ORDER SHEET

G.A. No. 172 of 2014
G.A. No. 227 of 2014
ITAT No. 20 of 2014

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, KOL-XI
Versus
SATYABRATA DEY

BEFORE:
The Hon'ble JUSTICE GIRISH CHANDRA GUPTA
The Hon'ble JUSTICE ARINDAM SINHA
Date: 7th May, 2014.

Appearance:
Mr. O.P. Dubey, Adv.
... for the Appellant

Mr. R. Bharadwaj, Adv.
... for the respondent

The Court: The application for condonation of delay is allowed.

The subject matter of challenge in this appeal is a judgment and order dated 14th May, 2013 by which the appeal preferred by the assessee was allowed. Aggrieved by the order the Revenue has come up in appeal. The facts and circumstances of the case briefly stated are as follows:

> The assessee entered into an agreement dated 2nd September, 2004 with one, Bhagyalakshmi Commercial Company Pvt. Ltd. Under the aforesaid agreement the latter agreed to sub-lease the flat nos. 3b and 3c at premises no.5, Lowdon Street, Kolkata to the assessee. The assessee on his part entered into an agreement dated 5th May, 2005 with one, Onkar Management Pvt. Ltd.

agreeing to transfer the aforesaid two flats at a consideration of Rs.90 lakhs. The assessee took an advance of a sum of Rs.10,000/-. The assessee, however, in breach of agreement dated 5th May, 2005 transferred the flats on 4th August, 2006 to Poonam Agarwal at a sum of Rs.2 crore 20 lakhs. Onkar Management Pvt. Ltd. sued the assessee for recovery of damages. An award was passed on 30th September, 2007 directing the assessee to pay a sum of Rs.72 lakhs. The assessee filed his return for the assessment year 2007-08 on 29th March, 2008 claiming deduction of the said sum of Rs.72 lakhs under Section 48(i) as expenditure incurred in connection with the transfer. The assessing officer and the CIT(A) both held against the aforesaid claim of the assessee which was ultimately allowed by the learned Tribunal. It is this order of learned Tribunal which is under challenge.

Therefore, the question for consideration is whether the sum of Rs.72 lakhs paid by the assessee pursuant to the award passed in favour of Onkar Management Private Limited can be treated as expenditure incurred with regard to the transfer under Section 48(i) of the Income Tax Act. Section 48 in-so-far-as the same is relevant or material for our purpose, reads as follows:

> "48. The income chargeable under the head "Capital gains" 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 the following amounts, namely:-

(i) expenditure incurred wholly and exclusively in connection with such transfer;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto;

Mr. Dubey, learned Advocate appearing for the Revenue, submitted that the sum of Rs.72 lakhs could not be deducted from out of the capital gains made by the assessee nor the sum of Rs.72 lakhs could be taken into account for the purpose of computation of the capital gains. He, in support of his submission, relied upon a judgment in the case of Commissioner of Income Tax, Visakhapatnam vs. Attili N. Rao, reported in (2003) 9 Supreme Court Cases 658. What had happened in that case was that the assessee was in debt payable to the Excise Department of the State of Andhra Pradesh. In order to secure the debt the assessee mortgaged his immovable property which, at a later date, was sold by public auction. A sum of Rs.5,62,980/- was realised. The State deducted a sum of Rs.1,29,020/- towards debt due by the assessee to the State and the balance sum was made over to the assessee. The assessee contended that the sum of Rs.1,29,020/- due by him to the State should be deducted from the total consideration for the purpose of computing capital gains. The contention of the assessee was rejected.

The aforesaid judgment, in our view, has no application to the facts and circumstances of the case. The money received by the assessee in hand and the money applied in repayment of the dues by the assessee to the State have both to be taken into account for the purpose of computing the capital gains. The

money applied in repayment of the debt due by the assessee is no less a money received by the assessee. The present case is altogether different.

Mr. Bharadwaj, learned Advocate appearing for the assessee/respondent, has drawn out attention to a judgment of the Madras High Court in the case of Commissioner of Income Tax vs. Bradford Trading Company Private Limited, reported in 2003 (261) ITR 222 (Madras). An almost identical situation had arisen before the Madras High Court. The facts briefly were that the assessee had entered into an agreement with one Buhari, agreeing to allow the latter to participate in the hotel business. The assessee subsequently sold the hotel to ITC and settled the matter with Buhari at a sum of Rs. 2 lakhs. The Madras High Court following an earlier judgment of the Bombay High Court, held as follows:

> "The Bombay High Court in CIT v. Shakuntala Kantilal [1991] 190 ITR 56 (58 Taxman 106), has dealt with a case where the assessee owned a piece of land and she entered into an agreement of sale of the said property with one R and a dispute subsequently arose and R filed a suit for specific performance and there was a settlement whereby the assessee agreed to pay certain sum of money to R and in the meantime, the assessee entered into another agreement of sale in 1967 in respect of the same property with one C and C gave an assurance to R that on the completion of the sale, they would deduct a sum of Rs.35,504/- from the total consideration and pay it to R. The assessee claimed that the sum of Rs.35,504/- from the total consideration and pay it to R. The assessee claimed that the

sum of Rs.35,504/- should be allowed as deduction for the purpose of computing her income from capital gains. The Bombay High Court held that unless the assessee had settled the dispute with R, the sale transaction with C could not have materialised and the sale consideration had to be reduced by the amount of compensation paid to R. We are in agreement with the view expressed by the Bombay High Court that the expression used in section 48 of the Act, viz., 'expenditure incurred wholly and exclusively in connection with such transfer' has wider connotation than the expression, 'for the transfer'. We are of the view that but for the payment of Rs.2 lakhs, the transfer would not have taken place and the payment has necessarily to be made for the transfer of the hotel in favour of India Tobacco Company Limited. Hence, we are of the view that the sum of Rs.2 lakhs was expended by the assessee wholly and exclusively in connection with the transfer of the capital asset and not de hors the transfer".

We are in agreement with the views expressed by the Madras High Court and the Bombay High Court. The question formulated above is, therefore, answered in the affirmative and in favour of the assessee.

The appeal preferred by the Revenue is, therefore, dismissed.

(GIRISH CHANDRA GUPTA, J.)

(ARINDAM SINHA, J.)

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