Almonard (P.) Ltd. Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Feb-13-1992

Reported in : (1992)41ITD337(Mum.)

Judge : U Shah, S Vice-, R Singhal

Appellant : Almonard (P.) Ltd.

Respondent : Assistant Commissioner of

Judgement :

1. This is an appeal against the order of the CIT (Appeals) wherein he has confirmed the action of the Asstt. Commissioner (AC) (i) in respect of bringing to tax Rs. 20,00,000 though under different head and (ii) disallowance of Rs. 3,33,744 and Rs. 75,000 under Section 43B of the Act.

2. The assessee is a company. The assessment year is 1987-88 and the relevant previous year ended on 30th June, 1986.

3. The first issue pertains to the taxability of the amount of Rs. 20,00,000. The facts in brief are the assessee had taken a factory premises on lease from M/s. Somabhai Desai & Others as per lease agreement dated 27-1-1970 and was paying rent thereof from year to year. M/s Somabhai Desai & Ors. sold the said premises to P.C.S. Date Products Ltd., as per the sale deed dated 17-9-1986. As M/s. Somabhai Desai & Ors. wanted vacant possession of the said premises, they had agreed to pay Rs. 20,00,000 to the assessee under an Agreement dated 3-6-

1986.

4. On the aforesaid facts, in the return of income as well as at the time of assessment proceedings, the assessee claimed that Rs. 20,00,000 was not chargeable to tax as the same was to be treated as capital receipts in its hands. Further it was submitted that even assuming for the sake of argument the said amount is to be treated as capital gains in its hands, it would not attract the provisions of Section 45 of the Act as for acquiring the tenancy rights, it had not paid any amount.

Relying on the decision of the Hon'ble Supreme Court in the case of CIT v. B. C. Srinivasa Setty [1981] 128 ITR 294 and of the Hon'ble Bombay High Court in the cases of CIT v. Mrs. Shirinbai P. Pundole [1981] 129 ITR 448 and Nila Products Ltd. v. CIT [1984] 148 ITR 99, it was submitted that the provisions of Section 45 of the Act cannot be attracted.

5. The AC however rejected the stand taken on behalf of the assessee and brought to tax Rs. 20,00,000 as according to him, the same has to be treated as revenue receipt in the hands of the assessee. The relevant portion of the order of the AC reads as under:- 7. I have carefully considered the submissions made. But in my opinion, the decisions of Bombay High Court relied on are distinguishable, on facts of the assessee's case. In the first case, there was surrender of tenancy right of ownership flats and in second case it was surrender of rights of factory premises. In assessee's case the amounts received are not for surrender of right but it was in lieu of agreement entered into by the assessee with the lessor. As per this agreement cash amount was paid for securing an alternative accommodation of assessee's choice. The amount received was not in nature of any capital receipt but it was in cash and therefore in nature of a revenue receipt. Since assessee had entered into agreement and received the amount in lieu of giving up business premises which was during the course of its business, it cannot be considered as revenue receipt earned even by way of adventure in nature of trade. Moreover the cash receipt is kept by the assessee in its business and books by way of reserve which indicated that it was earned during the course of business and was in nature of revenue receipt. The benefit derived by assessee by entering into agreement

clearly takes the character of income as defined under Section 2(24). Also as per charging Section 4 and 5 of the Act, income chargeable to tax included any income from whatsoever source it is derived. In this case, assessee has earned income in lieu of entering into agreement and the receipt is not of capital nature as such it is nothing but a revenue receipt.

8. The decision of Calcutta High Court in the case of CIT v. Ashoka Marketing Co. is distinguishable. In the assessee's case, amount was received in cash as per terms of agreement entered into and also by way of exchange for relinquishment of tenancy right and giving possession. Thus it can also be said that there was transfer within the meaning of Section 2(47) and tenancy right has cost, hence possibility of charging capital gains also cannot be ruled out but in view of various submissions made, the receipt is considered as in nature of revenue as discussed above.

9. Under the circumstances, the amount of Rs. 20 lakhs is treated as revenue receipt which is chargeable to tax. Accordingly it is added to the total income.

