

Equivalent citations: 2001 79 ITD 582 Delhi

Frick India Ltd vs Joint Cit on 16/8/2001

ORDER

Phool Singh, J.M.

This appeal, preferred by the assessed, is directed against Commissioner (Appeals)'s order dated 30-11-2000 passed by the Commissioner (Appeals) for assessment year 1997-98.

2.

Ground Nos. 2 to 4 are the effective grounds agitated and argued by the learned counsel for the assessed. Facts giving rise to these grounds are that assessed is a company in which public are substantially interested and was found engaged in the manufacture and sale of air-conditioning and refrigeration equipments and parts thereof within and outside India. The previous year relevant to the assessment year 1997-98 ended on 31-3-1997. The assessing officer noted that assessed had filed return of income at a total income of Rs. 2,50,04,520. assessed-company had claimed to have received a net consideration of Rs. 6.78 crores under the head capital gains which was set off against its claim for exemption under section 54EA of the Income Tax Act, 1961 (hereinafter referred to as the "Act") on the plea that net consideration was received on account of transfer of long-term capital assets being in the nature of tenancy rights acquired during the financial year 1972-73. The assessing officer looked into all the details and noted that assessed-company acquired tenancy rights in Jeewan Vihar Building on the basis of an agreement of lease deed dated 2-8-1972 from Life Insurance Corporation of India for occupation of that property for a period of three years commencing from 15-3-1973. It is also admitted fact that said agreement came to an end on 14-3-1976 and was not renewed but assessed-company continued to occupy property on the same terms and conditions. The assessing officer further noted that on 24-1-1997 the assessed-company entered into a Memorandum of Understanding (hereinafter referred to as the "MOU") with the bank of Tokyo Mitsubishi whereby it was agreed that assessed-company shall receive a sum of Rs. 6.78 crores subject to the condition that :

"(i) It shall deliver or cause to be delivered to LIC a letter (draft enclosed as per annexure-C to the MOU) intimating its decision to vacate the tenanted area,

(ii) Surrender the tenancy in respect of the tenanted area on or before 18-2-1997,

(iii) It shall provide to the bank a duly certified copy of the resolution (draft enclosed as per annexure-B to the MOU) adopted by the Board of Directors of the FII."

3.

According to assessing officer it was also provided in the MOU that in case assessed-company vacates the tenanted area by removing there from all its belongings on or before 18-2-1997 and provides/delivers to the bank the letters referred to in clause (1) in the presence of Mr. Brijmohan Lal Munjal, the assessed-company would be deemed to have fulfilled all its obligation contained there under and be entitled to receive the amount from the bank. It is also a fact as noted by the assessing officer that the assessed-company fulfilled its obligations under the MOU and in return received a sum of Rs. 6.78 crores in terms of agreement. The assessing officer proceeded to examine the true character of the capital asset as defined in section 2(14) of the Act and noted that word "property" was very wide and meant not only corporeal or tangible property but included all kind of rights in property as well. It included even lesser interest, its full ownership such as lease hold interest or tenancy rights and a right of enjoyment and exploitation etc. He referred to the decision of Apex Court in the case of Ahmed G.H. Ariff v. CWT in which term

