
(1974) 08 PAT CK 0006
In the Patna High Court
Case No : Tax Case No. 77 of 1972

Commissioner of Income Tax

APPELLANT

Vs

Vijoy Kumar Budhia

RESPONDENT

Date of Decision : 16-08-1974

Acts Referred:

Income Tax Act, 1961 — Section 2(24), 256, 45, 46, 46(1)

Citation : (1975) 100 ITR 380 : (1975) 8 PLJR 60 : (1975) PLJR 60

Hon'ble Judges : N.L. Untwalia, C.J.; L.M. Sharma, J

Bench : Division Bench

Advocate : Shambhu Sharan, for the Appellant; G.C. Bharuka, for the Respondent

Judgement

Untwalia, C.J.—This reference u/s 256(1) of the Income Tax Act, 1961 (hereinafter called " the Act "), made by the Income Tax Appellate Tribunal, Patna Bench, demonstrates how some cases including the present one, which have come to my knowledge, are not properly handled at the hands of the departmental authorities or representatives or when the case goes before the Tribunal. As I proceed to state the facts of the case and the points involved in this reference, there will be sufficient warrant for the remark which I have just made in the beginning.

2. The assessee, Shri Vijoy Kumar Budhia of Ranchi, has been assessed u/s 143(3) of the Act as an individual. He was a shareholder in a private limited company known as Ganpati Properties (P.) Ltd., Ranchi. The company went into voluntary liquidation. The voluntary liquidator valued the company's property situated at Patna at Rs. 1,53,000. The assessee received 83/510ths share in the said property of the company. The value of his share, therefore, came to Rs. 24,900. The Income Tax Officer found that the value of the property assessed by the liquidator was highly inadequate. He, accordingly, assessed the market value of the property of the company at Rs. 4,50,000. Thus, the value of the share of the assessee in the property of the company distributed to, and received by, him

was determined at Rs. 73,235. The assessee's stand that he was not chargeable for income from any capital gain on account of his receipt of the company's property was not accepted by the Income Tax Officer. He took the value of the company's property at Rs. 1,53,000 as prevailing on January 1, 1954. Deducting the said value from the market value of Rs. 4,50,000, the capital gain in the hands of the assessee was determined at Rs. 48,335, i.e., 83/510ths share in the sum of Rs. 2,97,000. A copy of the order of the Income Tax Officer is annexure " A " to the statement of the case and forms part of it.

3. The assessee preferred an appeal before the Appellate Assistant Commissioner of Income Tax. He also rejected the stand of the assessee that in a matter like this there was no capital gain in the hands of the assessee, namely, the shareholder. However, the Appellate Assistant Commissioner accepted the contention put forward on behalf of the assessee in appeal that the Income Tax Officer was not competent to enhance the value of the property as determined by the liquidator. He, therefore, deleted the addition of Rs. 48,335 from the total income of the assessee as determined by the Income Tax Officer. A copy of the order of the Appellate Assistant Commissioner is annexure " B " and it also forms part of the statement of the case.

4. The department preferred an appeal before the Tribunal. It was contended by the department that the provisions of Section 52 of the Act were not applicable as was the view of the Appellate Assistant Commissioner but then he should have upheld the market value of the property determined by the Income Tax Officer u/s 46 of the Act; hence, deletion of the sum of Rs. 48,335 from the total income of the assessee was not justified. The assessee argued before the Tribunal that there was no transfer of capital assets within the meaning of Section 45 of the Act read with Section 2(47), when the assessee received his share of the property on distribution by the voluntary liquidator of the company; hence, he was not liable to pay any tax on the allegedly capital gains.

5. The Tribunal relying upon a Bench decision of the Gujarat High Court in Commissioner of Income Tax, Gujarat II Vs. R.M. Amin. (Legal representative of the Late Chunibai Amin), held that there was no transfer of any capital asset within the meaning of Section 45 of the Act read with Section 2(47); hence, the Income Tax Officer was wrong in including the sum of Rs. 48,335 on the basis of the fair market value of the share of the assessee in the property distributed as being chargeable to Income Tax on capital gain. A copy of the order of the Tribunal is annexure " C " to the statement of the case and forms part of it.

