Allahabad High Court
P.K. Lahiri vs Commissioner Of Income-Tax on 3 February, 2005
Equivalent citations: (2005) 196 CTR All 406, 2005 275 ITR 17 All
Bench: R Agrawal, P Krishna
JUDGMENT

1. The Income-tax Appellate Tribunal, Allahabad, has referred the following questions of law under Section 256(1) of the Income-tax Act, 1961, hereinafter referred to as "the Act", for the opinion of this court :

"1. Whether, on the facts and circumstances to the case, the Tribunal was justified in law in holding that the conditions as prescribed under Section 54(1) of the Income-tax Act were not fulfilled in the assessee's case and thus he was liable to capital gains ?

2. Whether, on the facts and circumstances of the case, the Appellate Tribunal was correct in law in placing reliance on the definition of 'land appurtenant' as given in Section 5(1)(ivc) of the Wealth-tax Act ?"

2. The present reference relates to the assessment year 1979-80.

3. Briefly stated the facts giving rise to the present reference are as follows :

4. The applicant's father Dr. K.N. Lahiri, gifted 10,700 sq. ft. of land to the applicant on August 3, 1971. The property is situated in a compound of nearly 3.5 acres containing residential bungalow of the applicant's father Dr. K.N. Lahri. The applicant was residing in the bungalow along with his father. On April 1, 1978, the applicant sold 5,700 sq. ft. of land for Rs. 1,00,000 and the sale proceeds were utilised in the construction of the residential house on the remaining portion of the land of 5000 sq. ft. between May and October, 1978. The applicant claimed that the entire sale proceeds were invested in the construction which amounts to Rs. 1,08,344 and therefore no capital gain was exigible. The Income-tax Officer calculated the cost of the land as on January 1, 1964 at Rs. 2 per sq. ft. which worked out to Rs. 10,000. He proceeded to compute the capital gains on that basis. He negated the claim of exemption from capital gains under Section 54(1) of the Act put forward by the applicant on the ground that the residential house and the land which was sold belonged to two different persons, i.e., the applicant, father and the applicant himself, respectively and, therefore, Section 54(1) of the Act would not be attracted. The Assessing Officer was, however, of the view that the land in question was not appurtenant to the residential house being nearly 300 ft. away from the building. He also noticed that the major part of the residential house has been converted into a hotel with effect from February, 1976, and therefore, the income from the building was not assessable as income from house property. Feeling aggrieved the applicant preferred an appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) has upheld the order of the assessing authority. He had found that the applicant's father died on December 12, 1976, whereas the property was sold on April 1, 1978, and on that basis he had held that the parents of the applicant did not reside in the house in the two years immediately preceding the date of sale. The Commissioner of Income-tax (Appeals) had also found that the

applicant's father had left the property under a will to his grandson and not to the applicant and, therefore, the applicant was residing in his father's house property up to December 2, 1976, and in the son's property thereafter but never in his own property. He also held that the land sold was not appurtenant to the residential house as it was used independently. The matter was carried in further appeal before the Tribunal. After considering the various averments advanced on behalf of the parties and taking into consideration the entire material facts available on record the Tribunal applied the provisions of Section 5(1)(iv-c) of the Wealth-tax Act for the purpose of land appurtenant. The Tribunal has held as below :

"We have also taken into account the various papers placed before us on behalf of the assessee. The facts of the case have been noted by the authorities below in their respective orders. But it is pointed out by the assessee's learned counsel that there was some incorrect facts in respect of the construction of the hotel on the land. The assessee in the present case claimed that the land sold was appurtenant to the old residential house. The Assessing Officer considered the significance of the land appurtenant thereto as defined in Section 5(1)(ivc) of the Wealth-tax Act. Though we are concerned with the income-tax matters yet in the absence of a corresponding definition in the Income-tax Act, we are of the view that it would be permissible to adopt the same connotation and significance of the word 'appurtenant to' as spelt out in the Wealth-tax Act. It is seen that enjoyment, easement, etc. of the old residential building could be made even without the extra land which was sold, as otherwise if the above land is appurtenant to the old residential house, which cannot be enjoyed without that extra land then the land itself would not have been sold at the first instance. That apart, as pointed out by the Commissioner of Income-tax (Appeals) the old residential house did not belong to the assessee and the father of the assessee died much earlier than two years of the date in question. Thus, from any angle we may look at, we find that there is no case for the assessee to press for this claim. In the circumstances we sustain the order of the Commissioner of Income-tax (Appeals) on this point."

5. We have heard Sri Vikram Gulati, learned counsel for the applicant, and Sri Shambhoo Chopra, learned standing counsel appearing for the Revenue.

