(1984) 11 PAT CK 0001

In the Patna High Court

Case No : Tax Case No''s. 8 and 12 of 1974

Additional Commissioner of Income Tax — APPELLANT

Vs

Uma Devi Budhia — RESPONDENT

Date of Decision : 06-11-1984

Acts Referred:
Income Tax Act, 1961 — Section 2, 2(17), 2(24), 256(1), 45

Citation : (1985) 21 TAXMAN 205

Hon'ble Judges : Lalit Mohan Sharma, J;Ashwini Kumar Sinha, J

Bench : Division Bench

Advocate : B.P. Rajgarhia and S.K. Sharan, for the Appellant; L.K. Baijlal and G.C. Bharuka, for the Respondent

Judgement

Ashwini Kumar Sinha, J.—Both the tax cases are references u/s 256(1) of the income tax Act, 1961 (''the Act''), made by the Tribunal, Patna Bench ''A''. Identical question of law is involved in both these tax cases and, hence, they are disposed of by a common judgment. In tax case No. 8 of 1974, the question of law referred to for the opinion of this Court is as below:

Whether, on the facts and in the circumstances of the case, the amount of Rs. 14,560 was assessable in the hands of the assessee under the head ''Capital gains''?

2. In tax ease No. 12 of 1974, the question of law referred to for the opinion of this Court is as below:

Whether, on the facts and in the circumstances of the case, the amount of Rs. 30,900 was assessable in the hands of the assessee under the head ''Capital gains''?

TAX CASE No. 8 OF 1974

3. The assessment year in question is 1964-65. The original assessment for this assessment year was made determining capital gain of Rs. 1,640 on properties

received from Ganpati Properties. (P) Ltd. The assessee was one of the shareholders of Ganpati Properties Ltd. On voluntary liquidation of the company, the assessee received 5/102 shares in the undivided properties and a piece of land measuring about 3 acres, besides a building. The liquidator had valued that property at Rs. 1,53,000 and the share of the assessee in the same came to Rs. 7,500. ITO found that the valuation of the assets as made by the liquidator was underrated and inadequate. The ITO was of the view that the value given to these properties by the liquidator was low and considering the rental income from these properties, he estimated the value of the land at Rs. 3,86,000 and the value of the building at Rs. 63,200. On this basis, the value of the entire property was taken to be Rs. 4,50,000. The ITO was of the view that the liquidator had grossly underestimated the value and held that in the instant case, the provisions of section 52(1) of the Act were applicable. The ITO worked out the capital gain on the whole property at Rs. 2,77,000 and also worked out the assessee''s share by taking 5/102 of the above capital gain. Thus, an amount of Rs. 14,560 was taken as capital gain by the ITO.

4. The assessee went in appeal and the AAC held that the approval required to be taken u/s 52(2) had not been taken in this case while enhancing the value of the capital gains; instead, only approval u/s 52(1) had been taken from the IAC. The AAC, however, following the decision in earlier case of a shareholder, vacated the reassessment order and directed that the value of the capital gain be taken at the same figure, which was taken in the original assessment.

5. The department went before the Tribunal and the Tribunal following the decision in the case of Commissioner of Income Tax, Gujarat II Vs. R.M. Amin. (Legal representative of the Late Chunibai Amin), , held that there was no transfer of capital asset in this case and the Tribunal, therefore, held that the AAC rightly set aside the higher valuation taken in the reassessment for the computation of capital gain. The departmental appeal was dismissed by the Tribunal.

The department, thereafter, filed an application before the Tribunal u/s 256(1) and, thus, the matter has come to this Court.

TAX CASE No. 12 OF 1974

6. In this case the assessee was one of the shareholders of Ganpati Properties (P) Ltd. On the liquidation of the company, the assessee received a piece of land, on which the premises of Shri Vishnu Talkies, Ranchi, stood. According to the liquidator, the value of the land of 15 kathas came to Rs. 45,000. The ITO considered this to be an under-valuation and estimated the cost of land at Rs. 5,000 per katha. The ITO was of the view that the assessee was closely related to the liquidator and he was of the view that there was a transfer effected with the object of avoidance or reduction of liability u/s 45 of the Act. The ITO further estimated the fair market value of the properties on the date of transfer at Rs. 75,900 as against Rs. 45,000 estimate by the liquidator. The ITO held that there

being a difference between the value given by the liquidator and the market value of the properties, the same was to be assessed at Rs. 30,900 as capital gain.

7. The assessee went in appeal before the AAC. The AAC held that there was no object to avoid the tax and that the company had not gone into liquidation for the purposes of avoiding capital gains tax. The AAC held that the capital gains did not arise into the hands of the transferee but in the hands of the transferor. The AAC further held that the provisions of section 52(1) were not applicable in the instant case and the assessee had not transferred any asset and was only a recipient. The AAC deleted the addition of Rs. 30,900.

8. The department, thereafter, went before the Tribunal. The Tribunal agreed with the AAC and held that the provisions of section 52(1) were not attracted in the instant case and also held that the assessee had not transferred any asset but had merely acquired an asset in this case. The Tribunal held that the assessee, in the instant case, had received these assets on the liquidation of the company, of which he was a shareholder, and this did not amount to transfer of capital asset. The Tribunal also relied on the case of R.M Amin (Supra) and held that where a shareholder received money representing the share on distribution of the asset of the company in liquidation, he received such money in satisfaction of the right which belonged to him and not by way of consideration for the extinguishment of this right. The Tribunal further held that in the instant; case, it could not be said that the company j went into the liquidation only to avoid the tax. With these findings, the Tribunal agreed with the AAC and held that the AAC was justified in deleting the addition of Rs. 30,900 under the head ''Capital gains''.

