

(1960) 10 MP CK 0009
In the Madhya Pradesh High Court
Case No : S.A. No. 45 of 1959

Mannalal Nanhelal

APPELLANT

Vs

Sitambarnath Ramhirdelal

RESPONDENT

Date of Decision : 26-10-1960

Acts Referred:

Income Tax Act, 1961 — Section 10(2)(vii), 66(1)

Citation : (1961) MPLJ 169

Hon'ble Judges : P.K. Tare, J

Bench : Single Bench

Advocate : R.K. Pandey, for the Appellant; P. Lobo, for the Respondent

Final Decision : Dismissed

Judgement

Dixit, C.J.

In this reference u/s 66(1) of the income tax Act at the instance of the assessee, the questions formulated by the Appellate Tribunal, Bombay, for our opinion are:-

Whether on the facts and circumstances of the case the income tax Officer was entitled to re-open the assessment in respect of the escapement of deemed income under the second proviso to section 10(2)(vii) of the Act, when the notice dated 11-11-1952 u/s 34(1)(b) mentioned only capital gains ? and

Whether on the facts and circumstances of the case there was a transfer or sale of the colliery on 1-4-1947 so as to attract the provisions of the second proviso to section 10(2)(vii) and section 12-B of the Act for the assessment year 1948-49 ?

On 31st March 1947 the assessee M/s. D.B. Ballabhdas Mannoolal Kanhaiyalal, an unregistered firm which was the owner of a colliery known as "Hindusthan Lalpeth Colliery of Chanda", entered into an agreement with the Perfect Pottery Co. Ltd., Jabalpur, for the sale of the colliery including machinery, fixtures, land etc. for Rs. 4 lakhs. The agreement provided, inter alia, (1) that the vendors

would sell and the purchasers would purchase as from 1st April 1947; (2) that out of the consideration money of Rs. 4 lakhs, Rs. 50,000 would be paid on the execution of the agreement to sell, Rs. 50,000 on the execution of the deed of sale and the remaining amount in three equal instalments of Rs. 1 lakh each on the dates specified in clause, (2) of the agreement; (3) that the purchase would be completed within three months from the date of the execution of the agreement or within fifteen days of the receipt of the sanction of the Government for the transfer of the mining rights, whichever was earlier, when formal possession of the business and property would be given to the purchasers; and (4) that the possession of the business and property would be retained by the vendors up to the date of the completion of the purchase, who would in the meantime carry on the business as agent for and on behalf of the purchasers in accordance with their instructions and shall account to and be entitled to be indemnified by the purchasers accordingly. The sale-deed was executed and registered on 12th October 1948.

During the assessment year 1948-49 of which the corresponding accounting period was from 1st January 1947 to 31st December 1947, the Perfect Pottery Co. Ltd., claimed to set off losses of the colliery incurred during the period from 1st April 1947 to 31st December 1947 against their other profits. This claim was disallowed by the income tax Officer on the ground that the legal title to the colliery passed to the company only on 12th October 1948 and the loss intended to be set off was the loss of the vendor M/s D. B. Ballabhdas Manoolal Kanhaiyalal. Consistent with this view in the assessment proceedings of the assessee for the year 1948-49 of which the previous year was from 15th July 1946 to 3rd July 1947, the income tax authority allowed to the assessee proportionate loss of Rs. 22,141 incurred in the working of the colliery by the assessee during

the period from 1st April 1947 to 3rd July 1947. In Part VII of the return filed for the material year the assessee had shown a loss of Rs. 1,47,308 on account of the sale transaction. The capital gains of the assessee were not determined in the assessment for the year 1948-49.

The contention of the Perfect Pottery Co. Ltd. about the setting off of the losses incurred in the colliery business from 1st April 1947 to 31st December 1947 was, however, accepted in appeal by the Tribunal and also by the Nagpur High Court in Miscellaneous Civil Case No. 47 of 1953 (The Commissioner of

income tax v. P.P. Co. Ltd.) when the matter went up on a reference to the High Court on an application of the Department u/s 66(2) of the Act. The High Court held on 23rd March 1955 that until the completion of the sale on 12th October 1948 the vendor-firm acted only as "agent" of the Perfect Pottery Co. Ltd.; that until all the consideration was paid as stipulated in the agreement, "the assessee was to act as "agent" of the purchaser-company who was entitled to the profits and responsibility for the losses of the colliery till the completion of the sale; and that, therefore, the losses of the colliery during the period from 1st April 1947 to