"property" was defined in the way that it was a term of the widest import and subject to any limitation which the context may require, it signifies every possible interest which a person can acquire, hold and enjoy. According to the assessing officer the assessed-company had claimed that the true character of the capital asset in question was in the nature of tenancy rights but after signing the MOU the assessed acquired the right to receive the consideration on discharging its obligations of surrendering the tenancy rights and handing over a letter in a prescribed format and not for the surrender of the tenancy rights alone. Assessing officer was of the view that mere surrender of the tenancy rights did not entitle the assessed to receive the amount of Rs. 6.78 crores as consideration. Accordingly, assessing officer did not agree with the plea of the assessed that capital assets in question was the tenancy rights. Assessing Officer was of the view that capital asset in question is the right to enforce the MOU dated 24-1-1997 to the assessed-company and the bank of Tokyo. Assessing officer proceeded to examine the definition of "transfer" as given in section 2(47) and was of the view that either it was surrender of the tenancy right or the right to enforce the MOU that there had been a transfer within the meaning of the Act. Then, the assessing officer proceeded to examine the nature of capital assets. According to assessing officer MOU was entered on 24-1-1997 and right was extinguished on 18-2-1997 on the fulfillment of the terms and conditions thereof the capital asset was held for a period less than 36 months. On this basis he concluded that capital asset was in the nature of a short term capital asset. In Alternative the assessing officer examine the plea of the assessed and noted that even if it is taken that capital asset was in the nature of tenancy rights, the asset was a short term capital asset as assessed-company entered into lease agreement for occupation of a property for a period of three years ending on 14-3-1976. Thereafter the assessed was in occupation of the property on month to month basis. Assessing officer opined that assessed always acquired a new right of tenancy at the beginning of the month of payment of rent and that right extinguished on the last day of the month. This provision continued every month till January 1997. On 1-2-1997 the assessed-company once again acquired tenancy rights which were relinquished on 18-2-1997 and as tenancy rights were held for a period of less than 36 months this capital asset was in the nature of short term capital asset. Assessing officer proceeded to examine the cost of acquisition of the said asset. So far as capital asset in the nature of right to enforce the MOU was concerned assessing officer concluded that cost of acquisition of this asset was the cost of stamp paper worth Rs. 2 on which MOU was recorded and said amount would be the cost of acquisition. He further concluded that if the true nature of capital asset is taken to be month to month tenancy right, still the cost of acquisition is Nil and he worked out the capital gains after deducting Rs. 2 as cost of acquisition which came to Rs. 6,77,99,998. Exemption under section 54EA was not allowed since the capital asset was held in the nature of short term capital asset for the reasons recorded above.

4.

The assessed came in appeal before the Commissioner (Appeals) and it was submitted that section 2(42A) of the Act provides the definition of expression "short term capital assets" as capital assets held by an assessed for not more than 36 months immediately preceding the date of transfer. Learned counsel referred to the decision of Hon'ble Punjab & Haryana High Court in the case of CIT v. Ved Parkash & Sons (HUF) wherein it was observed that word "owner" had

designedly not been used by the legislature and word "hold" as per dictionary meaning means to possess; be the owner, holder or tenant of the property, stock or land. Thus a person could be said to be holding the property as an owner; as a lessee as a mortgagee or on account of part of performance of an agreement etc. Giving out the facts of the case, learned counsel submitted that upon the expiry of the lease on 14-3-1976 the assessed continued to occupy the premises and remained in possession thereof. The LIC had also shown the assessed-company as tenant in record and continued to accept the same rent from the assessed as being paid before. The assessed remained in possession up to 18-2-1997 when it was surrendered. The assessed never given the possession nor LIC had taken any step to take possession which remained uninterrupted for 23 years 11 months and 3 days before it was surrendered. On the basis of these facts the contention of the learned counsel for the assessed before the Commissioner (Appeals) was that tenancy right was a capital asset as held in the case of Bawa Shiv Charan Singh v. CIT (1980) 149 ITR 29 (Del). He submitted that in the instant case

the assessed had surrendered the possession and LIC issued the certificate of taking possession back in the year under consideration. The amount of Rs. 6.78 crores was for surrender of tenancy rights to LIC. The possession of the assessed was for a period of 23 years and more and thus the capital asset was held for more than 36 months and the capital gains which arose in the year under consideration were long-term capital gains.

5.