6. Learned counsel for the applicant submitted that it is not in dispute that the land which was sold by the applicant had formed part of the bungalow in which the applicant's father along with the applicant was residing till his death and thereafter the applicant was entitled to claim exemption under Section 54(1) of the Act. He further submitted that as the land in question formed part and parcel of the old big bungalow, it is to be treated as land appurtenant and the contrary view taken by the Tribunal cannot be sustained. He has relied upon the following decisions :

(1) CIT v. Natu Hansraj [1976] 105 ITR 43 (Guj) ;

(2) Addl. CIT v. Vidya Prakash Talwar [1981] 132 ITR 661 (Delhi) ;

(3) CIT v. Zaibunnisa Begum [1985] 151 ITR 320 (AP) ;

(4) CIT v. Kodandas Chanchlomal [1985] 155 ITR 273 (Guj) ;

(5) M. Abdul Sattar v. CIT [1987] 163 ITR 642 (Karn) ;

(6) CIT v. Kamala Ranganathan [1990] 186 ITR 536 (Mad) ;

(7) CIT v. Mrs. P. Rajasulochana [1994] 210 ITR 423 (Mad) ;

(8) CIT v. Smt. D. Rani [1996] 218 ITR 724 (AP) ; and (9) Unreported decision of this court in Wealth-tax Reference No. 17 of 1988 CWT v. Masood Halim--since reported in [2005] 275 ITR 14 (All) (supra), decided on October 1, 2004.

7. Learned standing counsel submitted that for the applicability of Section 54(1) of the Act the land which is claimed to be appurtenant and the building in which either the applicant or his father is residing should belong to the same person. If the ownership is different the provisions of Section 54(1) of the Act cannot be invoked and, therefore, the Tribunal has rightly not accepted the claim of exemption under Section 54(1) of the Act.

8. After hearing learned counsel for the parties, we find that it is not in dispute that the applicant had received 10,700 sq. ft. of land by way of gift from his father on August 3, 1971, out of which he had sold 5,700 sq. ft. of land on April 1, 1978, and had constructed residential house on the remaining portion of the land of 5,000 sq. ft. between May and October, 1978. Thus, it is established that the ownership of the land stood transferred in the name of the applicant whereas the residential bungalow stood in the name of the applicant's father. Section 54(1) of the Act as it stood during the relevant period is reproduced below :

"54.(1) Where a capital gain arises from the transfer of a capital asset to which the provisions of Section 53 are not applicable, being buildings or lands appurtenant thereto the income of which is chargeable under the head 'Income from house property', which in the two years immediately preceding the date on which the transfer took place, was being used by the assessee or a parent of his mainly for the purposes of his own or the parent's own residence (hereafter in this section referred to as the original asset), and the assessee has within a period of one year before or after that date purchased, or has within a period of two years after that date constructed, a house property for the purposes of his own residence, then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,--

(i) if the amount of the capital gain is greater than the cost of the house property so purchased or constructed (hereafter in this section referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under Section 45 as the income of the previous year ; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil ; or

(ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under Section 45 ; and for the purpose of computing in respect of the new asset

any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain."

9. From the reading of the aforesaid provisions, it will be seen that the exemption under the aforesaid provisions is available only where the building of the land appurtenant thereto is sold and within two years immediately preceding the date on which the transfer took place, was being used by the assessee or a parent of his mainly for the purposes of his own or the parent's own residence and the assessee has within a period of one year before or after that date purchased, or has within a period of two years after the date constructed, a house property for the purpose of his own residence. The question is as to where the residential bungalow belonged to the applicant's father and the land belonged to the applicant can be said to be the land appurtenant to the building or not. The land appurtenant to the building does imply that the ownership of the building and the land appurtenant should be of the same person. If the building is owned of one person and the land is owned by another person then it will be a case of land adjoining to the building and by no stretch of imagination can it be called land appurtenant to the said building. In the present case we find that the land is adjoining to the building and, therefore, the benefit under Section 54(1) of the Act would not be available. All the cases relied upon by learned counsel for the applicant are not on the point and, therefore, they are not dealt with.

10. In view of the above conclusion we are not going into the question as to whether the Tribunal was justified in placing reliance on the provisions of Section 5(1)(iv-c) of the Wealth-tax Act for determining the land appurtenant thereto or not. Accordingly, we answer the first question in the affirmative, i.e., in favour of the Revenue and against the assessee. In view of the answer to the first question the second question has been rendered academic and is returned unanswered. However, there shall be no order as to costs.