

(2008) 215 CTR 0267 :(2008) 021 (I) ITCL 0284 :(2008) 298 ITR 0268 :(2008) 169 TAXMAN 0124 :(2008) 003 DTR 0110

## June Perrett v. ITO ()

### INCOME TAX ACT, 1961

--**Capital gains**--Deduction under section 48*Amount spent to secure eviction order to evict unauthorised occupant*--On facts stated, any expense incurred in connection with suit filed for eviction of unauthorised tenant was to be treated as expenditure in connection with transfer of the property. If the unauthorised occupant had not been evicted, the value of the property would have been decreased, instead of increasing. Therefore, the expenditure incurred by the executors to evict the unauthorised occupant has to be treated as an amount spent towards cost of improvement of the property. Hence, entitled for deduction under section 48.

The executors could have sold the property even without evicting the unauthorised occupant. If such an attempt were to be made by the executors, no man of prudence would have come to buy the property, since the unauthorised occupant was claiming adverse possession of the property. In order to clear the cloud cast on the property, the executors were required to file a civil suit. Any expenses incurred in connection with such suit has to be treated as expenditure in order to transfer the property. [Para 9] If the unauthorised occupant had not been evicted, the value of the property would have been decreased, instead of increasing. Therefore, the expenditure incurred by the executors to evict the unauthorised occupant has to be treated as an amount spent towards cost of improvement of the property. [Para 9]

**Income Tax Act, 1961** Section 48

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### INCOME TAX ACT, 1961

--**Capital gains**--Deduction under section 48*Expenditure in connection with transfer of property*--Assessee's father died leaving behind a Will appointing executors, who were resident of United Kingdom. The executors were required to obtain probate of Will and then to sell residential property and distribute the sale proceeds to his sons/daughter. Assessee received 1/4th of the sale proceeds of the house, filed return of income showing 1/4th capital gains and claimed certain expenditure incurred by the executors for obtaining the probate and letter of administration. The expenses claimed by the assessee

while computing capital gain, was rejected by the AO. CIT(A) also denied the expenses incurred towards legal and professional taxes, executors expenses in India, executors| expenses in England and court fees paid to obtain letter of administration. Tribunal also rejected the appeal against order of the CIT(A). **Held:** Admittedly the person executed Will was the Christian, therefore, letter of the administration could not be granted to executors without obtaining probate of Will. Therefore, amount spent by the executors to obtain probate and letter of administration has to be treated as expenditure incurred to transfer the property. Similarly, without paying court fee, no letter of administration would be issued by the court. Therefore, Rs. 1,23,000 paid by the executors as court fee at the time of obtaining the letter of the administration has to be treated as expenditure incurred in connection with transfer of property, hence, deductible under section 48.

The real owner of the property in question was late father who had executed a Will. The executors who were residing in London were required to obtain the probate and the letter of administration and any expenditure incurred by the executors in order to obtain the probate and the letter of administration are to be treated as expenses incurred by them in connection with the transfer of property in question, since the executors could not sell the property to any party without a letter of administration. [Para 7] Admittedly, the person executed the Will was a Christian. When a Christian has executed a Will, without there being a probate, the letter of administration will not be granted to the executors. Therefore, the department cannot expect the executors to spend the money from their pocket in order to obtain the letter of administration. Therefore, the amount spent by the executors to obtain probate and letter of administration has to be treated as expenditure incurred to transfer the property. Similarly, without paying the court fee, no letter of administration would be issued by the court. Therefore, Rs. 1,23,000 paid by the executors as court fee at the time of obtaining the letter of administration has to be treated as expenditure incurred in connection with the transfer of property. [Para 7]

**Income Tax Act, 1961** Section 48

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## **(2008) 298 ITR 0268 (KARN-HC)**

### **Mrs. June Perrett v. ITO**

In the Karnataka High Court K.L. Manjunath & Arali Nagaraj, JJ.