It appears that Commissioner (Appeals) called for remand report from assessing officer who placed reliance on some case laws and submitted that tenancy of the assessed used to commence on first of each month and coming to an end on last of each calendar month. In the month of February 1997 it started on 1-2-1997 and came to an end on 18-2-1997 and thus capital gain should be treated as short term capital gain. The Commissioner (Appeals) after considering all the facts as well as the provisions of sections 106, 107 and 116 of Transfer of Property Act concluded that tenancy of the assessed was to be deemed to be leased from month to month on the basis of specific provisions of section 106 of the Act. The learned Commissioner (Appeals) also distinguished the case law referred to by the learned counsel for the assessed and after referring to the decision of Ganga Dutt Murarka v. Kartik Chandra Das, relied upon by the learned counsel, noted that the ratio of that case law supported the arguments of the learned assessing officer that duration of the tenancy was only for one month. In the end the learned Commissioner (Appeals) concluded that period of tenancy was of one month only and it commenced from 1 -2-1997 and came to an end on 18-2-1997 and thus assessed had held tenancy right for less than 36 months and assessing officer rightly treated it as short term capital gain. Commissioner (Appeals) also decided the issue of exemption claimed under section 54EA of the Act against assessed. Aggrieved, the assessed is in second appeal before the Tribunal.

6.

Learned counsel for the assessed after giving out the factual position as noted by assessing officer and Commissioner (Appeals) submitted that status of the assessed was that of as "tenant holding over". For this the learned counsel referred to the provisions of section 116 of the Transfer of Property Act and submitted that requirement of the said section stands complied with, section 116 contemplates an implied bilateral contract between the erstwhile landlord and the erstwhile tenant. On one side there should be an offer of taking a new lease, evidenced by lessee remaining in possession of the premises after lease was over and on the other side there must be a definite consent of the landlord to the continuance of possession by the tenant evidenced by the acceptance of rent or otherwise. In the case in hand, learned counsel for the assessed pleaded that lease expired on 14-3-1976 and assessed had been in possession up to 18-2-1997 without any interruption and LIC, the landlord, had been accepting the rent and issuing rent receipt as before and also showing the assessed as their tenant in the record and thus status of the assessed is that of a tenant "holding over". The other plea of the learned counsel is that provisions of section 106 of Transfer of Property Act raises a fiction and indicates a deeming provision in respect of leases which did not fall within the ambit of section 107. A lease under section 106 is known as a periodic lease which continues from one month to another and as per reading thereof shall show that this section provides that such a lease is of uncertain duration. In absence of any written contract or local usage if the lease is for immovable property then it shall be deemed to be a lease for month to month terminable of the part of either Lesser or lessee. The learned counsel submitted that this fiction cannot be extended further more and tenancy of the assessed no doubt was month to month but it remained in existence till 18-2-1997 the date of surrender. Apart from it learned counsel submitted that word "terminable" had been used in section 106 which provides that existence of tenancy will be there though it may be month to month but it will remain till it is determined by the Lesser. Reference to the case of *State of J&K v. Mst. Fazal Bibi* was made to in which Their Lordships have laid down that a monthly tenancy does not come to an end by mere afflux of time as in a case of tenancy of a fixed term. In such a case demand of possession or intimation to the tenant determining his tenancy is pre-requisite to the institution of the suit for ejectment. The contention is that no doubt tenancy was month to month but it will not come to an end on last day of each month as noted by the assessing officer and Commissioner (Appeals) but it will remain in existence till the same is determined. The same view had been taken by Hon'ble Allahabad High Court in the

case of Smt. Munni Devi v. State of U.P. and in the case of Khadiru Meera Rawther v. Mytheenkunju Meerankunju .

7.

The next plea of the learned counsel is based on the decision of Hon'ble Bombay High Court in the case of Utility Articles Mfg. Co. v. Raja Bahadur Motilal Bombay Mills Ltd. AIR 1943 Bom. 306 in which Their Lordships have given out the characteristic of periodical tenancy by noting that as each period commences, it is not a new tenancy but the same is accretion to the old tenancy. A monthly tenancy which is subject to a month's notice, creates, in the first instance, a tenancy for two months certain. But as soon as the third month commences, that is not a new tenancy but it turns the original tenancy into a three months' tenancy and when the fourth month begins, the tenancy becomes a four months' tenancy, and so on so forth until notice to quit is given. This view had been followed in the case of Birendra Pratap Singh v. Gulwant Singh contention is that assessed was tenant under section 116 of the Transfer of Property Act and his tenancy was in existence. It is not like that as noted by assessing officer that tenancy used to commence from first of each month and came to an end on last day of the month but fact is that no new tenancy came into existence but passing of each month was going to increase the time of tenancy and by the day of surrender, it was 23 years 11 months old and assessed has rightly claimed long-term capital gain and was entitled for exemption under section 54EA of the Act.

