
(1989) 09 KL CK 0016

In the High Court Of Kerala

Case No : Income-tax Reference No's. 516 and 517 of 1985

Commissioner of Income Tax

APPELLANT

Vs

Merchandisers (P.) Ltd.

RESPONDENT

Date of Decision : 25-09-1989

Acts Referred:

Citation : (1990) 182 ITR 107

Hon'ble Judges : Varghese Kalliath, J;K.S. Paripoornan, J

Bench : Division Bench

Advocate : P.K.R. Menon, for the Appellant; S.A. Nagendran, for the Respondent

Judgement

K.S. Paripoornan, J.—At the instance of the Revenue, the Income Tax Appellate Tribunal has referred the following two questions of law for the decision of this court:

"1. Whether, on the facts and in the circumstances of the case, the Tribunal is justified in holding that the amount of Rs. 38,300 received by the assessee as a consideration for vacating the business premises which was taken on rent by it, is not relatable to the business activity carried on by the assessee and not allowable as revenue receipt ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is justified in holding that no capital gains resulted and no tax on capital gains can be levied in the present case ?"

2. The respondent-assessee is a private limited company. We are concerned with the assessment year 1978-79. During the relevant previous year, the assessee stopped its business and vacated the business premises which it had taken on rent in 1966. It received a sum of Rs. 38,300 from the vendee of the landlord as consideration for vacating the premises. The Income Tax Officer brought the said amount to tax as a trading receipt. In appeal, the Commissioner of Income Tax (Appeals) held the receipt to be a capital one and ordered a remit. He also observed that, in making the assessment, the Income Tax Officer shall bear in

mind the decision of the Supreme Court in Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, . The Revenue took up the matter in appeal before the Income Tax Appellate Tribunal and contended that the Commissioner of Income Tax (Appeals) was in error in holding that the amount received- by the assessee was a capital receipt. The assessee also filed an appeal from the order of the Commissioner of Income Tax (Appeals) questioning the correctness of the restoration of the matter to the Income Tax Officer for making the assessment of possible capital gains. These two appeals were considered together and a common order was passed by the Income Tax Appellate Tribunal dated November 24, 1984. The Tribunal held that the premises taken on lease for the business by the assessee was surrendered to the vendee of the landlord and not to the landlord and so the amount received is not relatable to the business activity carried on by the assessee. The finding of the Commissioner of Income Tax (Appeals) that the amount received constituted a capital receipt was upheld. Following the decision of the Delhi High Court in Bawa Shiv Charan Singh Vs. Commissioner of Income Tax, Delhi, , the Appellate Tribunal held that no tax on capital gains can be levied, since there was no cost of acquisition for the transfer of the tenancy right in the instant case. It is, thereafter, at the instance of the Revenue, that the Income Tax Appellate Tribunal has referred the questions of law, formulated hereinabove, for the decision of this court.

3. We heard counsel. Mr. N.R.K. Nair, counsel for the Revenue, very vehemently contended that the Tribunal was in error in holding that the decision of the Delhi High Court in Bawa Shiv Charan Singh Vs. Commissioner of Income Tax, Delhi, , is applicable and so no tax on capital gains can be levied in the present case. Counsel for the assessee submitted that the ratio of the decision of the Delhi High Court in the said case is clearly applicable and that the decision of the Appellate Tribunal holding that no capital gains tax is exigible in the instant case is justified.

4. We considered the rival contentions put forward before us. The Appellate Tribunal has categorically found that it is not the business of the assessee-company to take on lease premises and surrender the same. The premises were taken on lease for its business and surrendered later. What is more, the surrender was, in the instant case, to the vendee who purchased the building from the landlord. On these premises, it is self-evident that the amount received by the assessee, when it vacated the premises, is not relatable to the business activity carried on by it. The receipt of the amount constituted only a capital receipt. The Appellate Tribunal was justified in holding so.

5. Next, the Tribunal adverted to the decision of the Supreme Court in Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, . An earlier decision of the Tribunal in Raman Krishnan v. ITO [1982] 2 ITD 611, which was brought to its notice, was distinguished. It was stated that in Raman Krishnan's case [1982] 2 ITD 611 what was transferred by the assessee was the land as such and not any particular right, The transfer therein was one of a capital asset

in respect of which capital gains tax is exigible. Holding that, in the instant case, the capital asset involved is only a tenancy right, the Tribunal posed the question whether any capital gains could be assessed to tax in the case of a transfer of a tenancy right for which there was no cost of acquisition. In considering the said matter, reliance was placed on the decision of the Delhi High Court in *Bawa Shiv Charan Singh Vs. Commissioner of Income Tax, Delhi*, Referring to the tenancy right and the imponderables involved in evaluating the value of such right, it was pointed out by the Delhi High Court that there was no premium when the premises were taken on lease, that it was not possible to predicate as to the exact moment of its birth and the rate or period of its growth, that the process of the growth in value was imperceptible, that it was self-created without any contribution by the assessee, monetarily or otherwise, and so it was not possible to ascertain as to what was the cost of acquisition or cost of improvement for the purpose of computation of capital gains. So stating and in the light of the decision of the Supreme Court in *Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty*, , the Delhi High Court held that no tax on capital gains could be levied in respect of the transfer of the tenancy right. The said decision was held to be fully applicable to the facts of the present case and the Appellate Tribunal held that no tax on capital gains can be levied. We fully concur with the reasoning and conclusion of the Appellate Tribunal.

