when it was surrendered, which was the same as market value of this asset as at the point of time when it was given to the assessee without any payments by the assessee. The cost of acquisition may be* 'nil' *on the facts of a case but yet the cost of acquisition may have been incurred (such as by surrender of tenancy rights on the facts of this case) and it may be capable of being determined (market value of premises at the point of time when tenancy rights were surrendered). In view of above, it was to be held that the gains on sale of property, received on surrendering the tenancy rights, were taxable as capital gains in the hands of the assessee. The claim made by the assessee was ill conceived and devoid of any merits. Therefore, the conclusion arrived at by the Commissioner (Appeals) was to be approved. [Para 10]*

In the result, the assessee's appeal was to be dismissed.

CASES REFERRED TO

Balmukund Acharya v. *Dy. CIT* [2009] 176 Taxman 316 (Bom.) (para 5), *CIT* v. *B.C. Srinivasa Setty* [1981] 128 ITR 294 (SC) (para 5), *CIT* v. *Dr. D.A. Irani* [1998] 234 ITR 850/[2000] 111 Taxman 600 (Bom.) (para 5), *Sabnis Ashok Anant* v. *Asstt. CIT* [2009] 29 SOT 29 (Pune) (URO) (para 7), *Khatau Junkar Ltd.* v. *K.S. Pathania* [1992] 196 ITR 55/ 61 Taxman 157 (Bom) (para 7), *Jethalal D. Mehta* v. *Dy. CIT* [2005] 2 SOT 422 (Mum.) (para 10) and *New Shailaja Co-operative Housing Society Ltd.* v. *ITO* [2010] 36 SOT 19 (Mum.)(URO) (para 10).

Arun P. Sathe and **Ms. Aarti Sathe** *for the Appellant.* **N.K. Balodia** *for the Respondent.*

ORDER

Pramod Kumar, Accountant Member - This is an appeal filed by the assessee and it calls into question correctness of CIT(A)'s order dt. 15th May, 2009 in the matter of order passed under s. 250 r/w s. 143(1)(a) of the IT Act, 1961, for the asst. yr. 1996-97 and upon the matter being restored to the file of the C1T(A) by Hon'ble High Court, on the following grounds :

"1. The CIT(A) erred in confirming the assessment order, in charging capital gains on sale of premises of the appellant, and failed to appreciate that the capital gain was not taxable under s. 45 as the premises which was sold by the assessee had not cost the appellant anything in terms of money, and, as such, computation of capital gains was not possible on the basis of principles laid down by Supreme Court judgment in the case of *ITO* v. *B.C. Srinivasa Setty* [1981] 21 CTR (SC) 138:[1981] 128 1TR 294 (SC).

2. The CIT(A) has erred in not following the order of the High Court and failed to appreciate that the judgment of Supreme Court in the case of *B.C. Srinivasa Setty* (*supra*) applies to the appellant's case, since the appellant had not transferred the tenancy right but the ownership right in the premises, and also further failed to appreciate that the judgment of Bombay High Court, in the case of *CIT* v. *Dr. D.A. Irani* [1999] 151 CTR (Bom.) 288 : [1998] 234 ITR 850 (Bom.) is not applicable to the facts of the appellant's case."

2. As a perusal of the material before us show, and as agreed to by the learned counsel during the course of hearing, the grievance of the assessee is against the finding given by the CIT(A), in the course of proceedings remanded by the Hon'ble High Court, confirming the AO's action in including the capital gains on sale of certain premises, as was disclosed by the assessee himself in his IT return, in the taxable income as per impugned intimation under s. 143(l)(a). In other words, grievance of the assessee is that even though admittedly the assessee had himself disclosed the said capital gains on sale of premises, the AO ought not to have taxed the same, and made appropriate adjustments to that effect in the intimation processed under s. 143(1)(a), since the premises sold by the assessee did not have any cost of acquisition. It is thus against the inertia, and not the action of the AO that the matter is now in appeal before us.

3. Let us first take a look at the material facts of this case and the developments leading to this appeal before us. In the IT return for the asst. yr. 1996-97, filed by the assessee on 17th Sept., 1996, the assessee, *inter alia,* disclosed capital gains on the sale of property at Rs. 1,07,00,000. *Vide* intimation under s. 143(1)(a), the AO did accept the capital gains so returned to tax, and he also raised demand for interest under s. 234C, amounting to Rs. 1,87,352. Aggrieved by the said intimation under s. 143(1)(a), assessee carried the matter in appeal before the CIT(A). One of the grievances raised by the assessee was against levy of interest under s. 234C, but, interestingly, the assessee also raised a grievance that the AO accepting taxability of the capital gains on sale of property. This grievance was as follows :

"Dy. CIT erred in charging capital gains on the sale of premises of the appellant, and failed to appreciate that the capital gains was not taxable under s. 45 as the premises, which was sold by the appellant had not costed the appellant anything in terms of money. As such, computation of capital gains was not possible on the basis of principles laid down by Supreme Court judgment in case of *ITO* v. *B.C. Srinivasa Setty* [1981] 21 CTR (SC) 138 : [1981] 128 ITR 294 (SC)."