31st December 1947 were the losses of the purchaser-company which could be set off against the profits of the company. As a sequel to this decision and about a year after the Tribunal decided that the loss of Rs. 73,130 incurred in the colliery business during the period from 1st April 1947 to 31st December 1947 was a loss of the purchaser-company allowable as a deduction. On 26th February 1952, the income tax Officer issued a notice to the present assessee u/s 34 of the Act for re-assessment on the ground that the assessee's income for the year 1948-49 had been under assessed inasmuch as a loss of Rs. 22,141 as proportionate loss in the colliery business for the period from "1st April 1947 to 3rd July 1947 had been allowed to the assessee. In the re-assessment proceedings this loss was disallowed. On 11th November 1952 another notice was issued to the assessee u/s 34(1)(b) on the ground that the "capital gains" arising from the transfer of the colliery had escaped assessment in the proceedings for assessment year 1948-49. In the re-assessment proceedings initiated on the second notice the income tax Officer assessed to tax Rs. 70,521 as "capital gains" and Rs. 76,791 as profits chargeable under the second proviso to section 10(2)(vii) of the Act. The assessee then preferred an appeal before the Appellate Assistant Commissioner contending that there was no sale of the colliery during the relevant previous year; that the proceedings taken u/s 34 were bad inasmuch as they were based on a mere change of opinion and not on any information; and that under the terms of the notice issued on 11th November 1952 u/s 34(1)(b) which pertained only to escapement of tax on capital gains no assessment could be made of profits under the provisions of the second proviso to section 10(2)(vii) which were not mentioned in the notice. All these contentions prevailed before the Appellate Assistant Commissioner. On an appeal being preferred by the Department, the Tribunal held that having regard to the conduct of the parties and the decision, of the Nagpur High Court in M. C. C. No. 47 of 1953, the sale of the colliery took place on 1st April 1947, that is to say, during the relevant previous year; that this decision of the Nagpur High Court was "information" warranting the proceedings u/s 34(1)(b); and that under the notice issued by the income tax Officer it was competent to him to tax not only the escaped "capital" gains but also the profits computed under the second proviso to section 10(2)(vii) of the Act. The Tribunal accordingly remitted the case to the Appellate Assistant Commissioner for determination of the quantum of capital gains and for the decision of the appeal preferred before him according to law.

It will be convenient to deal first with the second question referred to us for our opinion. On that question, Shri Bobde, learned counsel for the assessee, submitted that u/s 12-B, as it stood at the material time, capital gains tax was payable in respect of any profits or gains, arising from the sale, exchange or transfer of a capital asset effected after 31st March 1946 and before 1st April 1948 and such profits and gains were deemed income of the previous year in which the sale, exchange or transfer took place; that in the present case there was no sale or transfer of any kind of the colliery at all until 12th October 1948

when the sale deed was executed; that the decision in M. C. C, No. 47 of 1953 of the Nagpur High Court did not hold that the sale took place on 1st April 1947; that it proceeded on the footing that under the agreement dated the 31st March 1947 the management of the colliery continued to remain with the vendors till the completion of the sale and the purchasers were entitled to receive the income and profits and were made liable for the losses; that section 12-B applied only to cases of completed transfer or sale and not to agreement to sell or to a mere grant of the right of management of a capital asset; and that as the sale took place after 1st April 1948 that is on 12th October 1948 no question of taxing any capital gains arising from the sale or of any profits under the second proviso to section 10(2)(vii) could at all arise. In reply, learned Advocate-General appearing for the Department said that under the terms of the agreement dated the 31st March 1947 there was a transfer of the capital assets as from 1st April 1947. Learned Advocate-General built up an argument on the strength of Commissioner of income tax v. Bhurangya Coal Co. 34 ITR 802 and proceeded to say that there was in any case a transfer of movable properties on 1st April 1947.

In our view, learned counsel for the assessee is on a firm ground in his contention that there was no sale at all of the colliery until 12th October 1948. That there was no sale of the colliery till 12th October 1948, is obvious enough from the terms of the agreement to sell dated the 31st March 1947 and the sale deed dated 12th October 1948. One has only to read those documents in order to arrive at that conclusion. It is quite true that clause (1) of the agreement stated that the vendors would sell and the purchasers would purchase the property as from 1st April 1947. But the clauses relating to the payment of consideration money, the completion of the purchase within three months of the execution of the agreement or within fifteen days of the receipt of the necessary sanction for the transfer of the mining rights, whichever was earlier, the delivery of formal possession and the retention of the possession of the property by the vendors up to the completion of the purchase, all unmistakably point to the fact that the right, title and interest in the colliery did not pass to the purchaser on 1st April 1947 but only on 12th October 1948 when the sale deed was executed. Between 1st April 1947 and 12th October 1948 the assessee-vendor continued to remain the legal owner of the colliery. If during this period the purchasers became entitled to the profits of the colliery business and were made liable for its losses it was not because of the completion of the sale on 1st April 1947 or any legal transfer of property in the colliery but because of a special agreement between the parties. In other words, while remaining owners of the colliery till 12th October 1948 the assessee-vendor relinquished its right and liability for the profits and losses of the colliery in favour of the purchaser. It was on this basis that it was held in M. C. C. No. 47 of 1953 that the losses of the colliery for the period from 1st April 1947 to 31st December 1947 were the losses of the purchaser-company, the Perfect Pottery Co. Ltd. The Tribunal did not properly appreciate the decision of the Nagpur High Court in M. C. C. No. 47 of 1953 when it observed that its effect was to hold that the sale took place on 1st April

