

(1987) 07 MP CK 0009

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 284 of 1982

Ratansi Narayan Patel

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 28-07-1987

Acts Referred:

Income Tax Act, 1961 — Section 2(29), 2(42A), 45

Citation : (1988) 67 CTR 98 : (1988) 173 ITR 547 : (1987) 35 TAXMAN 349

Hon'ble Judges : N.D. Ojha, C.J.;C.P. Sen, J

Bench : Division Bench

Advocate : C.J. Thakar, for the Appellant; B.K. Rawat, for the Respondent

Judgement

N.D. Ojha, C.J.—The Tribunal, Nagpur Bench, Nagpur, has referred the following question to this court for its opinion u/s 256(1) of the Income Tax Act, 1961 ("the Act"):

" Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the capital gains arising to the assessee was liable to be assessed as short-term capital gains ? "

2. For the purpose of answering the aforesaid question, it may be pointed out that the assesses are Ramji Narayan Patel and Ratansi Narayan Patel. The relevant assessment year is 1976-77. The facts in a nutshell which are necessary to be taken notice of for answering the aforesaid question and are clear from a perusal of the appellate order passed by the Tribunal, its order dated April 7, 1982, passed on an application for correction of certain mistake in paragraph 2 of the aforesaid order and the statement of the case drawn up by the Tribunal are that, to start with, there was a partnership in the name of Ramji Narayan Patel & Co. constituted on November 3, 1967. This firm, consequent upon the death of one of the partners, was reconstituted on December 17, 1971, in the same name of Ramji Narayan Patel & Co. On November 6, 1972, this firm was dissolved and all the assets and properties of the firm on the dissolution were allotted to the

present assessees, Ramji Narayan and Ratansi Narayan. Thereafter, on November 7, 1972, Ramji Narayan and Ratansi Narayan contributed the assets and properties which they had got on the dissolution of the firm, Ramji Narayan Patel & Co., to a new partnership in the name of Vikas Timber Co. This newly constituted firm, Vikas Timber Co., was dissolved on January 31, 1975. At that time, there were seven partners in the firm, Vikas Timber Co., two of them being Ramji Narayan and Ratansi Narayan, the present assesses. All the co-owners of the assets of the dissolved firm aforesaid, sold the assets of the dissolved firm by a sale deed dated July 8, 1975. One of the questions which arose for consideration in the assessment proceedings of the present assesses, Ramji Narayan and Ratansi Narayan, was as to whether the capital gains which these assesses had obtained as a consequence of the sale deed dated July 8, 1975, were to be treated as short-term capital gains or long-term capital gains. The case of the present assesses was that the capital gains should be treated as long-term capital gains. The plea of the assesses did not find favour with the Income Tax authorities and was also repelled by the Tribunal. However, on an application made on their behalf, the question stated above has been referred to this court for its opinion.

3. On a perusal of the various deeds of partnership which have been placed before us from the record, it appears that right from November 3, 1967, the present assesses, namely, Ramji Narayan and Ratansi Narayan, had continuously held a share of a minimum of 25 per cent, each in the assets of the various partnerships. On this basis, it was asserted on their behalf that on the date of execution of the sale deed dated July 8, 1975, on the basis of which capital gains accrued to the assesses, the assets at any rate to the extent of 25 per cent, each held by the assesses continuously from November 3, 1967, were assets held by them for more than 60 months and, consequently, the capital gains should be treated as long-term capital gains and the Tribunal committed an apparent error in taking a contrary view.