4. The CIT(A) dismissed the appeal on the ground that the appeal is not maintainable inasmuch as the assessee has, on his own, offered the income to tax, and as there is no adjudication on the question of taxability of this income by the AO. The assessee then moved a rectification petition under s. 154 to the AO, but the said petition was rejected. The assessee also appealed against the rejection of the rectification petition, but without any success. So far as rectification petition matter was concerned, it appears that the matter rests at that level. However, against CIT(A)'s holding that the appeal against adjustments not made under s. 143(1)(a) is not maintainable, the matter travelled in appeal before a Co-ordinate Bench of this Tribunal. Our distinguished colleagues were of the view that "the scope of the appeal is limited to the adjustments made under s. 143(1)(a)". The assessee was, however, not satisfied with the stand so taken by the Tribunal, and carried the matter in appeal before the Hon'ble Bombay High Court. The substantial question of law, which was admitted for consideration by their Lordships, was as follows :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that no appeal lies against the order of intimation under s. 246 of the Act, and that the order under s. 143(1)(a) is limited to the adjustments made by the AO and the said adjustment does not include denial of tax liability by the assessee and that additional ground leading to tax liability of capital gain does not arise from the order of the CIT(A) ?"

5. Hon'ble Bombay High Court held [order is reported as *Balmukund Acharya* v. *Dy. CIT* [2009] 176 Taxman 316 (Bom.) that

"in the case on hand, it was obligatory on the part of the AO to apply his mind to the facts disclosed in the return and assess the assessee keeping in mind the law holding the field."

Their Lordships thus answered the question in favour of the assessee and proceeded to "quash and set aside the impugned order and restore the appeal to the file of the CIT(A) with directions to decide the same in accordance with the law". In coming to these conclusions, their Lordships also observed that the right to appeal should be construed in a practical, reasonable and liberal manner, that no tax can be levied without the authority of law, that if a particular levy is not permitted under the Act, tax cannot be levied applying the doctrine of estoppel, that an appeal cannot be partly maintainable and partly non-maintainable as has been held in this case by the CIT(A) and the Tribunal, and that the authorities under the IT Act are under an obligation to act in accordance with the law. The matter was thus remitted to the file of the CIT(A). That is how the CIT(A) has come to be *in seisin* of the matter, and, in accordance with the directions of Hon'ble High Court, passed the impugned order. The CIT(A) proceeded to examine the taxability of capital gains on sale of premises on merits. The CIT(A) noted that the

assessee's late father P.V. Acharya was sole proprietor of one Laxmi General Supply Co. (LGSC) which was a monthly tenant from 1952 in respect of ground floor tenement and open area around it. The assessee was taken as a partner in LGSC in 1971, and, upon the death of his father in 1981, the assessee became proprietor of the LGSC. That is how the assessee was in possession of the premises rented out to LGSC. It is in consideration of surrendering these tenancy rights that the assessee was given certain premises on 6th Dec., 1987, by the developer Padma Consultants, who had developed the property in which the assessee had the tenancy rights in question. The case of the assessee is that the asset so acquired by the assessee did not have any cost of acquisition. This property was sold by the assessee on 29th Nov., 1995 and 15th Dec., 1995. The assessee's submission was that since this property was acquired without any cost of acquisition, capital gains on the sale thereof cannot give rise to any taxable capital gains either. Reliance was placed on *CIT* v. *B.C.Srinvasa Setty* [1981] 128 ITR 294 (SC). However, CIT(A) did not agree with this submission. He was of the view that market value of tenancy right as on 6th Dec., 1987, *i.e.,* the date on which the assessee was given free premises by the developer, was the cost of acquisition in respect of the asset sold. In support of this conclusion, the CIT(A) relied upon Hon'ble Bombay High Court's judgment in the case of *CIT* v. *Dr. D.A. Irani* [1998] 234 ITR 850 /[2000] 111 Taxman 600 (Bom.). For this short reason, the CIT(A) dismissed the appeal of the assessee. The assessee is aggrieved and is in appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