IT Appeal No. 181 of 2002 15 November, 2007

Income Tax Act, 1961, section 48

In favour of: Assessee; Assessment year 1996-97

*Counsel : G. Saranganjbr S. Parthasarathi & Y.V. Ravirqj, for the Assessee M. V. Seshachala, for the Revenue*

## JUDGMENT

K.L. Manjunath, J.

This appeal is by the assessee challenging the order passed by the Income Tax Officer Ward-1, Chickmagalur which has been affirmed by the Commissioner (Appeals), Bangalore and further affirmed by the Tribunal, Bangalore Bench, in *ITA No. 678/Bang/1999 on 5-3-2002*.

2. The assessee is one of the daughters of one A.W.S. Barnard. A.W.S. Barnard died leaving behind a Will appointing one Mrs. Elsie F. Barnard, Mr. Robin Alexander Barnard and Mr. David Barnard, as executors, who were all residents of United Kingdom. A.W.S. Barnard owned a residential house situated in Bangalore. As per the Will, the executors were required to obtain probate of the Will and thereafter sell the residential property and divide the sale proceeds and distribute the same to the three sons and a daughter of A.W.S. Barnard. After the death of A.W.S. Barnard, the executors filed probate proceedings and obtained the probate by paying a court fee of Rs. 1,23,000 towards letter of administration. Since the executors were residing in England, they were forced to come to India in order to settle the matter. The probate proceedings were opposed by one of the sons of A.W.S. Barnard. Therefore, there was a long-drawn litigation. Further, the house was illegally occupied by a maid-servant. In order to secure the vacant possession of the property, the executors were forced to file an eviction petition in Bangalore and ultimately they succeeded in court. Accordingly, the possession was obtained. After obtaining the possession and after clearing all the litigation pending over the house property, it was sold on 23-11-1995 for a total consideration of Rs. 1,18,46,850. The assessee being a daughter of A.W.S. Barnard, received 1/4th of the sale proceeds of the house, filed return of income for the assessment year 1996-97 showing 1/4th of the capital gains. While computing capital gains, she claimed certain expenditures incurred by the executors towards litigation expenses, travelling expenses incurred by them to travel from England to India and their stay at Bangalore and the fee paid to the lawyers towards litigation expenses. The expenses claimed by the assessee while computing the capital gains, was rejected by the assessing officer. Against the said order, she filed an appeal before the Commissioner (Appeals), which appeal was also allowed in part denying the expenses incurred towards legal and professional taxes, executors expenses in India, executors expenses in England and the court fee paid to obtain letter of administration. Against the order of the Commissioner (Appeals), an appeal was filed before the Tribunal and the same has also been rejected. Against the concurrent findings of the authorities below, the present appeal is filed, raising the following substantial question of law :

"Whether the assessee can claim deduction incurred by her while computing capital gains under section 48(i) of the Income Tax Act towards the expenses incurred by the executors for legal and professional charges and court fee expenses ?"

3. We have heard the learned counsel for the parties.

4. Sri. Sarangan, senior counsel appearing for the counsel for the appellant contends that all the authorities did not consider the provisions of section 48(i) of the Income Tax Act, properly. According to him, while computing capital gains under section 48(i), any expenditure incurred wholly and exclusively in connection with the transfer of the property has to be deducted and similarly the cost incurred by the assessee for any improvement thereto was also required to be deducted while computing the capital gain. According to him, the executors had no power to sell the property without obtaining the probate and the letter of administration. Since they were required to obtain the probate and the letter of administration, the executors who were permanently residing in England, were forced to come down to Bangalore and to stay at a Hotel in connection with the probate proceedings and the expenses incurred by them were required to be deducted out of the sale proceedings as expenditure towards transfer of property. The professional fee paid by the executors to the lawyers, who conducted the case in order to secure the property of the deceased, has to be treated as expenditure incurred towards the transfer of property in question. He similarly contends that since the property was wrongfully occupied by a maid-servant of A.W.S. Barnard, without evicting the unauthorised occupant if the property had to be sold, it would not have fetched Rs. 1,18,46,850. Therefore, the executors were forced to file a suit in order to evict the unauthorised occupant and any expenses incurred to get the possession of the property by the executors has to be treated as expenditure incurred in connection with the transfer of the said property. Similarly, he contends the court fee of Rs. 1,23,000 paid by the executors in order to obtain letter of administration has to be treated as expenses incurred by the executors towards the transfer of property, since they could not have sold the property without obtaining such probate and the letter of administration. To support his view, he relied upon the judgment *CIT v. Miss Piroja C. Patel (2000) 242 ITR 582 (Bom)* and requested the court to answer the question of law framed in favour of the assessee and set aside all the orders passed by the authorities below.