In appeal before the CIT(A), the assessee once again argued that Rs. 20,00,000 received by it was a capital receipt not liable to tax as such, or under Section 45 of the Act. The CIT(A) however accepted the assessee's contention that Rs. 20 lakhs cannot be treated as a revenue receipt. He however held that the same has to be assessed as long term capital gains in the following manner:- 3. In the course of the hearing, I put it to the learned counsel as to why this receipt should not be taxed as capital gains? The submission of the learned counsel is that since the leasehold right was acquired without any cost, the money receipt as consideration for vacating the premises cannot be taxed for capital gains in view of the Supreme Court judgment in Srinivasa Setty's case 128 ITR 294 which was followed by Bombay High Court in the case of Shirinbai P. Pundole (129 ITR 448) wherein, the Hon'ble High Court of Bombay applied ratio of Shetty's case to tenancy and such like cases. This issue had recently come up before the Hon'ble Tribunal in the case of M. Electrical & Mechanical Appliances (P.) Ltd. [HA 4493 (Bom.) of 1986, Bench-B]. After reviewing the entire case law on the subject the Hon'ble Tribunal observed in para 10 of its order dt.

17th December 1990:- From the above it would be seen that the assessee cannot be permitted to say that there could be no cost of acquisition which is attributable to the right of limited enjoyment of assessee's right for the lease which, as submitted by the learned Authorised Representative, was granted in the year 1946. It was also contended on behalf of the assessee that ITO has taken the view that there was no cost of the tenancy in this case and as such the question of capital gains does not arise. We are afraid we cannot subscribe to such view. In canvassing assessee's view point the learned Authorised Representative placed reliance on the following passage from the ITO's order: The fact of the case are that the factory premises of the assessee at Khed Gaily, Dadar Bombay was in a rented premises. The company vacated this premises as per agreement dt. 6th October 1978 with M/s. Silver Builders on their providing alternative accommodation of about 5064 sq. ft. built-up area divided into eight flats on ownership basis. However the said M/s. Silver Builders failed to provide the alternative accommodation and hence paid a sum of Rs. 7 lakhs to the assessee as per agreement dt. 31-3-1982 as the assessee agreed to forego the rights of alternative accommodation.

I brought this decision specifically to the notice of the learned counsel and he submits that the Tribunal was not correct in not following the aforesaid decisions of Bombay High Court. Be that as it may, I am not in a position to comment on the subject as I am bound by the decision of the Tribunal wherein it has given detailed reasons as to why the decision of the Hon'ble High Court could not be followed keeping in view the later decision of the Supreme Court in Krishnamurthy 's case. In this view of the matter, I hold that the sum of Rs. 20 lakhs received by the assessee for prematurely terminating its lease rights and in handing back the occupation of the factory premises to the lessor is subject to capital gains. The assessing officer is directed to compute long term capital gains in accordance with the provisions of the Act. For this purpose, he will give an opportunity to the assessee.

6. The learned counsel for the assessee reiterated the submissions which were made before the I.T. authorities and strongly urged that the CTT(A) was not justified in holding that Rs. 20 lakhs received by the assessee has to be assessed

as long term capital gains. In this connection, he further submitted that the CIT(A) was not justified in relying on the order of the Tribunal in the case of M. Electrical & Mechanical Appliances (P.) Ltd. [IT Appeal No. 4493 (Bom.) of 1986, dated 17-12-1990], as according to him, in the said order, the Tribunal had wrongly applied the decision of the Hon'ble Supreme Court in the case of A.R. Krishnamurthy v. CIT"[1989] 176 ITR 4171. Thereafter, he invited our attention to the said decision of the Hon'ble Supreme Court and pointed out that the facts and circumstances obtaining in that case, are quite different from the one obtaining in the assessee's case and that considered by the Hon'ble Supreme Court in the case of B.C.Srinivasa Setty (supra). In fact, inviting our attention to p. 422 of the Report, he pointed out that the Hon'ble Supreme Court has itself noticed the distinguishing features obtaining in the case of B.C.Srinivasa Setty (supra) and that in the case of A.R. Krishnamurthy (supra). The learned counsel for the assessee pointed out that in the case of A.R. Krishnamurthy (supra), the assessee had purchased two pieces of land for Rs. 27,260. By an instrument of lease-cum-licence dt. 10-9-1970, the assessee granted a mining licence in favour of a company. The lease was for a period often years and the lessee had to pay a premium/ salami of Rs. 5,00,000 in addition to the payment of royalty of Rs. 12 per thousand cubic ft. of clay extracted subject to a minimum of Rs. 60,000 per year. On these facts, the Hon'ble Supreme Court held that of Rs. 27,260 paid by the assessee was not only for acquiring the land but also of acquiring a bundle of rights in the said land including the right to grant lease. It was, therefore, held that there was a cost of the right to grant lease and therefore, the assessee was liable to capital gains tax. On the contrary, in the case of B.C. Srinivasa Setty {supra), the Supreme Court has clearly held that when the assessee has paid nothing for acquiring an asset like goodwill (being a self-generated asset), the provisions of Section 45 of the Act cannot be attracted. According to the learned counsel for the assessee, the fine distinction between the two decisions of the Hon'ble Supreme Court has not been appreciated by the Tribunal in its aforesaid order. In this connection, he also invited our attention to the decisions of the Hon'ble Madras High Court in the case of A. R.Krishnamurthy and A.R. Rajagopalan v. CIT [1982] 133 ITR 922 wherein some more facts obtaining in the case are given. Thereafter, the learned counsel for the assessee invited our attention to the aforesaid two decisions of the Hon'ble

