A. Gasper vs Commissioner Of Income-Tax, Calcutta on 21 August, 1991

Equivalent citations: AIR1992SC147, [1991]192ITR382(SC), 1993SUPP(1)SCC52, AIR 1992 SUPREME COURT 147, 1991 AIR SCW 2845, 1992 TAX. L. R. 194, 1993 (1) SCC(SUPP) 52, 1993 SCC (SUPP) 1 52, (1991) 192 ITR 382

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Bench: S. Ranganathan

JUDGMENT

1. This is an appeal from a Judgment of the Calcutta High Court in a matter under the Income-tax Act. The Judgment of the High Court is reported as A. Gasper v. Commr. of Income-tax .

2. The assessee was a tenant in a premises in 240E, Acharya Jagdish Chandra Bose Road, Calcutta. He was a monthly tenant in the property since 1940 under certain earlier landlords. On 27-3-1967, the landlords entered into an agreement for leasing out the property to Associated Battery Makers (Eastern) Limited permitting them to construct a building on the said premises. The assessee was also a party to the said agreement. As part of the agreement, the assessee received a sum of Rs. 4,50,000/ - in consideration of which he permitted the new lessees to put up the construction. He transferred his tenancy rights to Associated Batteries and became a licencee in respect of the premises under Associated Batteries. The sum of Rupees 4,50,000/- was received in two instalments of Rs. 2,25,000/ - each, the first on 15-3-1967 and the second on 25-5-1967.

3. For the assessment year 1967-68, for which the previous year ended on 31-3-1967, the Income-tax Officer treated the sum of Rs. 2,25,000/- less certain amounts paid to the landlord and solicitor and the statutory exemption (a net sum of Rs.1,83,201/-) as capital gains. The assessee's objections before the Appellate Assistant Commissioner and the Appellate Tribunal were unsuccessful. So also the reference before the High Court. Hence, the present appeal.

4. We may mention that in respect of the other sum of Rs. 2,50,000/, a sum of Rupees 76,475/- (being Rs. 2,50,000/- less available deductions) was assessed by the Officer in the assessment year 1968-69. The Tribunal which disposed of the appeal for 1968-69 also by the same Order, deleted the addition observing that it was also assessable only in the assessment year 1967-68 and leaving the Department free to do so. It appears that no further proceedings have been taken in the matter. But we are not concerned with that amount here.

5. Three questions had been referred to the High Court by the Tribunal viz. :

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee's right of tenancy under the Landlords constituted a capital asset within the meaning of Section 2(14) of the Income-tax Act 1961?

2. If the answer to question No. (1) is in the affirmative, whether, on the facts and in the circumstances of the case, Tribunal was right in holding that there was a transfer of the assessee's right of tenancy under the Landlords within the meaning of Section 2(47) of the said Act?

3. If the answer to question No. (2) is in the affirmative, whether on the facts and in the circumstances of the case, the Tribunal was correct in holding that the sum of Rupees 1,83,201/- represented capital gains assessable under Section 45(1) of the said Act for the assessment year 1967-68 ?

6. Before us, learned Counsel raised only one contention based on the decision of the Supreme Court in Commr of Income-tax v. B.C. Srinivasa Setty . He submits that, even assuming that assessee had a capital asset and that the consideration had been received for relinquishing some part of his lights in respect thereof, the entire sum of Rupees 2,25,000/-could not have been brought to tax. He points out that the capital gains have to be computed under Section 48 of the Income-tax Act which provides for a deduction, among others, of the actual cost of the asset to the assessee. He submits that the monthly lease of the premises which the assessee was enjoying was not acquired by him at any ascertainable cost, even assuming that it is a capital asset, it is capital asset of such a nature that its actual cost of acquisition cannot be ascertained. He, therefore, submits that the decision of the Supreme Court earlier referred to will squarely apply and that, therefore, no capital gains was chargeable to tax in respect of the amounts received by the assessee from Associated Batteries.

7. The contention raised on behalf of the assessee has great force and, if it were open to it to raise this issue before us, we may have had to decide it in its favour. But, unfortunately, the course of proceedings in the present case precludes us from giving any relief to the assessee. The point now raised was raised by the assessee before the Appellate Tribunal apparently for the first time. The Appellate Tribunal took the view that, since the assessee had not placed any materials regarding the actual cost of the asset to the assessee, the amount of capital gain as computed without any further deduction for actual cost was taxable under Section 48 read with Section 45 of the Income-tax Act. We find that under Section 256(1) the assessee applied to the Tribunal for a reference of six questions to the High Court, one of which perhaps, had reference to the above argument for the statement of facts accompanying the application refers to the "actual cost" having been ignored In the computation of the capital gain. The question was phrased in the following manner :

Whether the Tribunal was justified in law in computing the capital gains at Rupees 1,83,201/- within the meaning of Section 48 of the Income-tax Act, 1961?

The Tribunal, however, in view of its findings in the appellate Order, rejected the application and refused to refer the above question to the High Court under Section 256(1) of the Act on the ground that its conclusion in this regard was based on facts

> and no question of law could arise there from. Unfortunately, the assessee did not pursue the matter further under Section 256(2) of the Income-tax Act. It is no doubt true that the mention of Section 45(1) in the third question referred to the High Court, if widely interpreted, may also carry with it, by implication, a consideration of the deductions permissible under Section 48. But the question referred to the High Court has to be understood in the context of the facts before the Tribunal and the manner of disposal of the application under Section 256(1). A question, the reference of which was declined by the Tribunal cannot be read into one of the other questions referred.

8. This apart, a further obstacle in the way of the assessee is that the contention which is now sought to be urged before us was not at all urged before the High Court. This is clear from the Judgment of the High Court which has dealt elaborately with the several contentions urged before it. Learned Counsel is also unable to say that he had in fact argued the question before the High Court but it had failed to deal with it. There is no such averment in the Special Leave Petition either. It is possible that this point was not urged as the report of the decision of the Supreme Court in Srinivasa Setty's case (supra) was not available at the time though there were certain High Court decisions on the same lines.

9. In the above circumstances the question which the learned Counsel seeks to argue is a question which was not argued before the High Court. It is a question of which reference was sought but declined by the Tribunal. It is now well settled law that the jurisdiction of the High Court in a reference under the Income-tax Act in the nature of advisory jurisdiction and only such issues can be and are answered as arise properly on the facts and the questions referred to the High Court. In the circumstances we are unable to permit the assessee to raise the question before us.

10. As we have stated earlier, it does appear that, on the merits, the assessee has a good case in view of the decision of the Supreme Court earlier referred to, which we are unable to consider for the "technical" reasons given above. If so advised, it will be open to the assessee to apply to the Central Board of Direct Taxes for administrative reliefs by abstaining from recovering the tax that has been levied on this amount if it has not already been recovered. If such an application is made, the Central Board will no doubt consider the same sympathetically and expeditiously.

11. In the result this appeal fails and is dismissed. In the circumstances, however, we make no Order as to costs.