6. In examining the scope of the charging section relating to capital gains and the relevant statutory provisions dealing with the mode of computation and deduction and cost of acquisition (Sections 45, 48 and 55(2)), the Delhi High Court in *Bawa Shiv Charan Singh Vs. Commissioner of Income Tax, Delhi*, , at pages 35 and 36, stated as follows :

"A cost to the assessee in the acquisition of the asset is thus clearly contemplated. The charging section and the computation provisions together constitute an integrated code for the purpose of ascertaining whether the transfer of the tenancy rights which is a capital asset gives rise to a capital gain for the purposes of the Act. If the computation provisions cannot apply at all to a given case, then such a case could not be intended by the Legislature to fall within the charging section. The value of the tenancy rights may be called "pagri", "premium" or "salami", etc., but it is an intangible property. Though intangible, it is materially valued. The assessee took the premises on rent in the year 1947-48. The tenancy rights had not cost the assessee anything and they were not purchased by him. On March 18, 1966, the assessee received an amount of Rs. 30,000, i.e., "pagri", for relinquishment of the tenancy rights or surrender of the tenancy rights. A variety of elements contribute in the making of the value of the tenancy rights, but there can be no account in value of the factor producing it. It is a composite thing referable in part to its locality, in part to the use to which the premises are put, in part to the nature of the business carried if commercial premises, in part to the success of the business conducted, in part of the trend of the customers or litigants, in part to the likelihood of the competition and in part to several other unpredictable factors, like whims and eccentricities of

the persons wanting to acquire the tenancy rights. The value may fluctuate from one day to another day depending upon the uncertain demand and supply of comparable premises, It may increase or it may decrease, but such increase or decrease is not like the periodic waning and waxing of the moon. In the year 1947-48, there was no premium. It is not possible to predicate as to the exact moment of its birth and the rate or period of its growth. The process of the growth in value is imperceptible. It is self-created without any contribution by the assessee, monetarily or otherwise. The fact remains that the capital asset has been acquired by the assessee without the payment of any money. It is, therefore, not possible to ascertain in this case when the assessee did not pay any amount in the acquisition of the tenancy rights, as to what is the "cost of acquisition" or "cost of improvement" for the purpose of computation of "capital gains" u/s 48. If the whole of the value of the capital asset transferred is brought to tax, then, what would be charged is the capital value of the asset and not any profit or gain as contemplated in Section 45."

7. Later, the court concluded as follows (at page 38) :

"It is not possible to apply the computation sections for quantifying the profits and gains on the transfer of leasehold rights which were acquired by the assessee without any cost, The mode of computation and deduction set forth in Section 45 provided the principal basis for quantifying the income chargeable under the head "Capital gains". What is contemplated is an asset in the acquisition of which it is possible to envisage a cost. In the case of self-created value of a tenancy right, it is not possible to determine the date of acquisition of the asset...."

8. The above decision was cited with approval by the Gujarat High Court in *Rajabali Nazarali and Sons Vs. Commissioner of Income Tax*, . We also find that in *Syndicate Bank Ltd. Vs. Additional Commissioner of Income Tax, (Kar)* ; *B.G. Shah Vs. Commissioner of Income Tax*, ; *Commissioner of Income Tax Vs. H.H. Maharaja Sahib Shri Lokendra Singhji*, and *Commissioner of Income Tax Vs. Markapakula Agamma*, , the decision of the Delhi High Court in *Bawa Shiv Charan Singh Vs. Commissioner of Income Tax, Delhi*, has been referred to. It cannot admit of any doubt that the consideration received by a tenant for parting with the tenancy right is not exigible to capital gains tax in cases where no cost of acquisition for the tenancy can be predicated. We fully concur with the reasoning and conclusion of the Delhi High Court stated in its decision in *Bawa Shiv Charan Singh Vs. Commissioner of Income Tax, Delhi*, .

9. In this view of the matter, the reasoning and conclusion of the Appellate Tribunal are justified in law. We, therefore, answer question No. 1 in the affirmative, against the Revenue and in favour of the assessee. We answer question No: 2 in the affirmative, in favour of the assessee and against the Revenue.

10. The references are answered accordingly.

11. A copy of this judgment, under the seal of this court and the signature of the Registrar, shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.