7. In the light of Hon'ble Bombay High Court's judgment, it is now free from doubt that not only an action of the AO, but also an inaction of the AO, can be appealed against. In case an AO fails to exercise the powers conferred upon him by the statute, when facts of the case warrant or justify the exercise of such powers, this inaction of the AO can also be called into question before an appellate authority. Every power granted to a public functionary comes with a corresponding duty to exercise such a power when circumstance so warrant or justify. A public official cannot decline to exercise the power on the ground that the assessee did not request for the same at the relevant point of time. On the same lines were the views of a Co-ordinate Bench of this Tribunal, in the case of *Sabnis Ashok Anant* v. *Asstt. CIT* [2008] 117 TTJ (Pune) 96/[2009] 29 SOT 29 (Pune)(URO) (Pune)(Trib.) 203, wherein the Tribunal, speaking through one of us (*i.e.,* the AM) had observed thus :

> "…… not only a mistake in the acts of an authority; even a wrongful inertia of a public authority is also a mistake apparent on record. All the powers of someone holding a public office are powers held in trust for the good of public at large. There is, therefore, no question of discretion to use or not to use these powers. It is for the reason that when a public authority has the power to do something, he has a corresponding duty to exercise these powers when circumstances so warrant or justify—a legal position which has the approval of Hon'ble Supreme Court."

What follows is that merely because an assessee had offered something to tax, AO could not have declined to exercise his powers to give relief to the assessee by not taxing the same. It is in this perspective that the CIT(A) ought to have decided the appeal on merits, and the CIT(A) could not have rejected the same *in limine*. It was not open to him to decline to decide the appeal on the ground that the assessee cannot appeal against the order of the AO as there was no adjudication by the AO on the issue of taxability of capital gains. That is precisely what Hon'ble High Court has held, and the CIT(A) has accordingly been directed to decide the matter afresh "in accordance with the law". Nothing more than this needs to be read into the judgment of Hon'ble Bombay High Court directing the CIT(A) to decide the matter afresh. Having said that, we must also point out that the CIT(A) ought not have forgotten that he was examining the stand of the AO in the course of processing of a return under s. 143(1)(a). What was required to be examined was whether or not the AO should have excluded the capital gains on sale of property from taxable income in the course of processing of IT return under s. 143(1)(a). The relevance of s. 143(1)(a), under which AO was acting, could not have been overlooked. The importance of scope of powers under s. 143(1)(a) lies in severe limitation of powers of the AO under this section. Any relief that he can grant, or the disallowance he can make, under this section must be solely on the basis of material on record. To that extent, *i.e.,* "determination of liability as ascertainable from the return filed", this section has been held to be somewhat analogous to s. 154. In the case of *Khatau Junkar Ltd.* v. *K.S. Pathania* [1992] 196 ITR 55 / 61 Taxman 157 (Bom.), Hon'ble Bombay High Court explained the scope of these powers as follows :

> "In fact the wording of this provision itself makes this very clear. Under cl. (ii) of the proviso to s. 143(1)(a), any loss carried forward, deduction, allowance or relief has to be allowed on the basis of the information available in such return or accounts or documents accompanying it. Similarly, under cl. (iii) of the proviso, to disallow any deduction, allowance or relief claimed, such deduction, allowance or relief must be such as is, on the basis of the information available in the return, accounts or documents, *prima facie* inadmissible. The ITO, therefore, has no power to go beyond or behind the return, accounts or documents, either in allowing or in disallowing any such deduction, allowance or relief."

8. The question that the CIT(A) ought to have adjudicated was whether the AO, in the course of exercise of his powers under s. 143(1)(a), could have held that the capital gains on sale of property ought not to have been included in the income liable to be taxed for that assessment year. The CIT(A) completely overlooked the limitations placed on the AO under s. 143(1)(a) and proceeded to decide the matter as if the AO had arrived at his impugned conclusion in a regular scrutiny assessment. The CIT(A) took a wrong path, though, for the reasons we will now set out, he reached the right conclusion anyway.

9. The statement of taxable income attached to the IT return showed the cost of acquisition as 'nil', but then can that fact by itself could have lead AO to conclude that the capital gains on sale of a property which has no cost of acquisition cannot lead to taxable capital gains ? We do not think so. In the case of *B.C. Srinivasa Setty* (*supra*) on which so much of reliance has been placed by the learned counsel, Hon'ble Supreme Court has held that when cost of an asset is incapable of being determined, the gains on sale of such assets cannot be brought to tax as capital gains. The key test is whether or not cost of the asset can be determined. Their Lordships also took note of the subtle distinction of cost being indeterminate and cost being nil, and held that where cost is indeterminate, capital gains on sale of such asset cannot be brought to tax, though, where cost is nil, the sale of asset can still lead to the capital gains. This aspect of the matter is clear from the following observations made by their Lordships :

> "The mode of computation and deductions set forth in s. 48 provide the principal basis for quantifying the income chargeable under the head 'Capital gains'. The section provides that the income chargeable under that head shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset :

'(*ii*) the cost of acquisition of the capital asset . . .'

