
(2011) 07 CAL CK 0115
In the Calcutta High Court
Case No : Income Tax A. No. 49 of 2003

Hari Shankar Bhartia

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 15-07-2011

Acts Referred:

Income Tax Act, 1961 — Section 260A

Citation : (2012) 247 CTR 611 : (2011) 203 TAXMAN 6

Hon'ble Judges : Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : J.P. Khaitan, Anirban Ghosh and C.S. Das, for the Appellant; Dipak Kumar Shome, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—This appeal u/s 260A of the income tax ("Act"), 1961 is at the instance of an Assessee and is directed against an order dated September, 2002, passed by the income tax Appellate Tribunal, "B" Bench, Kolkata in income tax Appeal bearing ITA No. 1449 (Cal)/2000 for the Assessment Year 1997-98 and thereby dismissing the appeal preferred by the Assessee.

2. Being dissatisfied, the Assessee has come up with the present appeal.

3. The facts leading to the filing of this appeal may be summed up thus:

a) The Appellant was one of the promoters and a Director of Ghaghra Sugar Limited (hereinafter referred to as the company) which has a factory for the manufacture of sugar. The Assessee is also Director of Ganges Sugar Mills Pvt. Ltd. which had applied for and received a license to set up a new sugar factory in the region in which the company had its sugar factory. According to Assessee, he had the requisite technical and financial expertise required for setting up and running a sugar factory and the Ganges Sugar Mills Pvt. Ltd. had obtained the license in view of the Assessee's association with it intending to utilise the Assessee's technical and financial assistance.

b) According to the Assessee, if he set up the new factory by Ganges Sugar Mills Pvt. Ltd., it would have posed a serious problem to the company inasmuch as the availability of sugarcane to the company would have been adversely affected. In such circumstances, the company negotiated with the Assessee and on December 27, 1996 entered into an agreement so as to prevent the Assessee from competing with the sugar business of the company directly or indirectly for a period of five years and in consideration of the respective covenant, the company agreed to pay to the Assessee a sum of Rs. 25 lakh.

c) On receipt of the said sum of Rs. 25 lakh, the Assessee resigned from the office of the Director of Ganges Sugar Mills Pvt. Ltd. and upon resigning from the said office of Director, the Ganges Sugar Mills Pvt. Ltd. decided not to go ahead with the setting up of the new sugar factory.

d) In the assessment proceeding for the Assessment Year 1997-98, the Assessee claimed that the said amount of Rs. 25 lakh received for "non-competition" with the said company was a capital receipt not liable for tax. The Assessee drew the attention of the Assessing Officer to the amendment made to the income tax Act by the Finance Act, according to which non-competition fee could be subjected to tax only from the Assessment Year 1998-99 under the head Capital Gains. The Assessee also drew the attention of the Assessing Officer to the circular being instruction No. 1964 dated March 17, 1999 issued by the Central Board of Direct Taxes to the effect that noncompetition fee could not be subjected to tax prior to the Assessment Year 1998-99.

e) The Assessing Officer, however, subjected the said amount to tax under the head "other sources" vide order dated March 3, 2000 for the Assessment Year 1997-98.

f) Being dissatisfied, the Assessee preferred an appeal before the Commissioner of income tax (Appeals), who by order dated August 29, 2000 allowed the same. The Commissioner of income tax (Appeals) accepted the contention of the Assessee that the said sum of Rs. 25 lakh was a capital receipt and would not be subject to tax.

g) Against the said order dated August 29, 2000, the Assessing Officer preferred an appeal before the Tribunal below and the Tribunal below while passing the order impugned proceeded as if the claim of non-competition fee was not a genuine one and allowed the appeal of the Assessing Officer by disbelieving the transaction of acceptance of the non-competition fees of Rs. 25 lakh.

h) Being dissatisfied, the Assessee has come up with the present appeal.

A Division Bench of this Court formulated the following question of law for disposal:

1) Whether the sum of Rs. 25.00 lacs received by the Appellant in terms of the Agreement dated December 27, 1996 with Ghaghra Sugar Ltd. by way of non-competition fee was a capital receipt not liable to tax under the provisions of

Income Tax Act, 1961?