6. The Additional Commissioner of Income Tax filed an application u/s 256(1) of the Act asking the Tribunal to state a case and refer the following two questions of law for the opinion of this court:

"(1) Whether, on the facts and in the circumstances of this case, the Tribunal was justified in holding that the Income Tax Officer was wrong in including the sum of Rs. 48,335 to the assessee's income, being the fair market value of the share of

the assessee on the distribution of the net assets of M/s. Ganpati Properties (P.) Ltd. by the liquidator as capital gains arising during the year within the meaning of Section 45 of the Income Tax Act, 1961 ?

(2) Whether, on the facts and in the circumstances of this case, the Tribunal has applied correctly to the facts of this case the principle of law laid down by the Gujarat High Court in the case of Commissioner of Income Tax v. R.M. Amin? "

7. The Tribunal in paragraph 6 of the statement of the case has stated that questions of law referred by the Additional Commissioner of Income Tax do not arise but the questions of law which emerge out of the finding of the Tribunal are :

" (1) Whether, on the facts and circumstances of the case, the amount received by the assessee as a shareholder on liquidation of the company was a transfer of capital asset within the meaning of Section 2(47) of the Income Tax Act, 1961 ?

(2) Whether, on the facts and circumstances of the case, Rs. 48,335 was rightly included as capital gains in the total income of the assessee ?"

8. In between the two questions, the Tribunal has stated:

" If the answer to the above question is in the affirmative then:--... "

9. It would thus be seen that while referring the two questions of law for opinion of this court, the Tribunal felt persuaded to think, that, perhaps, it would be necessary to express an opinion on question No. 2 only if answer to question No. 1 was in the affirmative--otherwise not. I shall now proceed to state some more matters with reference to the orders of the departmental authorities as also of the Tribunal. But before I do so, I may state the position of law which is in vogue after the coming into force of the Act and after the enactment of Section 46(2). I shall discuss the law on the point later in my judgment, but here I may state that the assets received by a shareholder from the company in liquidation on distribution of the assets are chargeable to Income Tax as tax on capital gain u/s 46(2) of the Act and not u/s 45. The method of computation of the quantum of capital gain is indicated in Sections 46(2), 48 and 49. I shall deal with, them later in my judgment, In this background, I proceed first to refer to the order of the Income Tax Officer. It would be found from his, order that the assessee had not shown any income from capital gains but on June 20, 1968, a letter was filed stating that as the properties were received on liquidation of the limited company, the transfer did not amount to actual sale and, therefore, there was no capital gain in the hands of the assessee. By Ms another letter dated March 19, 1969, the assessee had further stated that, even if it was decided that any principle of taxation on capital gain was attracted, the cost of assets, namely, Rs. 1,53,000 may be taken to be the market value of the property as on January 1, 1954, and that the market value was the same, on the date of distribution, i.e., October, 1963. The Income Tax Officer gave certain materials in his order for coming to the conclusion that the market value of the property distributed on

October 1, 1963, it could not be less than Rs. 4,50,000. Thinking that the undervaluation was for avoidance of proper tax u/s 45, he proceeded to determine the fair market value in exercise of his power u/s 52 and did so with the approval of the Inspecting Assistant Commissioner of Income Tax as required by the said provision of law. In that view of the matter, he added the extra value of the capital assets received by the assessee to the tune of Rs. 48,335 to the total income of the assessee.