1947. The position of the assessee here is somewhat analogous to that of the assessee in *Commissioner of income tax v. Provident Investment Co. Ltd.* 32 ITR 190, where also the sale of certain shares along with the managing agency by the assessee company was preceded by an agreement between the parties that instead of transferring the managing agency the assessee-company should resign the managing agency so that at the time of the delivery of the shares the managing agency would have come to an end. The Supreme Court held that the transaction was of relinquishment of managing agency, and was neither a sale nor a transfer thereof, and section 12-B of the Act, as it stood before it was amended in 1956, did not apply. Here also even if it be taken that the assessee-vendor relinquished its right and liability for the profits and losses of the colliery after 1st April 1947, the capital gains arising from such relinquishment were not taxable u/s 12-B as it stood on 1st April 1947.

Learned Advocate-General suggested that there was a transfer from 1st April 1947. But he did not indicate the nature of it. We fail to see how there could be any transfer of right, title and interest in the colliery from 1st April 1947 on the terms of the agreement to sell dated the 31st March 1947. The Department cannot be allowed to make a distinction for the first time in this Court between the transfer of movable and immovable properties and to urge that in any case there was a transfer of movable property from 1st April 1947, This was never the stand of the Department at any time before the taxing authorities, or even before the Tribunal. Learned counsel for the assessee rightly pointed out that under the agreement dated 31st March 1947 the sale of the entire property, movable as well as immovable, was one consolidated and not in two different parts; that no separate consideration was fixed for movables and for immovable's; that the sale consideration of Rs. 4 lakhs related to the entire property and the sale-deed executed on 12th October 1948 was also of the entire property; that the movable property of which the transfer was said to have taken place on 1st April 1947 was embedded in the earth and u/s 2(7) of the Sale of Goods Act there could be no sale of this immovable property unless it was severed and sold separately; and that the question whether any movable property was or was not embedded in the earth or was severable was a question of fact. If the Department intended to contend that movable property as distinct from immovable property was sold separately on 1st April 1947, the question should have been raised specifically before the taxing authorities or before the Tribunal which would have then found the facts necessary for deciding the question. In a reference u/s 66(1) this Court cannot investigate facts raised for the first time and enter on a fresh line of enquiry. The decision of the Supreme Court in *Commissioner of income tax v. Bhurangva Coal Co.* (1) is of no assistance to the Department. In that case the second schedule of the agreement to sell the property set out the details of the movable and immovable properties in two parts and there were really two sale transactions; different prices were fixed therefore and the actual conveyance under the sale deed was only of the immovable's described in one part. The prices of the movable and

immovable properties were also fixed separately. It was because of these circumstances, which do not exist in the present case, that it was held by the Supreme Court that the distinction made by the Appellate Tribunal between the sale of movable and immovable properties was legitimate.

It is worthy of note that in Commissioner of Income Tax Vs. Bhurangya Coal Co., , the Supreme Court upheld the refusal of the Patna High Court to remand the case to the Appellate Tribunal for a further enquiry into the question whether certain items were movables or immovable's and were sold separately. Before the Patna High Court it was argued on behalf of the Department that the various items of property mentioned in the second part of the schedule to the contract of sale in that case, such as tramlines, shafts, engines, railway sidings, etc., were immovable properties and could be validly sold only by a registered sale-deed and that title to that property could not pass by execution of the contract of sale and subsequent delivery of possession. The Patna High Court refused to entertain the contention on the grounds that the point had never been taken before the departmental authorities or before the Appellate Tribunal, and that the question raised whether certain property was movable or immovable was a question of fact which could not be allowed to be raised for the first time in the High Court on reference. Therefore, here also the Department cannot be allowed to urge for the first time that certain movable property was sold by the assessee to the purchaser-company on 1st April 1947.

From what we have said above, it is plain that the second question must be answered by saying that the sale of the colliery took place on 12th October 1948, and that being so the capital gains arising from the sale transaction could not be taxed u/s 12-B of the Act as it stood on 1st April 1947, and consequently no question of taxing any profits under the second proviso, section 10(2)(vii) can arise.