8.

Learned Departmental Representative placed reliance of the order of assessing officer as well as of Commissioner (Appeals) in which reference to the decision of Ganga Dutt Murarkas case (supra) was made and it was noted that this case cited by the assessed was going to conclude that tenancy of the assessed was from month to month in accordance with the provisions of section 106 of the Act. The contention of the learned Departmental Representative is that assessing officer as well as Commissioner (Appeals) have rightly decided the issue in favor of the assessed and no interference is called for.

9.

We have considered the rival submissions and perused the record carefully as well as gone through the case law referred to by the learned representative of the parties. So far as facts of the case are concerned, it is not in dispute that assessed-company occupied the premises owned by LIC through lease deed executed on 15-3-1973 for a period of 3 years. It is also a fact that after expiry of 3 years' period the lease deed was not reduced to writing but assessed-company continued to occupy the premises in question and had been paying rent therefore as agreed upon in the above referred to lease-deed. LIC of India also recognised the assessed as tenant of the said premises and had been receiving the rent and issuing the rent receipt. On 24-1-1997 MOU between the assessed and the bank of Tokyo Mitsubishi Ltd. was executed by which the assessed-company was to receive a sum of Rs. 6.78 crores if it delivers a letter to LIC of India intimating its decision to vacate the tenanted area and to surrender the tenancy in respect of the said tenanted premises on or before 18-2-1997 after passing necessary resolution by the Board of Directors. assessed had admittedly fulfilled the above referred to conditions of MOU and received Rs. 6.78 crores. It is also not disputed by either of the parties that tenancy rights are capital assets and surrender thereof in favor of landlord or its nominee will amount transfer of capital assets within the meaning of section 2(47) of the Act. The only controversy which requires consideration is whether on the facts of the case such transfer of tenancy right resulted in short term capital gains as per section 2(42B) of the Act or it was long-term capital gain as defined in section 2(29B) of the Act. To resolve this controversy the crucial aspect to be determined is whether capital asset in the present case was short term capital asset" as defined in section 2(42A) of the Act, which reads as under :

"short term capital asset" means a capital asset held by an assessed for not more than thirty six months immediately preceding the date of its transfer."

10.

After perusal of this definition the word "held" is significant one for the purpose of resolving the controversy in question. The dictionary meaning of expression "held" is as follows:

"(1) Possess; gain; or have esp.; (a) to be the owner or tenant of (land, property, stocks, etc.); (b) keep possession of (a place, person's thoughts, etc.)- (page No. 561 of Concise Oxford Dictionary, Eighth Edition);

(2) To keep, to have, to have in one's possession, to occupy, to retain, to continue - (Page 597 of Chambers 20th Century Dictionary, New Edition 1983)-.

11.

The expression "held" has also been subject matter of scrutiny and Hon'ble Punjab & Haryana High Court in the case of Ved Parkash & Sons (HUF) (supra) had an occasion to consider the said expression. assessed of that case entered into an agreement for purchase of flat on 29-5-1970 and in pursuant to the agreement he was put in possession of the flat on the same day. According to the stipulation the assessed was to pay the amount due in Installments and the final amount was paid on 10-2-1973. The assessed sold the property on 10-2-1973 and claimed that the gain arising was long-term capital gain. Their Lordships explaining the meaning of the word "held" as appearing in section 2(42A) observed at page 154 of the report as under:

"We find no merit in this contention of learned counsel. As is clear from a bare reading of section 2(42A) of the Act, the word "owner" has designedly not been used by the legislature. The word "hold", as per dictionary meaning, means to possess, be the owner, holder or tenant of property, stock, land ...). Thus, a person can be said to be holding the property as an owner, as a lessee, as a mortgage or on account of part performance of an agreement, etc."

12.

Their Lordships concluded that assessed was put in possession in May 1970 and remained in occupation as of right and thus for all intent and purposes the assessed was beneficial owner from the start and Tribunal was right in holding that the capital was a long-term capital gain.