4. Having heard learned counsel for the parties, we find Substance in this Submission. The term "long-term capital gain" as has been denned in Clause (29B)* of Section 2 means capital gain arising from the transfer of a long-term capital asset. "Long-term capital asset" in its turn has been denned in Clause (29A)* of Section 2 and means a capital asset which is not a short-term capital asset. Clause (42A) defines "short-term capital asset" to mean a capital asset held by an assessee for not more than sixty months immediately preceding the date of its transfer. Capital gains arising to the assesses from the sale deed dated July 8, 1975, could consequently be long-term capital gains only if they arose from the transfer of long-term capital assets meaning thereby capital assets so held by the assesses for a period of more than 60 months immediately preceding the date of its transfer. The plea raised by the assesses was not accepted by the Tribunal in view of the decision of the Supreme Court in *Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others*, , where it was held that the whole concept of partnership is to embark upon a joint venture and for that

purpose to bring in as capital, money or even property including immovable property. Once that is done, whatever is brought in would cease to be the exclusive property of the person who brought it in. On this basis, the Tribunal took the view that it was for the first time when the firm, Ramji Narayan Patel & Co., was dissolved and the assets and properties of the firm were allotted to Ramji Narayan and Ratansi Narayan on November 6, 1972, that these assesseees can be held to be the owners of the assets. According to the Tribunal, prior to that date, they could not be held to be the owners of the assets and the assets held by them cannot be long-term capital assets as they were not held for a period of more than 60 months. The decision of the Supreme Court in Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, , was cited before a Division Bench of this court in Narsibhai Patel Vs. Commissioner of Wealth-tax, , in connection with the interpretation of Section 5(1)(xxvi) of the Wealth-tax Act, 1957, where it was held (p. 639):

" Reference may also be made to the case of Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, . In this case, it was pointed out that the whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital, money or even property including immovable property, and once that is done whatever is brought in would cease to be the exclusive property of the person who brought it in. " It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership ". It is true as explained in these cases that a partner has no exclusive right over any such property and he cannot also exercise any right in such property even to the extent of his share in the partnership because his right during the Subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after dissolution of the firm to get the value of his share in the net partnership assets as on the date of dissolution. These are restrictions over the right of ownership of partners and they do not militate against the legal position that the partners collectively own the partnership property. As already stated, a partnership or firm is not a legal person and so it cannot hold property. But the property brought in by the partners for the partnership business cannot be without any owner. Such a property really vests in the partners collectively in proportion to their shares although the right of ownership of each partner in respect of that property is restricted by the contract of partnership and the very nature and character of the collective business called the partnership business for which the property is to be utilised. We, therefore, find no difficulty in holding that deposits made by a partnership in a bank are in law held by partners in proportion to their shares in the partnership and that the partners are entitled to the benefit of the exemption contained in Section 5(1)(xxvi) in their individual assessments to the extent of the maximum prescribed by Section 5(1A)."

5. Applying the principle laid down by this court in the case of Narsibhai Patel Vs. Commissioner of Wealth-tax, , namely, that even during the Subsistence of a

partnership, the deposits made by the partnership in a bank are in law held by the partners in proportion to their shares in the partnership, it would be seen that notwithstanding reconstitution of the firm, Ramji Narayan Patel & Co., on the death of one of the partners, the constitution of a new partnership in the name of Vikas Timber Co. consequent upon the dissolution of Ramji Narayan Patel & Co. and Subsequent dissolution of Vikas Timber Co., the assessee, Ramji Narayan and Ratansi Narayan, at every point of time right from November 3, 1967, held assets to the extent of 25% each. That being so, the assets held by these two assessee on July 8, 1975, the date of the sale deed, were obviously held by them for more than 60 months and consequently fell within the definition of " long-term capital asset " as contained in Clause (29A) of Section 2. Since capital gains in the instant case arose from the transfer of a long-term capital asset, these capital gains would be long-term capital gains as defined in Clause (29B) of Section 2.

6. In view of the foregoing discussion, our answer to the question referred to us is that, on the facts and circumstances of the case, the Tribunal was not right in holding that the capital gains arising to the assessee were liable to be assessed as short-term capital gains. In other words, our answer to the aforesaid question is in the negative, in favour of the assessee and against the Department. In the circumstances of the case, there shall be no order as to costs.