

**Subhash Arora Vs. Assistant Commissioner of**

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**Court :** Income Tax Appellate Tribunal ITAT Delhi

**Decided On :** Dec-31-2001

**Judge :** S Yadav, R Syal

**Appellant :** Subhash Arora

**Respondent :** Assistant Commissioner of

**Judgement :**

1. This appeal by the assessee is preferred against the order passed by CIT(A) on 22-3-1994 in relation to assessment year 1992-93.

2. The issue raised in this appeal relates to chargeability of income under the head "Capital Gains". The facts of the case lie in a narrow compass. The Assessing Officer while framing assessment under Section 143(3) observed that the assessee was holding 60,948 shares of HCL Ltd. The said HCL Ltd., through an arrangement entered into with HCL-HP Ltd., transferred 32% of the holdings i.e., 19,503 shares on behalf of the assessee to HCL-HP Ltd. The said transfer was made consequent to the arrangement approved by the Hon'ble Delhi High Court. It was explained on behalf of the assessee that in consequence of the agreement entered into by the assessee with HCL-HP Ltd. the shares of HCL Ltd. were to be reduced to the extent of 68% and in lieu thereof each shareholder was allotted shares in HCL-HP Ltd. (new company) to the extent of 32%. It was explained that instead of one old share, each shareholder of HCL Ltd. (existing company) became entitled to two shares, one of HCL and one of HCL-HP Ltd. It was explained that simultaneous to the split of the company there was an interchange

in the names of the company i.e., HCL Ltd, (existing company) was renamed as HCL-Hewlett Packard Ltd. and HCL-HP Ltd. was renamed as HCL Ltd. it was further explained that after the split, the share capital of HCL Ltd. was divided into shares of two companies, which after interchange in the names stood as under :-- Consequent of splitting into two companies it was explained that the assessee's shareholding got split up as follows :-- It was pointed out that this conversion was like converting a 500 rupee note into 50 rupee note and 100 rupee note and as such no transfer was involved in this transaction which could attract the provisions of Chapter IV-E. The Assessing Officer noted that the assessee had shown consideration equivalent to 19,503 equity shares at Rs. 10 each. The cost of such shares was computed by the assessee @ Rs. 0.16 paise per share. The assessee claimed that there was no transfer resulting into the chargeability of the amount to capital gain because his case was covered under Section 47(vii). The Assessing Officer jettisoned the assessee's explanation in this regard by holding that Section 47(v)(ii) applied only to the case of amalgamation whereas in the facts of the case it was an arrangement and not amalgamation. Accordingly, the Assessing Officer computed capital gain at Rs. 1,91,910 by deducting Rs. 3,120 being the cost of such shares as computed by the assessee from Rs. 1,95,030 being the value of consideration of 19,503 equity shares @ Rs. 10 per share.

3. Aggrieved thereby the assessee agitated before the first appellate authority, it was contended on behalf of the assessee that the case of the assessee was not falling within the ambit of word "transfer" as defined in Section 2(47) read with Section 47. The Id. CIT(A) placing reliance on the decision of Gujarat High Court in the case of CIT v. Vania Silk Mills (P.) Ltd. [1977] 107 ITR 300 held that the case of assessee was covered under Section 2(47)(ii) being "extinguishment of any rights therein" and hence had amounted to transfer within the pale of the definition of the term "transfer". Ergo the action of the Assessing Officer was echoed by CIT(A).