13.

Now we shall examine the case of the assessed in view of the above observation of Their Lordships and admittedly assessed had been in possession of property from 15-3-1973 to 18-2-1997 when tenancy rights were surrendered. The case of the revenue is based on the interpretation of section 106 of Transfer of Property Act which reads as under :

"106. Duration of certain leases in absence of written contract or local usage - In the absence of a contract or local law or usage to the contrary, lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either Lesser or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month terminable on the part of either Lesser or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

14.

On the basis of above provisions the view taken by the assessing officer as well as by Commissioner (Appeals) is that a lease of immovable property as is the case of the assessed shall be deemed to be a lease from month to month, terminable on the part of either Lesser or lessee by thirty days' notice expiring with the end of a month of the tenancy. However, the view is not justified as in this case admittedly assessed kept the premises in question on the basis of lease deed executed on 15-3-1973 for a period of three years which expired on 14-3-1976 and after that undisputedly as noted above the assessed had been paying rent as original lease deed and LIC of India, the owner of the premises had been receiving the rent and issuing receipts. It means the land-lord is also accepting the assessed as its tenant. Here the provisions of section 116 of Transfer of Property Act comes into play which reads as under:

"116. Effect of holding over If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to lessee, and the Lesser or his legal representative accepts rent from the lessee or under lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106."

15.

The assessed, as pointed out above, continued to occupy the premises maintaining its possession over the premises in question and LIC of India continued to accept same rent as was being paid before 14-3-1976 and had been showing the assessed-company as the tenant in their record. The term "possession" consists of two ingredients viz., "animus" ie., mental element like intention of holding or possessing and "corpus" ie., effective control. In the case in hand assessed never lost either the animus or corpus or both between 15-3-1976 to 18-2-1997 nor LIC had made any effort to take possession of the property from assessed-company prior to 18-2-1997, Accordingly, the status of the assessed was that of tenant holding over. The case of the assessed is fully supported by the decision of Hon'ble Allahabad High Court in the case of Smt. MunniDevi(supra) 386 in which Their Lordships have laid down as under :

"Where a lessee remains in possession of immovable property leased even after the expiry of the term of the lease and the Lesser accepts rent from him or otherwise assents to his continuing in possession, he would become by reason of the provisions of section 116, Transfer of Property Act a tenant holding over. The tenancy created by the tenant holding over is a statutory tenancy which enables the tenant to retain possession after the expiry of the contractual tenancy. The statutory tenancy so created continues till it is terminated or determined. In the absence of any agreement to the contrary the statutory tenancy created under section 116, Transfer of Property Act may be determined in the manner enjoined by section 106 of the Act. The lease is renewed from year to year, or from month to month according to the purpose for which the property is leased as specified in section 106 aforesaid. In the instant case as the lease was granted for building purposes and not for agricultural or manufacturing purposes the tenancy created by holding over under section 116 was a monthly tenancy terminable on the part of either the Lesser or the lessee by the thirty days' notice."

16.

The contention of the learned counsel which was based on this reasoning has got force that tenancy created by the assessed was tenant holding over, a statutory tenancy which enabled the tenant to retain possession after the expiry of contractual tenancy and such statutory tenancy continued till it is terminated or determined. The same was the view in the case of Khadiru Meera Rawther (supra) in which Their Lordships concluded that in a case where there is a clear proof of holding over after expiry of the original term contained in the lease, the provisions of section 106 of the T.P. Act would operate and a notice to quit was absolutely necessary. Not only this Their Lordships in the case of Mst. Fazal Bibi (supra) have also laid down as under:

"Admittedly, the tenancy in the instant case is to be deemed to be a lease from month to month. It is well settled that a notice terminating a monthly tenancy is essential before a suit can be filed for eviction. A monthly tenancy does not come to an end by mere efflux of time as in the case of a tenancy for a fixed term. In such a case demand of possession or intimation to the tenant terminating his tenancy is prerequisite to the institution of the suit for enactment".

17.