10. When the assessee went up in appeal before the Appellate Assistant Commissioner, it would appear from his order that he brushed aside the argument made on behalf of the assessee that capital gains in his hands could not be taxed u/s 45 of the Act, by stating that the clear provisions contained in Section 46 of the Act would be applicable and the point did not need any elaboration. But then, he held that the Income Tax Officer had no power u/s 52 of the Act to enhance and determine* the fair market value of the property in this case as one of the conditions for exercise of that power was surely not fulfilled, namely, avoidance or reduction of the liability of the assessee u/s 45. Taking the two values at par, therefore, he came to the conclusion that there was no capital gain in the hands of the assessee and hence the inclusion of the amount in his assessment was erroneous.

11. The department went up in appeal before the Tribunal. While recapitulating in paragraph 3 of its order as to what was done by the Appellate Assistant Commissioner it referred to his view with reference to Section 46. In paragraph 4 of its order, the Tribunal said :

" At the time of the arguments, the departmental representative urged before us that since the provisions of Section 52 of the Act were not applicable, the Appellate Assistant Commissioner should have upheld the market value determined by the Income Tax Officer u/s 46(2) of the Act and, as such, the order of the Appellate Assistant Commissioner was not proper and deserves to be set aside."

12. (Paragraph 4 as printed in the paper book is incorrect, and we have quoted it from one of the certified copies produced before us on behalf of the assessee.)

13. It would thus be seen that the Appellate Assistant Commissioner had opined that the liability of the assessee in this case can be fixed u/s 46(2) of the Act. It was not thought necessary for the department to challenge this finding of the Appellate Assistant Commissioner. The argument, therefore, before the Tribunal was that the Income Tax Officer had the power to determine the market value u/s 46(2) of the Act although he had no such power u/s 52. The argument put forward on behalf of the assessee as noted in paragraph 5 of the order is as follows :

" On the other hand, it was urged on behalf of the assessee that there was no transfer of capital asset within the meaning of Section 45 read with Section 2(47) when the assessee received Rs. 24,900 on final distribution of the net assets of

M/s. Ganpati Properties (P.) Ltd., Ranchi."

14. Whether the assessee combated the argument of the department with reference to Section 46(2) of the Act or not is not clear. The Tribunal proceeded to discuss the argument put forward on behalf of the assessee and did not touch at all in its appellate order the argument put forward on behalf of the department. It accepted the argument of the assessee, relied upon the Bench decision of the Gujarat High Court in Commissioner of Income Tax v. R.M. Amin and decided that:

".....the Income Tax Officer was wrong in including Rs. 48,335 being the fair market value of the share of the assessee on the distribution of the net assets of M/s. Ganpati Properties (P.) Ltd. by the liquidator as capital gains arising during the year."

15. It, therefore, maintained the final order passed by the Appellate Assistant Commissioner although for different reasons.

16. As pointed out by the Supreme Court in Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., :

" When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is, therefore, one arising out of its order. "

17. On behalf of the department, therefore, a question of law ought to have been pointedly raised as to whether the liability of the assessee in this case for tax on capital gain could be determined u/s 46(2) of the Act and so the Income Tax Officer had power to determine the market value under the said provision of law. When in appeal it was conceded that Section 52 was not attracted, by necessary implication it must be deemed to have been conceded--and, I may add--conceded rightly, that the assessee could not be held liable in this case u/s 45 of the Act. Yet it is strange to find that the first question of law asked to be referred on behalf of the department was with reference to Section 45 and no question of law was framed in specific terms referring to Section 46 at all. The second question framed was whether the principle of law enunciated by the Gujarat High Court had been correctly applied to the facts of this case. If the facts of this case were referable to Section 45, undoubtedly, the principles have been correctly applied. But the Additional Commissioner of Income Tax sought for a reference on the second question clearly on the footing that the principles had not been correctly applied because this was not a case which was governed by Section 45--rather it was a case where the liability of the assessee could be fixed u/s 46(2). It is, however, not intelligible to me as to why a specific question in certain term with reference to Section 46(2) of the Act was not sought to be referred to this court by the Additional Commissioner of Income Tax. Be that as it may, while making reference of the two questions of law, the Tribunal framed the first question more or less incorporating therein the spirit of the first question sought to be referred by the department. The second question referred by the Tribunal is

