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**Gopaldas T. Aggarwal Vs. Income-tax Officer**

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**Court** : Income Tax Appellate Tribunal ITAT Mumbai

**Decided On :** Jun-13-1983

**Reported in** : (1983)6ITD451(Mum.)

**Judge** : V Balasubramanian, Vice, K Menon

**Appellant** : Gopaldas T. Aggarwal

**Respondent** : income-tax Officer

**Judgement** :

1. One Tulsiram Devidayal executed a deed of trust on 2-2-1943 whereby he settled certain properties on several beneficiaries. The settlor's wife Mansadevi had a life interest in the trust property. After her death during the joint lives of the assessee and his wife Pannadevi they were each to have a 12.5 per cent share, right, title and interest in the income of the trust estate. Mansadevi died on 5-6-1955 from which date the above-mentioned 12.5 per cent share devolved on the assessee and his wife. The assessee's wife Pannadevi herself died on 8-3-1971. On her death, as provided by the trust deed, her share of the income devolved on the assessee. During the previous year relevant to the year under appeal, the assessee assigned his 12.5 per cent share to Gopaldas Aggarwal, HUF, for a consideration of Rs. 49,500. In respect of this transaction, the assessee claimed a long-term capital loss of Rs. 74,500 which he computed by deducting from the consideration of Rs. 49,500, a sum of Rs. 1,24,000 which, according to the assessee, represented his beneficial interest as on 1-1-1954. The ITO recast the computation. According to him, the average income of property being in the neighbourhood of Rs. 10,000, a probable purchaser of the assessee's wife's right would have taken into account the fact that it would take 17 years for the property to fall in. Adopting a rate of 6 per cent and making an estimate of the life expectancy of the lady, the ITO computed the cost of this asset as on 1-1-1954 at Rs. 25,000 and worked out a long-term capital gain of Rs. 24,500. The Commissioner (Appeals) upheld this inclusion. Thus, the appeal before the Tribunal.

2. The learned Counsel for the assessee has stressed the point made out before the authorities below. The assessee's wife was receiving income from her interest, right from the time it fell in. Referring to the various provisions of the trust deed and the assessments made on the income of this property, the learned Counsel has pointed out that this was an asset in which he had incurred a capital loss. The assessee's wife was assessed on the life interest. In support of this, the assessments to income-tax and wealth-tax as well as the inclusion of the wealth in the assessee's own assessment for the immediately preceding assessment year were referred to. Alternatively, it is pointed out that no long-term capital gains are to be assessed.

3. For the department stress is laid on the orders of the authorities below. The

assessee had a right in this property in 1943 and according to the learned Counsel for the department this right was sold for a considerable sum. Looking to the expected life expectancy of the assessee's wife, reasonable interest rates, etc., the computation of the market value as on 1-1-1954 by the ITO was correct.

4. In our view there is an obvious misconception about the whole transaction. That the original testator Tulsiram Devidayal made out a deed of trust and under the deed certain rights devolved on the assessee and his wife and subsequent to the latter's death further properties devolved on the assessee is not in dispute. Whether the assessee received or acquired some property which he sold off to the HUF during the year, thus, leading to a capital gain or a capital loss is a question to be explored. In our view the approach of both the assessee and the department in this regard seems to be rather confused.

The assessee's claim is that he had an asset in the form of a life interest which existed also on 1-1-1954 entitling him to substitute its market value on that date as the cost and which he sold during the year. Apparently the department also agrees with the assessee's case on this point but there is a difference of opinion as to the market value as on 1-1-1954. To our question as to the exact nature of the asset which if at all existed on 1-1-1954 and which was sold during the year, no clear cut answer is available either from the assessee or the learned Counsel for the department. The deed of trust was executed on 2-2-1943. When Mansadevi died on 5-6-1955 both the assessee and his wife had the right to enjoy 12.5 per cent share in the income of the property. It is the assessee's case that this 12.5 per cent, which was inherited was sold by him during the previous year. It is against this concept that he has claimed the capital loss. It is to this asset that the market value as on 1-1-1954 is also assigned. In the first place as on 1-1-1954 even when Mansadevi was alive under the deed of trust of Tulsiram Devidayal, neither the assessee nor his wife had any prospects of obtaining a 12.5 per cent share in the income on that date. If Mansadevi had survived these two persons, neither the assessee nor his wife would have been entitled under the trust deed to any share at all.