This answer renders it strictly unnecessary for us to consider the other objections advanced by Shri Bobde as to the validity of the proceedings u/s 34 of the Act. But it must be said in connection with the learned counsel's contention that there was no information before the income tax authority justifying the reopening of the assessment u/s 34 that it is not without any substance. The Supreme Court has now no doubt held in Maharaj Kumar Kamal Singh v. Commissioner of income tax (1), that two conditions must be satisfied before the income tax Officer can act u/s 34(1)(b); that he must have come into possession subsequent to the making of the assessment order in question "information"; and that this information must lead to his belief that income chargeable to income tax has escaped assessment or that it has been under assessed or assessed at too low a rate, or has been made the subject of excessive relief under the Act. The Supreme Court has further held that "information" for the purpose of section 34(1)(b) is not limited to factual information but includes information as to the true and correct state of the law and so would cover information as to relevant judicial decisions. Shri Bobde did not dispute this basic

proposition. He, however, argued that in the original assessment the income tax Officer had already held that the legal title to the colliery passed to the Perfect Pottery Co. Ltd. on 12th October 1948 and consistent with this finding had not assessed the capital gains for the assessment year 1948-49; that the decision of the Appellate Tribunal in the appeal preferred by the Perfect Pottery Co. Ltd. and of the Nagpur High Court in M. C. C. No. 47 of 1953 did not in any way alter the view of the income tax authority that the sale took place on 12th October 1948; that in those proceedings the only question determined was as to the person entitled to the profits of the colliery or responsible for its losses during the period from 1st April 1947 to 31st December 1947; that, therefore, it could not be said that the income tax Officer received information as to the correct legal position about the date of the sale from the decision of the Appellate Tribunal or of the Nagpur High Court in M. C. C. No. 47 of 1953; and that the reassessment proceedings u/s 34(1)(b) were consequently based only on the change of view of the income tax Officer on the same set of facts. Shri Bobde referred us to the last paragraph of the judgment in Maharaj Kumar Kamal Singh Vs. The Commissioner of Income Tax, Bihar and Orissa, , where the Supreme Court left open the question whether the income tax Officer or his successor can take action u/s 34 if he thinks that the original order of assessment was wrong without any information from an external source. There can be no doubt that the decision of the Tribunal and of the High Court in M. C. C. No. 47 of 1953 did not in any way upset the finding of the income tax Officer in the original assessment proceedings that the sale took place on 12th October 1948. The finding about the assessability of the profits and loss incurred by the colliery during the period from 1st April 1947 to 31st December 1947, which was not based on the date of the sale of the colliery but on the special agreement between the parties, was not any "information" about the true and correct legal position about the date of the sale of the colliery. It could not, therefore, be regarded as a "relevant judicial decision" entitling the income tax Officer to reopen the assessment. As the decision of the Tribunal in the appeal preferred by the Perfect Pottery Co. Ltd. and of the High Court on a reference in M. C. C. No. 47 of 1953 had no bearing whatsoever on the question of the date of the sale of the colliery, they could not be taken as a shelter for correcting a supposed error in the original assessment. So far as this Court is concerned, it has been held in (1946) 14 ITR 174 , that the income tax Officer cannot take any action u/s 34 merely because he intended to change his view or to hold an opinion different from that of his predecessor on the same set of facts.

The contention that the income tax authority could not travel beyond the contents of the notice which only specified "capital gains" as having escaped assessment, and assess other income found to have escaped assessment earlier, is contrary to the decision of this Court in SETH KELEKHAN MAHOMED HANIF Vs. COMMISSIONER OF Income Tax, M.P. AND BHOPAL, NAGPUR., where it has been held that when once an assessment is reopened u/s 34 the income tax Officer is not limited to the information which he had received and on the strength of

which he had obtained sanction for reopening the assessment, and if he discovers other escaped income he is entitled to take it into account and assess it. In COMMISSIONER OF Income Tax, PUNJAB, HIMACHAL PRADESH and BILASPUR, SIMLA Vs. JAGAN NATH MAHESHWARY., the Punjab High Court has ruled that it is not necessary that a notice u/s 34 should specify an item of income or the source of the income which has escaped assessment. Learned counsel for the assessee sought to distinguish these cases by saying that they related to items of income under one head which had escaped assessment and not to income under different heads. The question whether such a distinction can validly be made may well arise for determination in another case. In the view we have expressed above, it seems to us unnecessary to express any opinion on the tenability of the distinction made by the learned counsel for the assessee. As on the answer given by us to the second question, the first question does not survive, it is unnecessary to answer it.

Our answer to the second question, therefore, is that the sale of the colliery took place on 12th October 1948 and consequently the capital gains arising from the sale transaction could not be taxed u/s 128 as it stood on 1st April 1947 and no question of taxing any profits under the second proviso to section 10(2)(vii) of the Act arises. In view of this answer, the first question does not arise.

The assessee shall have costs of this reference. Counsel's fee is fixed at Rs. 250.