undoubtedly comprehensive enough to cover the question of law which does arise in this case and which will consist of two parts, namely, whether the Income Tax Officer had power to impose tax on the assessee in this case u/s 46(2) of the Act; if so, whether he could determine the market value of the assets distributed in exercise of that power. But, while referring the second question, the Tribunal again ignored that the case would be squarely covered by Section 46(2) of the Act and the second question was necessary to be answered not only when the answer to the first question was in the affirmative but, more so, when the answer was in the negative. I shall, therefore, ignore the rider put by the Tribunal in between the two questions and shall treat both the questions as having been referred to this court for its opinion.

18. A Division Bench of the Calcutta High Court had taken an identical view as the one taken by the Gujarat High Court, in the case of Commissioner of Income Tax (Central) Vs. Associated Industrial Development Co. P. Ltd., The view expressed in the two cases was approved by the Supreme Court in the case of Commissioner of Income Tax, Madras Vs. Madurai Mills Co. Ltd., , after referring with approval to the two decisions of the two High Courts, it was stated by Khanna J., delivering the judgment on behalf of the court:

" We are, therefore, of the view that distribution of the assets of the companies in liquidation does not amount to a transaction of sale, exchange, relinquishment or transfer so as to attract Section 12B of the Act."

19. For the purposes of the point at issue, Section 12B of the Indian Income Tax Act, 1922, corresponds to Section 45 of the Act. The decision in the Gujarat case, in terms, was given with reference to Section 45. It is, therefore, clear that the first question referred to this court has got to be answered in the negative, in favour of the assessee and against the revenue. I accordingly hold that, on the facts and in the circumstances of this case, the amount received by the assessee as a shareholder on liquidation of the company was not a transfer of capital asset within the meaning of Section 2(47) of the Act and hence he was not chargeable to Income Tax on the capital gain u/s 45 of the Act.

20. I now proceed to discuss the second question by pointing out the relevant provisions of the Act. I ought to have stated that the assessment year in question was 1964-65. Section 45 of the Act, as originally enacted, became Sub-section (1) of Section 45 by Act 5 of 1964 which came into force with effect from April 1, 1964. By the same Act, Sub-sections (2) to (4) were added to Section 45. The said sub-sections, however, were deleted with effect from April 1, 1966, by Section 13 of the Finance Act, 1966. For my purpose, I shall quote only Sub-section (1) of Section 45 which was in force at the relevant time. The said sub-section reads:

" Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in Sections 53 and 54, be chargeable to Income Tax under the head "Capital gains" and shall be deemed to

be the income of the previous year in which the transfer took place. "

21. The mode of assessment of capital gains on distribution of assets of companies in liquidation has been provided in Section 46 of the Act, which reads:

"(1) Notwithstanding anything contained in Section 45, where the assets of a company are distributed to its shareholders on its liquidation, such distribution shall not be regarded as a transfer by the company for the purposes of Section 45.

(2) Where a shareholder on the liquidation of a company receives any money or other assets from the company, he shall be chargeable to Income Tax under the head "Capital gains", in respect of the money so received or the market value of the other assets on the date of distribution, as reduced by the amount assessed as dividend within the meaning of Sub-clause (c) of Clause (22) of Section 2 and the sum so arrived at shall be deemed to be the full value of the consideration for the purposes of Section 48. "