What is contemplated is an asset in the acquisition of which it is possible to envisage a cost. The intent goes to the nature and character of the asset, that it is an asset which possesses the inherent quality of being available on the expenditure of money to a person seeking to acquire it. It is immaterial that although the asset belongs to such a class, it may, on the facts of a certain case, be acquired without the payment of money. That kind of case is covered by s. 49 and its cost, for the purpose of s. 48, is determined in accordance with those provisions. There are other provisions which indicate that s. 48 is concerned with an asset capable of acquisition at a cost. Sec. 50 is one such provision. So also is such sub-s. (2) of s. 55. None of the provisions pertaining to the head 'Capital gains' suggests that they include an asset in the acquisition of which no cost at all can be conceived."

10. In view of the above discussions, in our considered view, merely because an asset does not have a cost of acquisition, this fact *per se* cannot lead to the conclusion that the sale of such an asset will not lead to capital gains liable to be taxed. As we have noted, during the analysis of AO's powers under s. 143(1)(a), only such adjustments could have been made by the AO as could have been conclusively held to be admissible on the basis of IT return and accompanying documents. The only support for non-taxability of capital gains on sale of property, as admitted by the learned counsel, was the fact, as disclosed in the computation of income, that the asset did not have a cost of acquisition, but then there is an important distinction between an asset not having cost of acquisition and an asset cost of acquisition of which cannot be determined. As Hon'ble Supreme Court has observed, the former could lead to taxable capital gains, the sale of latter cannot lead to taxable capital gains. On the basis of the fact that the asset did not have any cost of acquisition, the AO, for the purposes of *prima facie* adjustments under s. 143(1)(a), could not have come to the conclusion that the income on sale of such asset cannot lead to taxable capital gains. The plea of the assessee is thus devoid of legally sustainable merits, and we hold that the AO was justified in not excluding, in the course of processing under s. 143(1)(a), capital gains from taxable income. The CIT(A) was thus quite justified in dismissing the plea of the assessee. In any event, the scope of *B.C Srinivasa Setty* (*supra*) judgment is confined to the assets in respect of which cost of acquisition cannot be determined in the sense it is inherently impossible to determine such a cost. In the present case, the asset sold is a property which is given free of cost to the assessee on surrender of tenancy right. The consideration for this asset is the market value of tenancy right as on the point of time when it was surrendered, which is the same as market value of this asset as at the point of time when it was given to the assessee without any payments by the assessee. When it was pointed out to the learned counsel for the assessee, he invited our attention to Tribunal's decision in the case of *Jethalal D. Mehta* v. *Dy. CIT* [2005] 2 SOT 422 (Mumbai) which has also been followed in the case of *New Shailaja Co-operative Housing Society Ltd.* v. *ITO* [2010] 36 SOT 19 (Mum.)(URO). This was a case in which the assessee received certain sum as its property was entitled to "receive the TDRs" *i.e.,* build additional space in the building on the basis of transferable development rights purchased by the builder. Obviously, the cost of acquisition of such right to 'receive' the TDRs could not have been determined, and the Tribunal held the consideration received for allowing building additional FSI as not taxable as capital gain—though with the rider that it will go on to reduce the cost of acquisition. By no stretch of logic, conclusions arrived at in this decision help the assessee. In *New Shailaja Cooperative Housing Society Ltd.'s* case (*supra*), the Tribunal held that consideration received for sale of TDRs is also not taxable, and proceeded on the basis that this issue is also covered by *Jethalal D. Mehta order* (*supra*), but even then Tribunal did take notice of the fact that

> "there is a difference in the situation when cost of acquisition is 'nil' and the cases in which cost of acquisition cannot be ascertained or no cost of acquisition has been incurred".

If anything, this reasoning supports the case of the Revenue. The cost of acquisition may be 'nil' on the facts of a case but yet the cost of acquisition may have been incurred (such as by surrender of tenancy rights on the facts of this case) and it may be capable of being determined (market value of premises at the point of time when tenancy rights were surrendered). Learned counsel's reliance on these decisions does not help the assessee either. In view of above analysis, in our considered view, not only that the AO could not have made the adjustment canvassed by the assessee, even if tenable in law, within the limited scope of his powers under s. 143(1)(a) of the Act, even on merits the gains on sale of property, received on surrendering the tenancy rights, were taxable as capital gains in the hands of the assessee. The claim made by the assessee is ill conceived and devoid of any merits. We, therefore, approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

11. In the result, the appeal is dismissed.

■■

*In favour of revenue.