What the assessee had if at all on 1-1-1954 was an expectancy on the death of Mansadevi, certainly this would not have been an asset, directly covered as it is by Section 6 of the Transfer of Property Act, 1882. In other words, the assessee's claim that he had some asset-granting that he can identify it--on 1-1-1954 is without a basis.

5. The next is the question of the identification of the asset which is stated to have given rise to a capital gain or a capital loss. After the death of the assesse's wife, 12.5 per cent of the income devolved on the assessee which he is stated to have sold to the HUF. What the assessee's wife Pannadevi had received on the death of Mansadevi was her right to receive 12.5 per cent share in the property till her death. Certainly a right to receive income for a period is property, but that property is a wasting asset dependent on the life of the life-interest holder. The assessee did not receive even this property in 1970 when for the first time it came into existence. The facts detailed above clearly indicate that until the death of Mansadevi this property had no existence at all. The property itself being the life interest of the assessee's wife was personal to her and owned by her and was never received during her lifetime by the assessee. As a matter of fact, therefore, the assessee never received that particular asset if it were treated as the asset. To be specific, the asset was the right to get 12.5 per cent of the income of the trust even till the death of the assessee's wife. The wife never transferred that asset to anyone, least of all to the assessee. Apart, therefore,

from the fact that this right was a wasting asset having a value when it fell in 1970; but continuously diminishing in value to nil on the death of this lady, how the assessee claims to have got hold of this property and further claims to have sold it subsequently is a mystery. Certainly this asset which the assessee never received could not have been sold off during the previous year.

6. That leaves us with the question of the right to 12.5 per cent of the income of the property received by the assessee himself on the death of his wife. This is a right which he himself had received on his own. Apart from the fact that nothing was purchased by him, this was inherited by him, the right is his personal right to receive 12.5 per cent of the share of the trust income for as long as he lives.

Certainly this is also an asset. The asset which he transferred during the previous year to the HUF perhaps could have been identified thus as a right of the assessee to receive 12.5 per cent of the income so long as he lives. This property inherited as it is by him has no original cost even if it is regarded as a capital asset. No capital gains or capital loss, therefore, can be computed on this in the light of the decision in CIT v. B.C. Srinivasa Setty [1981] 128 ITR 294 (SC).

7. Even otherwise what the assessee has as a life interest is his right to get the income so long as he is alive. This is also like a wasting asset, a property which diminishes in value from time to time. Granting that a value could be found for this, a question of capital loss or capital profit can arise only if this asset on a particular date is sold off for a value more or less than the cost of acquisition. If on the date the property has been transferred to the HUF, its cost of acquisition could be found and that cost of acquisition differs from the value for which it was transferred to the HUF, that could give rise to a profit or loss but then the actuarial value of this asset on the date of acquisition would not give the cost of acquisition because with every day expectancy of the life of the assessee reduces and to this extent a part of the asset is wasted. A purchaser, therefore, or even the assessee as a seller cannot find out the cost of the particular asset which he is selling by making the transfer to the HUF. In fact what the assessee has acquired as an asset is entirely different from what he sold. The former was his right to income so long as he lives.

What he has sold is the right to the income transferred to the HUF so long as the assessee lives after the transfer--which is a much shorter period. Even actuarial valuations on these two dates could be found, but the life expectation at 1970 is certainly different from the life expectation at 1976 and it would be both factually and legally incorrect to say that the assessee sold the particular asset which he acquired. Whatever he has sold is certainly not what he acquired in 1971. Both the tasks of identifying the asset and its cost of acquisition for the computation of capital gains or loss are impossible tasks that have not been performed here. Since the assessee has come up on appeal against the inclusion of the capital gains, all we can do is to delete the addition of Rs. 24,500. For the reasons mentioned in detail above, there is no question of the assessee being entitled to any capital loss.

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