

(1981) 11 MAD CK 0001
In the Madras High Court
Case No : Tax Case No. 970 of 1977

Commissioner of Income Tax

APPELLANT

Vs

Umedmal Bhandari

RESPONDENT

Date of Decision : 30-11-1981

Acts Referred:

Citation : (1983) 15 TAXMAN 471

Hon'ble Judges : V. Balasubrahmanyam, J; S. Padmanabhan, J

Bench : Division Bench

Advocate : J. Jayaraman and Mrs. Nalini Chidambaram, for the Appellant; V. Narayanan, for the Respondent

Judgement

V. Balasubrahmanyam, J.—This is a reference by the Tribunal by way of a case stated on the following question of law:

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in law in holding that the sum of Rs. 35,000 being

the share of goodwill in the firm is not assessable as capital gains for the assessment year 1971-72?

The Tribunal has ruled out the relevant facts from the order of assessment passed by the ITO. The assessment order states that the assessee in this

case became a partner in a firm called Ranka Cable Corpn. He is stated to have become a partner with effect from 7-2-1969. After about

eighteen months, in the business, the assessee retired from the firm on 15-10-1970, leaving the remaining partners to continue the partnership. On

his retirement, the assessee was paid an amount equal to the credit balance in his capital account. He was paid, in addition, a further sum of Rs.

35,000 being his share in the goodwill of the firm. The ITO assessed this latter amount to capital gains on the ground that it represented the

consideration received by the assessee for relinquishing his share of goodwill in the firm's business. The Tribunal, however, on appeal, cancelled

this part of the assessment following the law laid down in a number of authorities, and more particularly in a decision of this Court in

COMMISSIONER OF Income Tax, MADRAS Vs. K. RATHNAM NADAR., . The department has now come on reference against the Tribunal's decision.

2. Having regard to the subject-matter of the reference before us, it becomes necessary to refer immediately to a recent decision of the Supreme

Court in Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, . The Supreme Court in that case explained the scheme of taxation of

capital gains laid down under the income tax Act, 1961 ("the Act"). The Act brings to charge under the head "Capital gains", the gains arising on

transfer of capital assets. In this respect, the Supreme Court distinguished, broadly, between two kinds of capital assets. Of the first kind are assets

in the acquisition of which an element of cost is either actually present or is capable of being reckoned. Of the other kind are assets in the

acquisition of which the element of cost is altogether inconceivable, either conceptually or in the particular manner of acquisition. The Supreme

Court laid down that liability for capital gain tax under the Act would arise only on transfers of capital assets of the former kind, but not on transfers

of capital assets of the latter kind. According to the Supreme Court, the goodwill in a business which the assessee starts from scratch is a capital

asset of the latter description, for it is acquired by way of self-creation, self-production or self-generation, in which no cost element can be

identified or envisaged. The Supreme Court further pointed out that the very idea of cost of acquisition in relation to an asset must necessarily

involve cost as on the date of acquisition, or as at the hour of acquisition, or at some other fixed point of time when the asset can be said to have

been acquired. In contrast, it was observed, no one can pinpoint any particular day or hour as the precise point of time when goodwill may be said

to have been acquired in a business started and continued by the same proprietor. Goodwill in such a case, and similar self-generated assets, have

no date of acquisition, and, hence, it is well-nigh impossible to conceive of and reckon any cost of acquisition in their case.

3. In the present case, neither the deed of partnership of Ranka Cable Corpn. nor any instrument governing the assessee's retirement from the firm is on record. Even otherwise, it is not clear from the facts stated by the Tribunal whether the firm was a pre-existing partnership into which the assessee was inducted as a new partner with effect from 7-2-1969, or whether the firm itself was started ab initio by the assessee in association with the rest of the partners as from 7-2-1969. On the enunciation of the law relating to capital gains by the Supreme Court in the case earlier cited, it is quite conceivable that the decision on the question of law before us might turn one way or the other according to either of the two different possibilities which the factual situation in this case might be thought to hold. Since we do not know what precisely are the facts, we are unable to hold whether the payment of Rs. 35,000 to the assessee towards his share in the firm's goodwill can be regarded as a self-generated asset eschewing any idea of cost of acquisition, or on the contrary, an asset for which there can, conceivably, be a cost element of acquisition, although none might actually have been accounted for in the firm's books. We, therefore, refrain from answering the question referred to us for our opinion and return the reference unanswered. It, however, goes without saying that the Tribunal will have to consider the appeal afresh on the basis of a fuller consideration of the facts in the light of the law enunciated by the Supreme Court in the case of B.C. Srinivasa Setty (*supra*). The reference is disposed of accordingly. There will be no order as to costs.