4. Before us the learned counsel for the assessee contended that the CIT(A) had miserably failed to appreciate the contentions raised before him and had relied upon the decision of Hon'ble Gujarat High Court in the case of Vania Silk Mills (P.) Ltd. (supra) which was no more a good law because the Hon'ble Apex Court has reversed the said order in Vania Silk Mills (P.) Ltd. v. CIT [1991] 191 ITR 647, 59

Taxman 3. It was further submitted that though the CIT(A) passed order in 1994 but he failed to take into consideration the decision of the Apex Court which was rendered much earlier in 1991. The learned counsel reiterated the stand taken before the lower authorities to the effect that for any transfer there must be two separate persons and the value of the assets for transfer/exchange must also be different. The learned counsel also placed reliance on the decision of the Supreme Court in the case of CIT v. Rasiklal Maneklal (HUF) [1989] 177 ITR 198, 43 Taxman 259 to stress that the conversion of 19,503 shares of HCL Ltd. was not covered within the scope of Section 2(47) and hence no capital gains tax was leviable.

Our attention was drawn towards an order passed by CIT(A) on 17-1-1996 in the case of Ashish Vaidya, placed at pages 19 to 30 of the paper book, to show that under similar circumstances the CIT (A) while applying the ratio decidendi of the Supreme Court in Vania Silk Mills (P.) Ltd. (supra) upheld the assessee's contention and while doing so he had taken into consideration the impugned order passed by CIT(A) in the case of present assessee and had specifically differed from the conclusions arrived at in that order. In the opposition the learned DR strongly relied on the order passed by the CIT(A) in question and submitted that the same was in accordance with law and no interference was called for.

5. We have considered the rival submissions in extenso in the light of material placed before us and precedents relied upon. The only issue that falls for our consideration is to decide as to whether any transfer was involved in the transaction of converting the shares of assessee from one company to another. Section 45 of the Act provides that any profits or gains arising from the transfer of a capital asset effected in the previous year shall be charged to income-tax under the head Capital Gains. The term "transfer" has been defined in Section 2(47) in an inclusive manner by taking into its ambit, inter alia, sale, exchange, relinquishment of assets or the extinguishment of any rights therein. Section 47 states that certain transactions would not be regarded as "transfer" and hence the provisions of Section 45 would not apply to such transfers. The main plank of the argument of the learned counsel for the assessee is that the case of the assessee is covered by the decision of the Apex Court in the case of Vania Silk Mills (P.)

Ltd. (supra) for in that case it was held that the expression "extinguishment of any rights therein" had to be confined to the extinguishment of rights on account of a transfer and could not be extended to refer to the extinguishment of rights independent of or otherwise than on account of transfer. Therefore the view has been canvassed that since the extinguishment of rights in the shares was not on account of transfer and hence the same could not be charged to tax under the head Capital Gains. There is no dispute about the fact that the learned CIT(A) while disposing of the appeal decided the matter in revenue's favour by relying upon the judgment of the Hon'ble Gujarat High Court in the case of Vania Silk Mills (P.) Ltd. (supra) which was subsequently reversed by the Apex Court. It is imperative to note that the interpretation of the expression "extinguishment of any rights therein" did not come to an end with the decision of the Supreme Court in Vania Silk Mills (P.) Ltd. s case (supra). In a recent decision the Hon'ble Supreme Court in the case of CIT v. Mrs. Grace Collis [2001] 248 ITR 323, 115 Taxman 326 again considered the expression "extinguishment of any rights" and specifically disapproved the observations earlier made in the Supreme Court in Vania Silk Mills (P.) Ltd.'s case (supra) by holding that the extinguishment of any rights in capital assets was not confined to the extinguishment by transfer or exchange and had included extinguishment of any capital assets independent of and otherwise than on account of transfer. The relevant observations of the Apex Court in this decision, rendered by three judges, are as under :-- "We have given careful thought to the definition of "transfer" in Section 2(47) and to the decision of this Court in Vania Silk Mills (P.) Ltd.'s case [1991] 191 ITR 647. In our view, the definition clearly contemplates the extinguishment of rights in a capital asset distinct and independent of such extinguishment consequent upon the transfer thereof. We do not approve, respectfully, of the limitation of the expression "extinguishment of any rights therein" to such extinguishment on account of transfers or to the view that the expression "extinguishment of any rights therein" cannot be extended to mean the extinguishment of rights independent or otherwise than on account of transfer. To so read the expression is to render it ineffective and its use meaningless. As we read it, therefore, the expression does include the extinguishment of rights in a capital asset independent of and otherwise than on account of transfer." In the light of recent pronouncement by the

Hon'ble Supreme Court in the case of Mrs. Grace Collis (supra) it is clear that the restricted manner assigned to the expression "extinguishment of any right" in Vania Silk Mills (P.) Ltd.'s case (supra) is no more a good law.