Bombay High Court in Mrs. Shirinbai P.Pundole 's case (supra) and Nila Products Ltd.'s case (supra) and pointed out that the facts and circumstances obtaining in those two cases are identical with the facts and circumstances obtaining in the instant case. Relying on the decision of the Hon'ble Supreme Court in the case of B.C. Srinivasa Setty (supra), the Hon'ble High Court has held that the provisions of Section 45 of the Act cannot be attracted.

He also invited the decision of the Hon'ble Calcutta High Court in the case of CIT v. Mangtu Ram Jaipuria [1991] 192 ITR 533 wherein also following the decision of the Hon'ble Supreme Court, in the case of AC Srinivasa Setty (supra) it was held that the Tribunal was justified in holding that there was no cost of acquisition of tenancy rights when there could not be a contract of tenancy in law without consideration either premium or rent both. He also relied on the consolidated order of the Tribunal dated 4-6-1990 and 28-6-1991 in the case of Bank of India and Bajaj Electricals Ltd. wherein also on similar facts and circumstances obtaining the cases, relying on the aforesaid decisions of the Hon'ble Supreme Court in the cases of B. C. Srinivasa Setty (supra) and of the Hon'ble Bombay High Court in the case of Mrs.

Shirinbai P. Pundole (supra) and Nila Products Ltd. (supra), the Tribunal was pleased to hold that the provisions of Section 45 of the Act cannot be attached. He, therefore, urged that Rs. 20 lakhs should be deleted from the total income of the assessee. Faced with this position, the learned representative for the Department strongly relied on the order of the CIT(A) as well as of the Tribunal in the case of M.Electrical & Mechanical Appliances (P.) Ltd. (supra).

7. We have considered the rival submission of the parties as well as perused the material already brought on record and are of the view that the stand taken on behalf of the assessee is unassailable and in view of the aforesaid decisions of the Hon'ble Supreme Court in the case of B.C. Srinivasa Setty (supra) and of the Hon'ble Bombay High Court in the case of Mrs. Shirinbai P. Pundole (supra) and Nila Products Ltd. (supra). We have carefully gone through the order of the Tribunal in the case of M. Electrical & Mechanical Appliances (P.) Ltd. (supra) as well as the decisions of the Hon'ble Supreme Court in the cases of

A.R.Krishnamurty and A.R. Rajagoplan (supra) and we are inclined to agree with the submission made on behalf of the assessee that in the said order, the Tribunal has failed to appreciate the fine distinction made by the Hon'ble Supreme Court between the facts and circumstances obtaining in that case and in the case of B.C. Srinivasa Setty (supra).

We entirely agree with the assessee's contention that the facts and circumstances obtaining in its case are in all fours with the facts and circumstances obtaining in the cases of Mrs. Shirinbai P. Pundole (supra), Nila Products Ltd. (supra) and Mangtu Ram Jaipuria (supra).

Respectfully applying the ratio laid down in these cases, we hold that Rs. 20,00,000 received by the assessee cannot be brought to tax as "capital gains" under Section 45 of the Act. The AC is accordingly directed to modify the assessment.

8. to 12. [These paras are not reproduced here as they involved minor issues.]