
(1989) 09 BOM CK 0107

In the Bombay High Court

Case No : Income-tax Reference No. 516 of 1976

Commissioner of Income Tax

APPELLANT

Vs

Pitamber Dharsey

RESPONDENT

Date of Decision : 26-09-1989

Acts Referred:

Income Tax Act, 1961 — Section 45, 49(1)

Citation : (1990) 181 ITR 502

Hon'ble Judges : T.D. Sugla, J;S.P. Bharucha, J

Bench : Division Bench

Judgement

T.D. Sugla, J.—The only question of law in this reference is :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the sum of Rs. 61,000 received as consideration for goodwill by the assessee should not be treated as capital gains for purposes of section 45 of the Income Tax Act, 1961 ?"

2. According to Dr. Balasubramanian, learned counsel for the Department, the question is not covered by the Supreme Court decision in the case of Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, as the assessee in this case had got the goodwill on dissolution of the firm in which he was a partner and the goodwill was valued at Rs. 3,000 in the deed of dissolution. The assessee's brother, the other partner, it was pointed out, was given one shop and the trade name, while the assessee was given another shop. Though the Income Tax Officer took the value of the goodwill at nil, he did so by applying the provisions of section 49(1)(iii)(b) of the Income Tax Act, 1961. The assessee, thus, got the shop which in itself had an element of goodwill and for high there was a cost of acquisition. Referring then to the fact that the assessee admittedly sold the goodwill of his business on January 21, 1971, for Rs. 61,000, Dr. Balasubramanian contended that the surplus arising on the sale of the goodwill was taxable as income under the head "Capital gains".

3. The facts stated in the statement of the case are :

"The reference relates to the assessment year 1972-73, the previous year for which was the financial year ending on March 31, 1972. The assessee and his brother, Shri Damodar Dharshi, were equal partners in the firm of Messrs. Shah Damodar Dharshi and Bros., from October, 1943, to October, 1965. The business was in hosiery material and cap material, and was conducted in two shops in Jhaveri Bazar, Bombay, one being shop No. 148 and another being shop No. 192. The two brothers decided on October 21, 1965, to dissolve the partnership and to separate. A written agreement was drawn up according to which shop No. 192, together with the furniture and fixtures as well as stock-in-trade lying therein, was allotted to the assessee, whereas shop No. 148, along with furniture and fixtures and stock-in-trade was allotted to his brother. It was laid down in the agreement that the partner who was allotted stock-in-trade greater in value would make good the excess to the other partner. Clause 5 of the agreement stated that goodwill and the name of Shah Damodar Dharshi and Bros. was allotted and given to the assessee's brother, Shri Damodardas, who could conduct the business in that or allied name. Clause 18 of the deed mentioned that for the purpose of stamp duty, the value of goodwill was to be fixed at Rs. 3,000."

4. It is evident that on the dissolution of the partnership firm with effect from October 21, 1965, the goodwill of the partnership firm was allotted to the assessee's brother and not to the assessee. And it is the assessee's brother who was made accountable in respect thereof to the extent of Rs. 3,000. Under the circumstances, it is not possible to accept Dr. Balasubramanian's submission that the shop that remained with the assessee on the dissolution of the partnership firm cost him something. In the absence of necessary material, it is also not possible to accept Dr. Balasubramanian's submission that the Income Tax Officer had taken the value of the goodwill at nil not because it had cost nothing to the assessee, being self-generated, but that the same was taken at nil of the reason that the provisions of section 49(1)(iii)(b) were applicable. The facts, on the other hand, clearly show that the assessee and his brother were carrying on business since 1943 in partnership. The firm was dissolved in the year 1965. There is no whisper that the partnership had purchased the goodwill. The deed of dissolution clearly provided that the goodwill of the partnership remained with the assessee's brother the value of which was taken at Rs. 3,000 for the purpose of stamp duty. The assessee, thus, did not receive the goodwill of the firm. The goodwill was self-generated in his case. Assuming the shop itself had goodwill in the sense that the place of business where business was carried on for over 20 years would have, the assessee having paid no cost for it, in our judgment, the Supreme Court decision in Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, is squarely applicable.

5. Accordingly, the question is answered in the affirmative and in favour of the assessee.

6. No order as to costs.