9. The department, thereafter, filed an application u/s 256(1) before the Tribunal and, thus, the matter has come to this Court.

10. As would appear from paragraph Nos. 2 and 3 above, the questions of law referred this Court for opinion are identical.

11. In both these tax cases, it would appear from the averment of facts given above that the Tribunal (in both the cases) based its decision on the case of R.M. Amin (supra).

12. The main question was, whether there was any ''capital gain'' on the distribution of assets on the liquidation of the limited company between the shareholders of the company.

13. On the facts of the cases, the learned senior standing counsel of the income tax department contended that the Tribunal in both the cases had wrongly relied on the case of R.M. Amin (supra) and contended that the facts of that case were clearly distinguishable and the dictum laid down in that case could not be applied in the instant cases. The learned senior standing counsel for the department further contended that in the instant cases, the assessees, on the facts of the present cases, were clearly chargeable to capital gains not under the general

provisions of section 45 but under the specific provisions of section 46(2) of the Act.

There is enough force in the submission advanced by the learned counsel for the department, as would appear hereafter.

14. On the other hand, the learned counsel for the respective assessees contended that the Tribunal had rightly relied upon the case of R.M. Amin (supra) and was justified in deleting the respective additions in the two cases under the head ''Capital gains''.

15. I may just mention here that the facts in the case of R.M. Amin (supra) are clearly distinguishable. In that case, the capital gains was held to be not assessable because the company, of which the assessee was a shareholder, was not registered in India, with the result, that the said company fell outside the definition of company as laid down in section 2(17) of the Act. The decision in that case was given with reference to section 45.

If the facts of the instant cases were referable to section 45, the contention advanced by the learned counsel for the respective assessees was understandable but on the facts of the instant cases, it is really section 46(2), which is attracted and, hence, there is no substance in the contention advanced on behalf of the assessees, and I hold that the Tribunal wrongly applied the principles decided in the case of R.M. Amin (supra) for the purpose of deciding the point involved in the instant cases.

16. Section 46(1) makes it clear that where the assets of a company are distributed to its shareholders on its liquidation, it is not a transfer by the company for the purposes of section 45. The company is not chargeable to income tax on any capital gain in respect of such transaction. However, section 46(2) imposes a liability on the shareholder and the shareholder becomes chargeable to income tax under the head ''Capital gains'' in respect of money received or the market value of other assets received by him on the date of distribution.

Section 48 of the Act prescribes the mode of computation of the income tax chargeable under the head ''Capital gains''. The computation of income u/s 48 has to be done by the ITO. It is inherent in the exercise of that power to determine the full value of the consideration as provided in section 46(2). The ITO has a duty to determine the market value of the assets received by the shareholder on liquidation of the company, on the date of distribution. A contributory receiving assets from a company does not necessarily receive the assets of the value determined by the liquidator. Where such a value has been determined by the liquidator, it is the duty of the ITO and within his power to determine the market value of the assets received by the shareholder and such market value has to be determined as prevalent on the date of distribution.

17. The learned counsel for the respective assessee also attempted to contend

that u/s 2, ''income'' has been defined to include under sub-clause (vi) ''any capital gains chargeable u/s 45'' and not capital gains chargeable u/s 46(2). There is no force in this submission advanced by the learned counsel for the respective assessee. Section 2 defines income as including capital gains chargeable u/s 45. This does not mean that the capital gains chargeable u/s 46(2) is not assessable as income. The definition of income in section 2 (24) is inclusive and not exhaustive. Section 46(2), read with section 48, in my opinion, fixes the liability for payment of income tax on capital gains of the shareholder in a case covered by the provisions and this liability cannot be wiped off by reference to the inclusive definition of income in section 2 (24). The definition in section 2 itself starts with the expression ''In this Act, unless the context otherwise requires'' and, thus, in section 2 (24), when capital gains are sought to be included, it must, on correct construction, mean that all ''capital gains'' which are sought to be charged to income tax under the said heading are included.

18. Identical question, as involved in the instant tax cases, was considered in the case of Commissioner of Income Tax Vs. Vijoy Kumar Budhia, and thereto the Tribunal had relied upon the case of R.M. Amin (supra). This Court in the case of Vijoy Kumar Budhia (supra) considered the case reported in R.M. Amin (supra) and held that the Tribunal had wrongly relied upon the principles laid down in that case, i.e., R.M. Amin''s case (supra). On the legal view, as stated above, I hold that the respective amount in the instant case was rightly included in the ''capital gains'' of the respective assessee u/s 46, read with sections 48 and 49 of the Act and in both the instant Tax Cases, the Tribunal has taken a wrong view of the law and wrongly held that the AAC was justified in deleting the respective additions and wrongly relied on the case of R.M. Amin (supra).

19. The questions of law, as stated in paragraph Nos. 2 and 3 above, for the opinion of this Court, are squarely covered by the decision in the case of Vijoy Kumar Budhia (supra). For the reasons stated above, I answer both the questions in the instant tax cases (as referred to in paragraph Nos. 2 and 3 above) in the affirmative, against the assessee and in favour of the revenue and hold that, on the facts and in the circumstances of the case, in Tax Case No. 8 of 1974, Rs. 14,560 was assess able in the hands of the assessee under the head ''Capital gains'' and I further hold that in the Tax Case No. 12 of 1974, on the facts and in the circumstances of that case, Rs. 30,900 was assessable in the hands of the assessee under the head ''Capital gains''.

Hearing fee is assessed at Rs. 100 only.