The ratio of the above case law clearly makes out a case in favor of the assessed that assessed acquired statutory tenancy by holding over as defined under section 116 of the T.P. Act and possession of the assessed would continue till tenancy was terminated or determined. It is admitted fact that till 18-2-1997 the tenancy of the assessed was never terminated nor any effort was made by owner viz., LIC of India to determine the said tenancy. Accordingly possession of the assessed was statutory one and that extended from 15-3-1976 to 18-2-1977.

18.

The other plea of the department is that tenancy of the assessed in respect of premises in question was month to month basis which used to start from 15th of each month and used to come to an end on 14th of next month. This plea of the revenue is also not well founded and for this we can refer to the decision of Hon'ble Bombay High Court in the case of Utility Articles Mfg. Co. (supra) in which Their Lordships, while discussing the provisions of sections 105 and 106 of the Income Tax Act, have observed as under :

"A characteristic of a periodical tenancy is that as each period commences, it is not a new tenancy; it is really an accretion to the old tenancy, a monthly tenancy that is a tenancy subject to a month's notice, creates in the first instance a tenancy for two months certain. But as soon as the third month commences, that is not a new tenancy; it turns the original tenancy into a three months tenancy, and when the fourth month begins, the tenancy becomes a four months' tenancy, and so on so long as the tenancy continues, until, that is to say, notice to quit is given. One result of that doctrine is that a notice to quit must always expire with the expiration of the period of the original tenancy. Of course, the rule is subject to any contract the parties may intake between themselves.... But a provision that either side will give one clear months's notice to determine the tenancy does not effect the rule that the notice must expire with the expiration of the tenancy".

19.

This view had been cited with approval by the Hon'ble Supreme Court in the case of Birender Pratap Singh (supra).

20.

The ratio of the Hon'ble Bombay High Court clinches the issue in favor of the assessed as characteristic of periodical tenancy has been defined by Their Lordships to the effect that as each period commences, it is not a new tenancy but it is accretion to the old tenancy. Not only that Their Lordships gave example that a monthly tenancy, that is a tenancy subject to a month's notice creates in the first instance a tenancy for two months certain. But as soon as third month commences, that is not a new tenancy; it turns the original tenancy into a three months' tenancy and likewise when the fourth month begins, the tenancy becomes a four months' tenancy. If we apply the above ratio to the facts of the case then admittedly assessed had been tenant in the premises in question for 23 years and 11 months and tenancy of the assessed is more than 23 years old. So far as provisions of section 2(42A) are concerned, the only requirement is that assessed must hold the property for more than 36 months. Here admittedly assessed had been in possession over the property for more than 23 years and requirement of section 2(42A) is fully met and the assessed is justified in asserting that capital gains which arose in the case in hand were long-term capital gains. The plea of the department that tenancy of the

assessed used to commence on each month and going to an end on the end of that month is not justified as provisions of section 106 of the T.P. Act were in respect of the situation where there was no written agreement for lease in between landlord and tenant then the legislature prescribed the tenancy so far as agricultural property was concerned would be year to year basis and for other immovable property it would be month to month, terminable on the one month's notice etc. That fiction created for a limited purpose and not applicable to the assessed particularly for application of provisions of section 2(42A) of the Income Tax Act as it is settled preposition of law that a fiction created by statute cannot be extended for another statute unless provided under that Act. Here we are concerned with the specific provision of section 2(42A) which requires that assessed must be holding property for more than 36 months and here assessed was possessing tenancy right for more than 23 years and thus the case of the assessed was just one in claiming long-terms capital gain. So far as exemption under section 54EA is concerned, the same had been denied to the assessed simply on the ground that assessed had not been able to prove that capital gains were long-term capital gains but as per our findings assessed's case is that of long term capital gains and thus he was entitled for exemption claimed under section 54EA. All the grounds stand decided in favor of the assessed.

21.

So far as ground No. 1 is concerned that is in respect of disallowance of subscription paid to club. This was not seriously pressed by the learned counsel for the assessed at the time of hearing of the appeal. Accordingly, ground is rejected as not pressed.

22.

Ground No. 5 raised in this appeal in general in nature and requires no comments.

23.

The result is that appeal is partly allowed.