



## To determine holding period of capital asset, for the purpose of classifying it as Long term or Short, the date from which property is “held” by assessee is relevant and not “owned”

### Background

Industrialization of a particular area or belt is the sole responsibility of the Government and so as the providing or arranging for land required for said purpose. In order to ensure that the said land is used for setting up the industry only and same is not diverted for any other purpose, often government do not transfer the legal ownership up front rather they give it to user initially under lease or assignment deed (containing various restrictive covenants including revocation) and after a certain period of time legal ownership is also transferred to the said user.

Post vesting of legal ownership, the user may sale the land to third party. In that case, what will be the nature of capital asset i.e. Short or Long Term or more precisely when the capital asset is acquired became crucial as it can significantly impact the capital gain tax liability as both indexation benefit and in some cases cost of acquisition (in case asset is acquired prior to 01-04-1981) is depends upon it.

It is in the above background that the recent decision of Kolkata ITAT in *Stewarts & Lloyds of India Ltd.* [ITA No. 372/Kol/2009] dated 02-03-2016 needs to be analyzed.

### Facts of the case

The assessee sold the property to Reliance Infocom Ltd., under a sale deed dated 02.12.2003 for a net consideration of Rs.3,12,41,074 and computed the long term capital loss at Rs.31,68,346.

The assessee deducted the indexed cost of acquisition i.e., Rs.3,41,19,420 calculated on the fair market value of the land as on 01.04.1981 of Rs.74,34,000 from the said net sale consideration.

The AO accepted the above capital loss as declared by the assessee without verification which prompted the CIT to exercise its power u/s 263 to revise the assessment order as the same in its view was both erroneous and prejudicial to the interest of revenue. The basis for revision as given in show cause notice issued by CIT (this was

also the argument of DR) was as under:

- Government of Tamilnadu assigned property to the assessee on 03-03-1971 by an assignment deed subject to many conditions which indicates that developed plot of land was assigned to the assessee for its use and the assessee was not conferred the absolute right over the said land. Therefore, assessee was not the owner of the property but a user of the property and right of the assessee over the property was limited to use of plot of land for business purposes.
- By a G.O. Ms.N-959 dated 23-07-1976, the Government of Tamilnadu handed over the management and maintenance of the Industrial Estate at Ambattur to Tamilnadu Small Industries Development Corporation Ltd. and transferred the ownership of the Industrial Estate at Ambattur to the said Corporation by G.O.Ms.N-785 dated 07-08-1988 and the said Corporation became the absolute owner of the Industrial Estate.
- The above corporation sold the property to the assessee and registered conveyance was obtained by the assessee as per the sale deed dated 19-04-1994 for a consideration of 68,800 already paid by the assessee back in 03-03-1971. Therefore, cost of acquisition based on Fair Market Value as on 01-04-1981 and consequently the indexation benefit will be available

to the assessee only from 1994.

- Reliance was placed upon the decision of Dr. V.V. Mody [218 ITR 1 (Kar)] which was on same facts as that of assessee.

### **Assessee's Contention**

#### **On jurisdiction of CIT to exercise power of revision u/s 263 :**

- Power u/s 263 can be exercised by the CIT suo motto and not on the basis of proposal of the AO who himself terming his own order as erroneous.

#### **On Computation of Capital gain on sale of land :**

- in terms of agreement dated 03-03-1971, the assessee was enjoying the possession of immovable property from 08-04-1970 onwards
- Entire consideration of Rs. 68,800/- was paid upfront in 1970 i.e. at the time of assignment deed only and nothing is paid in 1994 i.e. at the time of sale deed.
- all sections dealing with the computation of capital gain viz., Sec. 2(14) Capital Assets, Sec. 2(42A) Short Term Capital Assets and Explanation (iii) to Sec. 48 indexed cost of acquisition, the term used is 'held' and not 'owner' or 'owned'. Therefore, for the purpose of determining date of acquisition absolute ownership is not relevant. Reliance was placed upon decision of Madras HC in Madathil brothers



- [301 ITR 345 (Mad)] & Kolkata ITAT in Anindya Dutta [ITA No. 473/Kol./2012].
- possession of land was given to the Assessee in 1970 and by way of sale deed executed in 1994, only improvement of the existing right in the said land has taken place. The said improvement will not have any impact on determination of holding period. Rama Rani Kalia [358 ITR 499 (All.)]
  - Depreciation u/ s 32 of the Act is allowable, inter-alia, if the assets are wholly or partly owned by an assessee. Even in such cases, it has been held that legal ownership is not necessary and possession of assets would suffice for allowance of depreciation. Reference was made to the decision of the SC in Mysore Minerals Ltd. [239 ITR 775 (SC)].
  - Enabling enjoyment of any immovable property by way of any agreement or arrangement or in any other manner falls within the definition of 'transfer' as per Sec. 2(47)(vi) of the Act. Sec. 2(47)(vi) of the Act. -Decision relied upon by the Ld. **Dr. V.V. Mody [218 ITR 1 (Kar)]** does not hold good since the same was rendered without considering the amendments made vide Finance Act 1987 in Sec. 2(47) by way of insertion of clause (v) & (vi).

- Explanation 1 to Sec. 2(47) r.w.s. 269UA(d)(i) adopts definition of 'transfer' from clause (f) of Sec. 269UA which provides that the term 'transfer' includes lease for a term not less than 12 years. In the case of the Assessee, possession of immovable property has been transferred for an indefinite period (certainly for more than 12 years) since 1971 and hence the same constitutes transfer u/s 2(47)(vi) of the Act.

### Revenue's Contention

As mentioned above it has relied upon the detailed reasoning given by CIT in his show cause notice.

### ITAT decision

- Initiation of revision proceeding has been upheld on the basis that there is no prohibition u/s.263 of the Act for the CIT to act on the basis of proposal by the AO and that the CIT has to initiate action u/s.263 of the Act only suo motto. So long as there is application of mind on errors brought to his notice and the other conditions u/s.263 of the Act are satisfied, there can be no grievance whatsoever to the assessee.
- The ITAT painstakingly scanned the entire assignment deeded and held that the assessee had an antecedent interest over the property as early as 3.3.1970 and a vested right over the property by paying the entire sale consideration and complying with



the other terms of the deed of assignment much prior to 1.4.1981.

- The expression “where the capital asset became the property of the assessee before 1st April, 1981” as used in Sec.55(2)(b)(I) of the Act should not be equated to legal ownership.
- Assessee had paid the entire consideration for the property prior to 1.4.1981. Therefore the claim of the Assessee that the property became property of the assessee before 1st April, 1981 as it held the property from the year 1970 has to be accepted, keeping in mind the policy and object of the provisions giving the benefit of inflation by adopting fair market value as on 1.4.1981 in respect of properties acquired prior to that date.

or possession of property shall be given precedence over the legal ownership. This decision shall definitely going to help those assessee’s in computing their capital gain liability where gain is arising from transfer of capital asset which is held by assessee from a date prior to vesting of legal title. The effort of the AR of the assessee, who has extensively argued the case by bringing into the attention of the Bench various other references of the Act to drive home his point that legal ownership is not relevant for computing holding period, is also praiseworthy.

Further, on exercise of jurisdiction u/s 263 on the basis of AO proposal there are decisions delivered by various benches of ITAT which held that exercise of his own discretion and judgement is must for initiating proceeding under said section. Decision of Span Overseas [ITA No. 1223/PN/2013] & Vinay Pratap Thacker [ITA No. 2939/Mum./2011] relied upon.

### **Our Comments**

This is a very welcome decision wherein the ITAT has reiterated the legal position taken by the High Court & ITAT in past that enjoyment

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