2) Whether the Tribunal was justified in law in entering into the question of genuineness of the transaction relating to receipt of noncompetition fee of Rs. 25-00 lacs raised before it for the first time by the Department representative when none of the authorities below had deputed the factual position that the receipt by the Appellant represented non-competition fee?

3) Whether the Tribunal was justified in law in holding that the sum of Rs. 25-00 lacs was not non-competition fee or capital receipt not liable to tax and its purported findings in this behalf are not based on any material, wholly arbitrary, unreasonable and perverse?

4. Mr. Khaitan, the learned Senior Counsel appearing on behalf of the Appellant, strenuously contended before us that for the assessment year in question the non-competition fee should be treated to be in the nature of capital receipt and as such, is not taxable. In support of such contention, Mr. Khaitan relied upon a decision of the Supreme Court in the case of *Guffic Chem P. Ltd. Vs. Commissioner of Income Tax, Belgaum and Another*,

5. Mr. Khaitan next contended that even the Assessing Officer, while passing the order of assessment, did not dispute the genuineness of the transaction of acceptance of Rs. 25 lakh as non-competition fee but the Assessing Officer by treating the said amount as revenue receipt assessed the amount to tax. Mr. Khaitan further contends that even before the Commissioner of Income tax (Appeal) it was not the contention of the Assessing Officer that the said transaction was not genuine.

6. Mr. Khaitan has also placed before us the only ground taken before the Tribunal below indicating that the following ground was taken as the sole ground of appeal.

The Ld. CIT (A) has erred in holding that "non-compete" fee received by the Assessee is no taxable capital receipt.

7. Mr. Khaitan, therefore, contended that the learned Tribunal below committed substantial error of law in entering into the question of genuineness of the transaction and that too, without giving any opportunity to the Assessee to prove that the said transaction was a genuine transaction.

8. Mr. Shome, the learned Counsel for the parties appearing on behalf of the Revenue, has, on the other hand, supported the order passed by the Tribunal below.

9. Therefore, two questions arise for determination before this appeal; first, whether the non-competition fee can be taxed as a revenue receipt and secondly, whether the Tribunal was justified in entering into the question as to whether the transaction of acceptance of Rs. 25 lakh as "non-competition fee" was a genuine one when at no point of time such plea was taken earlier by the Revenue.

10. After hearing the learned Counsel for the parties and after going through the decision of the Supreme Court in the case of Guffic Chem. Pvt. Ltd. v. Commissioner of income tax (supra), we find that the point involved herein is squarely covered by the said decision as the case relates prior to April 1, 2003 and consequently, the payment should be treated to be capital receipt and not taxable.

11. The next question is whether in the case before us, there was any scope for the Tribunal to enter into the genuineness of the non-competition fees received by the Assessee.

12. In the case before us, the Assessing Officer did not dispute the genuineness of the transaction but taxed the amount as a revenue receipt. When the Assessee preferred an appeal before the CIT (Appeals), the Assessing Officer even at that stage did not assert anything about the genuineness of the transaction but maintained that the same was a revenue receipt and lost. When the Assessing Officer preferred an appeal before the Tribunal against such order of the C.I.T (Appeals), in the Memorandum of Appeal quoted by us above the only point taken was that it was a revenue receipt. Thus, on the basis of the ground taken in the Memorandum of Appeal before the Tribunal, there was no scope of questioning the genuineness of the transaction without amending the Memorandum of Appeal.

13. In our view, the genuineness of a transaction being essentially a question of fact and no such allegation about the genuineness having been levelled against the Assessee by the Assessing Officer, such question even cannot be lawfully raised for the first time before the Tribunal, the second appellate forum and that too, without giving opportunity to the Assessee to prove the genuineness of the transaction.

14. We, therefore, find that the Tribunal below committed a substantial error of law in disbelieving the transaction as a sham transaction which is totally a new case not even borne out by the records.

15. We, consequently, set aside the order of the Tribunal below and affirm the order of the C.I.T. (Appeals) and thus, allow this appeal by answering the first point formulated by the Division Bench in the affirmative and against the Revenue and the second and third points in the negative and against the Revenue.

16. In the facts and circumstances, there will be, however, no order as to costs.

Sambuddha Chakrabarti, J.-

I agree.