5. Per contra, learned counsel for the respondent contends that the authorities were justified in not considering the deductions claimed by the assessee since the amount has been spent by the executors and the assessee cannot be considered as expenses incurred for transfer of property. He has relied upon the judgment of this court in the case of *B.N. Pinto v. CIT (1974) 96 ITR 306 (Mys)* to support his contention and requested this court to dismiss the appeal.

6. We have heard the learned counsel for both the parties. What is required to be considered by us is, whether the amount spent by the executors in order to sell the property has to be treated as expenditure incurred for the transfer of property or not.

7. After hearing the parties, we have noticed that the real owner of the property in question late A.W.S. Barnard had executed a Will. The executors who were residing in London were required to obtain the probate and the letter of administration and any expenditure incurred by the executors in order to obtain the probate and the letter of administration are to be treated as expenses incurred by them in connection with the

transfer of property in question, since the executors could not sell the property to any party without a letter of administration.

Admittedly, the person executed the Will was a Christian. When a Christian has executed a Will, without there being a probate, the letter of administration will not be granted to the executors. Therefore, the department cannot expect the executors to spend the money from their pocket in Order to obtain the letter of administration. Therefore, the amount spent by the executors to obtain probate and letter of administration has to be treated as expenditure incurred to transfer the property. Similarly, without paying the court fee, no letter of administration would be issued by the Court. Therefore, Rs. 1,23,000 paid by the executors as court fee at the time of obtaining the letter of administration has to be treated as expenditure incurred in connection with the transfer of property.

**8.** Then the last question to be considered by us is, whether the amount spent by the executors to secure an order of eviction to evict unauthorised occupant has to be treated as expenditure in connection with the transfer of property ?

**9.** The executors could have sold the property even without evicting the unauthorised occupant. If such an attempt were to be made by the executors, no man of prudence would have come to buy the property, since the unauthorised occupant was claiming adverse possession of the property. In order to clear the cloud cast on the property, the executors were required to file a civil suit. Any expenses incurred in connection with such suit has to be treated as expenditure in order to transfer the property. Our view is supported by the judgment of the Bombay High Court in the case of *CIT v. Miss Piroja C. Patel* (supra). In the aforesaid case, certain eviction proceedings were initiated to evict the unauthorised occupant from the land. Due to eviction of the unauthorised occupant from the house, the value of the property was increased and the expenditure incurred for vacating the land has been treated as cost of improvement. Similarly, in this case also, if the unauthorised occupant had not been evicted, the value of the property would have been decreased instead of increasing. Therefore, we have to treat the expenditure incurred by the executors to evict the unauthorised occupant as an amount spent towards cost of improvement of the property. In the circumstances, we have to answer the question of law framed in favour of the assessee.

**10.** Insofar as the judgment relied upon by the revenue is concerned, in the aforesaid case a sum of Rs. 41,507 was claimed by the assessee towards lawyer's fee, travelling expenses and damages for wrongful detention of the property. The court, while doubting the genuineness of the claim of the assessee therein has rejected the contention of the assessee. Here the assessing officer or the Commissioner (Appeals) are not doubting the claim made by the assessee. But the contention of the assessing officer in the instant case is that the amount claimed by the assessee are not in connection with the transfer of the property. Therefore, the judgment relied upon by the revenue has no application to the facts and circumstances of this case,

**11.** In the result, the questions of law raised in this appeal are answered in favour of the appellant. Accordingly, this appeal is allowed by holding that the assessee is entitled to

claim deduction of the amount incurred towards legal and professional tax, executors expenses in England and India and the court fee expenses.