22. Sub-section (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, therefore, not chargeable to Income Tax on any capital gain in respect of such transaction. But Sub-section (2) imposes a liability on the shareholder and he becomes chargeable to Income Tax under the head " Capital gains " in respect of the money received or the market value of the other assets received by him on the date of distribution. For determining the full value for the purposes of Section 48, the amount assessed as dividend within the meaning of Sub-clause (c) of Clause (22) of Section 2 of the Act has got to be deducted from the said money or the market value, which in this case does not arise. Section 48 prescribes the mode of computation of the income chargeable under the head "Capital gains". The method of computation is to deduct from the full value of the consideration received or accruing as a result of the transfer of the capital assets the amount, namely, the cost of acquisition of the capital assets and the cost of any improvement thereof. In this case, therefore, the computation of income chargeable under the head " Capital gains " u/s 48 of the Act undoubtedly had to be done by the Income Tax Officer. It was inherent in the exercise of that power to determine the full value of the consideration as provided in Section 46(2). The Income Tax Officer was, therefore, enjoined 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 not necessarily receives 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 Income Tax Officer and within his power to determine the market value of the assets received by the shareholder and such a market value has to be determined as prevalent on the date of distribution. In this case the Income Tax Officer determined the market value of the assets received by the assessee from the company on liquidation on the date of distribution to be Rs. 73,235. From this

full value had to be deducted the cost of acquisition of the capital asset; there was no cost of improvement in this case. In a case like this, the cost of acquisition of the capital asset has to be determined u/s 49(1)(iii)(c), the relevant words of which would read as follows :

"(1) Where the capital asset became the property of the assessee--.....

(iii) (c) on any distribution of assets on the liquidation of a company..... the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be....."

23. Section 55 gives an option to the assessee to take the market value of the asset as on the 1st of January, 1954, to be the cost of acquisition of the capital asset. I shall read the terms of Section 55(2)(ii) and (iii):

" (2) For the purposes of Sections 48 and 49, " cost of acquisition ", in relation to a capital asset,--.....

(ii) where the capital asset became the property of the assessee by any of the modes specified in Sub-section (1) of Section 49, and the capital asset became the property of the previous owner before the 1st day of January, 1954, means the cost of the capital asset to the previous owner or the fair market value of the asset on the 1st day of January, 1954, at the option of the assessee;

(iii) where the capital asset became the property of the assessee on the distribution of the capital assets of a company on its liquidation and the assessee has been assessed to Income Tax under the head " Capital gains" in respect of that asset u/s 46, means the fair market value of the asset on the date of distribution."

24. The difference between clauses (ii) and (iii) is significant. The cost of acquisition in relation to a capital asset for the purposes of Section 49(1)(iii)(c) in this case should be the market value of the company's asset on the 1st day of January, 1954, as was the option of the assessee in this case. And after the assessee has been assessed to Income Tax under the head " Capital gains " in respect of the asset which he received from the company u/s 46 vis-a-vis any further transaction which he may enter into, the fair market value of the asset on the day of distribution will be the cost of acquisition of the capital asset under Clause (iii). I shall make myself clear by making a supposition. Supposing to-day the assessee sells the assets received by him from the company for Rs. 1,00,000, then he will be assessed to Income Tax on capital gain on a sum of Rs. 26,765 only, which is the difference between the figure of Rs. 1,00,000 and Rs. 73,235--the fair market value of the asset on the date of distribution. It would thus be seen that in this case for the purposes of Section 46(2) the full value of the asset on the date of distribution was Rs. 73,235. From this had to be deducted the value of that asset on January 1, 1954. The assessee's share came

to Rs. 24,900. u/s 48, deducting the same from the full value, the income chargeable under the head " Capital gains " will be Rs. 48,335, the amount determined by the Income Tax Officer. It is true no doubt that neither the Appellate Assistant Commissioner nor the Tribunal went into the question as to whether the market value fixed by the Income Tax Officer of the assets received by the assessee from the company on liquidation on the date of distribution with reference to the total market value of such assets in the shape of the property of the company situated at Patna was proper or high. But we are not concerned with this matter in this reference. In my opinion, the question of law which does arise from the appellate order of the Tribunal has got to be refrained in order to bring about the real bone of contention between the parties, which will be in consonance with the second question of law referred by the Tribunal and not an addition to it. The refrained question will be:

" Whether, on the facts and in the circumstances of this case, the sum of Rs. 48,335 could be held to have been rightly included in the capital gain of the assessee u/s 46 read with Sections 48 and 49 of the Income Tax Act, 1961 ?"