6. The learned counsel has also relied on another decision of Supreme Court in the case of Rasiklal Maneklal (HUF) (supra) in his support in which case it was held that no exchange was involved in the transaction where certain shares of amalgamated company were allotted in lieu of assessee's holding of certain shares in amalgamating company. It is to be noted that this decision was delivered in the context of Section 12B of the Indian Income-tax Act, 1922 which stated that "the tax shall be payable by an assessee under the head 'Capital Gains' in respect of any profits or gains arising from the sale, exchange, relinquishment or transfer of a capital asset....." At that time no provision analogous to the "extinguishment of any rights" was there in the section. Such incorporation was specifically made in Section 2(47) of the 1961 Act which defines "transfer" to include "extinguishment of any rights" in a capital asset. It is, therefore, palpable that the said decision of the Apex Court cannot be applied to the facts of the present case for the reason that the definition of the term "transfer" has undergone a change which specifically includes the extinguishment of any rights in a capital asset.

7. In Orient Trading Co. Ltd. v. CIT [1997] 224 ITR 371, 90 Taxman 535 the Supreme Court was concerned with a case where a company dealing in shares was holding 14,500 shares of A Ltd. of the face value of Rs. 10 each as its stock-in-trade. The said shares were valued by the company at Rs. 1,45,000 and included in the closing stock. Subsequently a new company AC Ltd. made an offer to obtain shares of A Ltd. In exchange for the allotment of its own shares @ 38 equity shares in AC Ltd. for 10 equity shares in A Ltd. The company accepted the said offer and received 55,100 shares of AC Ltd. in exchange of its holding of 14,500 shares in A Ltd. The face value of the shares of the second company was Rs. 10 per share. The Assessing Officer held that the assessee had earned a profit of Rs. 4,06,000 in the said transactions and brought the same amount to tax. The plea of the company was that it was the case of mere exchange of shares of one company for another company and the difference between the price of the

shares of the first company and the second company on the date of exchange was not income chargeable to tax. The Hon'ble Supreme Court held that the exchange of shares of one company for shares of another company was realisation of shares of first company and the difference between the price of shares of the first company and the second company on the date of exchange was income chargeable.

8. Now we would deal with the contentions raised by the assessee to the effect that the case was covered under Section 47(vii). The prescription of this section is that any transfer by a shareholder, in a scheme of amalgamation, of a capital asset being shares held by him in the amalgamating company subject to the fulfilment of certain conditions would not be regarded as transfer. From a bare perusal of this section it becomes amply clear that only the cases of amalgamation are covered within the ambit of this clause whereby one or more companies merge together to form one company in such a manner that all the properties and the liabilities of the amalgamating company immediately before the amalgamation become the properties and liabilities of the amalgamated company. In contrast, the facts before us are that it is such an arrangement where both the companies are very much in existence and are maintaining their separate legal entities.

Had the intention of the Legislature been not to treat the conversion of shares in any arrangement other than amalgamation, as is involved in the present appeal, a provision on the lines similar to Section 47(vii) would have been incorporated. In the absence of such a provision, we find it difficult to accept the contention raised on behalf of the assessee in this regard and hold that the present case cannot be considered to be falling in Section 47(vii). Resultantly we find that the case of the assessee is not covered in any of the clauses of Section 47 and since the word "transfer" has been defined under Section 2(47) in an inclusive manner, the assessee cannot escape his liability to tax for this transaction. In view of the legal and factual position discussed above, we do not find any infirmity in the order of the CIT(A).