

(1985) 10 BOM CK 0013

In the Bombay High Court

Case No : Income-tax Reference No. 235 of 1975

B.G. Shah

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 04-10-1985

Acts Referred:

Income Tax Act, 1961 — Section 4

Citation : (1986) 52 CTR 313 : (1986) 162 ITR 23

Hon'ble Judges : Kania, J;Bharucha, J

Bench : Division Bench

Judgement

Bharucha, J.

1 . This is a reference at the instance of the assessee u/s 256(1) of the Income Tax Act, 1961. The question to be considered read thus :

"(a) Whether, on the facts and in the circumstances of the case, the receipt of Rs. 37,500 by the assessee on termination of the tenancy agreement was revenue or capital in nature ?

"(b) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the assessee had entered into the tenancy agreement in the course of his business and the compensation received for termination of such agreement would be revenue in nature ?"

2. The reference relates to the assessment year 1970-71, the relevant previous year having ended on March 31, 1970.

3. The assessee is an advocate. he entered into an agreement with the Indian National Press (Bombay) Pvt. Ltd. for obtaining on monthly tenancy ground floor premises in a building on Dalal Street, Fort, Bombay. The assessee filed a suit in the City Civil Court at Bombay (being Suit No. 4978 of 1962) for specific performance of the said agreement. While the suit was pending, the assessee came to learn that the Bank of Baroda was interested in the said premises. He

approached the Indian National Press (Bombay) Pvt. Ltd. and requested it to negotiate with the bank to their mutual advantage. As a result, the assessee received an amount of Rs. 37,500 from the Indian National Press (Bombay) Pvt. Ltd. by way of compensation for non-performance of the said agreement.

4. For the assessment year in question, the assessee claimed that the said amount of Rs. 37,500 was exempt from Income Tax, being a capital receipt. The Income Tax Officer came to the conclusion that the assessee had wanted the said premises for business and that the compensation received for the breach in this connection was revenue receipt. The said agreement having been entered into in the ordinary course of business, it could not be regarded as a capital asset. The compensation received was income liable to tax in the year in which it was received.

5. The Appellate Assistant Commissioner, on appeal by the assessee, held that the said amount of Rs. 37,500 received by the assessee as damages was not a revenue receipt.

6. The Revenue appealed to the Income Tax Appellate Tribunal. Reliance was placed on behalf of the Revenue upon the statement made by the assessee in the said suit that he was carrying on business as sole proprietor of M/s. Badrawal Traders. It was urged that if the assessee was carrying on this business at Abdul Rehman Street, as the plaint stated, there was reason why the assessee should have proposed to take the said premises unless it was in regard to a business-making proposition. The assessee, on the other hand, contended that no business had ever been carried on by him; that a trade name was fixed at the time of obtaining the tenancy; that the compensation had been received for not obtaining the tenancy; and that the tenancy right had not been obtained in the regular course of business. The Tribunal found that it could not, in view of the said statement in the plaint, accept the assessee's oral plea that he had never carried on business. The facts that the assessee, when he came to know that the Bank of Baroda was interested in the said premises, had approached the Indian National Press (Bombay) Pvt. Ltd. and requested it to negotiate with the bank to their mutual advantage made it clear to the Tribunal that the assessee was interested in the tenancy as a business and a profit-making proposition. The Tribunal was, therefore, compelled to conclude that the assessee had entered into the said agreement in the course of his business. The compensation received for its termination was, in its view, a revenue receipt.

7. Mr. Khatri, learned counsel for the assessee, submitted that the tenancy of the said premises was business or capital asset; that it had not been acquired in the course of the assessee's business but to carry on the business; and that the said compensation amount of Rs. 37,500 was a capital receipt not susceptible to Income Tax.

8. Reliance was placed by Mr. Khatri upon the judgment of this court in *Bombay Burmah Trading Corporation Ltd. Vs. Commissioner of Income Tax, Bombay City-*

II, . This court observed that compensation received for loss of a capital asset would be a capital receipt. Where compensation was recovered for an injury inflicted on a man's trading, so to speak, hole in his profits, it would go to fill the hole and would be trading receipt. On the other hand, where the injury was inflicted on the capital assets of the trade, making, so to speak, a hole in them, the compensation recovered was meant to be used to fill that hole and was a capital receipt. Where the agreement related to the structure of an assessee's profit-making apparatus and affected the conduct of his business, the money received for the cancellation or variation of such an agreement would be capital receipt.

9. The judgment of the Delhi Court in *Bawa Shiv Charan Singh Vs. Commissioner of Income Tax, Delhi*, , was also cited by Mr. Khatri. Therein, it was held that a monthly tenancy or a leasehold right is a capital asset. The judgment mentions a similar view taken by the Calcutta High Court in the case of *A. Gasper Vs. Commissioner of Income Tax*,

10. Mr. Jetly, learned counsel for the Revenue, submitted that the question as to whether the tenancy which the assessee had agreed to obtain was a capital asset or not had been referred by the Tribunal to the court in this reference and that, therefore, we should not go into this question. The question that has been referred is as to whether the receipt of the said amount of Rs. 37,500 by the assessee on the termination of the said agreement is revenue of capital in nature. In our view, the question as framed is wide enough to cover the argument that the tenancy which the assessee had agreed to take under the said agreement was a capital asset and that, consequently for its non-performance was a capital, not a revenue receipt.

11. Mr. Jetly then submitted that the receipt of the said compensation amount of Rs. 37,500 by the assessee was a revenue receipt upon the following basis : The assessee had attempted to obtain the tenancy. He was carrying on business. If he had obtained the tenancy, he would have earned profits. Instead, he had entered into a more profitable transaction and obtained the said amount of Rs. 37,500. Mr. Jetly stressed the fact that the assessee had not obtained and then surrendered the tenancy.

12. Mr. Jetly makes impermissible assumptions of fact : as for example, that the assessee entered into a more profitable transaction by obtaining the said amount of Rs. 37,500 instead of the tenancy.

13. The assessee was carrying on business. He obtained the tenancy intending to use the said premises for the purposes of carrying on his business. In the language of this court in the *Bombay Burmah Trading Corporation Ltd. Vs. Commissioner of Income Tax, Bombay City-II*, , he intended it to be a part of the structure of his profit-making apparatus. There is nothing to suggest that he intended to trade in the tenancy. The tenancy was, therefore, to be a capital asset. The said amount of Rs. 37,500 received by the assessee as compensation

in lieu thereof was, therefore, a receipt capital in nature.

14. In the premises, the questions are answered thus :

(a) The receipt of the said amount of Rs. 37,500 by the assessee was of a capital nature.

(b) In the negative.

15. The Revenue shall pay to the assessee the costs of the reference.