25. Mr. G.C. Bharuka, learned counsel for the assessee, had to concede and conceded rightly, in my opinion, that the liability of the assessee in this case could be fixed under Sections 46(2) and 48 of the Act. But he strenuously submitted that no such question of law was either sought to be referred by the Commissioner of Income Tax nor has any been referred to this court. He relied upon the decision of the Supreme Court in *New Jehangir Vakil Mills Ltd. Vs. Commissioner of Income Tax, North, Kutch and Saurashtra*, . In my opinion, the argument is not sound and must fail. It will be seen from the decision aforesaid of the Supreme Court that by calling for a supplementary statement of the case the High Court purported to ask the Tribunal to decide new questions of fact on the basis of new materials which were not the basis of the Tribunal's appellate order. The question of law which was endeavoured to be roped in by the supplementary statement in the case did not arise out of the Tribunal's appellate order nor was it asked to be referred by the applicant in reference. To crown all, no such question had been referred by the Tribunal. In such a situation, it was held that the power of the High Court u/s 66(4) of the Indian Income Tax Act, 1922, was circumscribed by its power u/s 66(2). In the instant case, however, as I have said above, by necessary implication, question No. 2 sought to be referred by the department was clearly referable to the liability of the assessee u/s 46(2) of the Act. The principle laid down by the Gujarat High Court was not challenged in the said question ; only its application was challenged. Section 46(2), as would appear from the judgment of P.N. Bhagwati C. J., could not be applied in that case as the company was not a company to which the said provisions of law could apply. Argument on behalf of the department with reference to Section 45 was repelled. When the Additional Commissioner said that the principle of the Gujarat High Court had not been correctly applied to the facts and circumstances of the instant case, surely he meant to convey that to the facts of this case was applicable the provisions of Section 46(2) of the Act. When the Tribunal referred

the second question in that broad and general term, it did invite this court to record its opinion whether, on the facts and in the circumstances of this case, the sum of Rs. 48,335 was rightly included as capital gain in the total income of the assessee. If the first question referred by the Tribunal were to be answered in the affirmative, the answer to the second question would have followed as a matter of corollary and, perhaps, any specific answer was necessary. Expression of opinion on the second question was necessary, chiefly, if not only, when the answer to the first question was in the negative.

26. I would in passing just deal with the argument attempted to have been made on behalf of the assessee that u/s 2(24) of the Act "income" has been defined to include--" (vi) any capital gains chargeable u/s 45", and not capital gains chargeable u/s 46(2). I have no difficulty in rejecting this argument and for two reasons. Firstly, the definition of the term "income" starts with the word "includes"; the list is not exhaustive. When Section 46(2) read with Section 48 clearly fixes the liability for payment of Income Tax on capital gains of the shareholder in a case covered by the said provision of law then it is difficult to wipe off the liability with reference to the inclusive definition of the term "income" in Section 2(24) of the Act. The second reason is that, as in every statute, the definition section starts with the expression "In this Act, unless the context otherwise requires". The context in this case does require otherwise. I may also venture to add one more reason and that is this. Section 45 of the Act is the first section under the head "E. Capital gains". In the definition, therefore, when capital gains are sought to be included, it must, by way of construction, mean that all capital gains which are sought to be charged to Income Tax under the said heading are included.

27. For the reasons stated above, I would answer the reframed question 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, Rs. 48,335 was rightly included by the Income Tax Officer as capital gains in the total income of the assessee and the inclusion is well sustainable u/s 46(2) read with Sections 48 and 49 of the Act. The assessee must pay the costs of this reference; hearing fee is assessed at Rs. 100 only.

L.M. Sharma, J.

28. I agree.