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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jul-28-2004

Reported in : (2004)91ITD354(Delhi)

Judge : R Easwar, M Nayar

Appellant : impsat (P) Ltd.

Respondent : ito

Judgement :

1. In this appeal by the assessee, two questions arise for consideration: (1) whether a company whose name has been struck off from the register under Section 560 of the Companies Act, 1956 and was thus dissolved, be assessed to tax after dissolution? and (2) whether the amount of Rs. 1,65,29,255 is assessable Under Section 56(1) of the Income Tax Act as a casual and non-recurring receipt?

2. The assessee is a private limited company incorporated to implement the V. Sat project in India, in collaboration with Corporation Impsa S.A. of Argentina. In the financial years ended 31-3-1996 and 31-3-1997, it received share application monies from the Argentinian company in the amounts of Rs. 18,73,500 and Rs. 1,46,55,755 respectively. In the assessments made to income-tax upon the appellant for the assessment years 1996-97 and 1997-98 these amounts were accepted as having been genuinely received by it as share applicant monies pending allotment. On 24th October 2000, the Argentinian company wrote to the assessee-company the following letter (a copy is at page 37 of the paper book): This is to state that the equity advance for share subscription of US Dollar

4,75,000 (four hundred and seventy five thousand) sent to IMPSAT INDIA PRIVATE LIMITED, New Delhi - INDIA, in 1996 may be written off in view of abandoning of VSAT project and CORPORACTION IMPSA S.A. has not claim over it.

Since the assessee company had incurred huge losses, abandoned the VSAT project and did not have my funds to refund the share application monies to the Argentinian company, the latter thought it fit to waive the claim over the share application monies. The board of directors of the assessee thereafter applied to the Registrar of Companies to have the company's name struck off Under Section 560 of the Companies Act.

The Registrar, after going through the procedure prescribed in this behalf, passed an order on 18th September 2001 to the effect that the company's name has been "struck off the Register and the said Company shall stand dissolved on the publication of this notice in the official gazette". A copy of this communication has been filed before us from which it is also seen that the Chief Commissioner of Income Tax, C.R.Building, I.P. Estate, New Delhi 110002 has been marked a copy.

3. On 29-10-2001 the assessee filed a return of income declaring a loss of Rs. 84,290. The return was first processed Under Section 143(1) on 26-3-2002 accepting the loss. Thereafter proceedings were taken with the approval of the CIT to complete the assessment Under Section 143(3). In the course of the assessment proceedings, the AO took the view that the waiver of the share applications monies received by the assessee from the Argentinian company gave rise to a casual and non-recurring income Under Section 10(3) of the Income Tax Act. He also held that such income was taxable Under Section 56(1) under the head "income from other sources", as it is not covered by any of the other four heads of income specified in Section 14, viz., Salaries, House property, Profits and gains of business or profession and income from capital gains. Accordingly he brought the amount of Rs. 1,65,29,255 to tax, and allowed the statutory deduction of Rs. 5000 under Section 19(3). Since no business was carried on by the assessee during the previous year ended 31-3-2001, the brought forward business

loss of Rs. 1.61 crore was not adjusted against the income assessed as above under the head "income from other sources". Certain capital loss (short term) incurred by the assessee was also not set off against the income from other sources, citing Section 71(3).

4. On appeal, the CIT(A) agreed that at the time of receipt the share application monies were capital receipts but the legal ownership and the character of the monies changed on waiver and they became the assessee's own monies. They became revenue receipts in its hands. The contention taken on behalf of the assessee that the character of the receipt which was capital at the time of the receipt, cannot change at a later point of time and become a revenue receipt, was rejected by him on the strength of the judgment of the Supreme Court in CIT v. Karam Chand Thapar (222 ITR 112). The contention that the entire monies have been spent on the abortive VSAT project and nothing remained to be distributed to the shareholders was also rejected on the ground that the fact that expenditure had been incurred out of the share application monies is no ground to hold that there is no income. It was also contended before the CIT(A) that the receipt cannot be considered to be "income" in any case, but this contention also did not find favour with him. In the view of the CIT(A), the waiver resulted in a windfall gain to the assessee and such windfall was nothing but a "casual and non-recurring receipt", as it was not a planned or anticipated receipt. He relied on the judgment of the Calcutta High Court in CIT v. Stewarts and Lloyds of India Ltd (165 ITR 416). In this view of the matter, he confirmed the assessment.

5. The assessee is in further appeal before the Tribunal. In ground No.4, the point taken is that the revenue authorities have erred in framing an assessment of the assessee which had been dissolved on 18-9-2001. It is claimed that the assessee did not exist in the eyes of law on the date when the assessment order was passed and also did not exist when the learned CIT(A) passed the impugned order. The other grounds (from 1 to 3) challenge the addition of the share application monies as casual and non-recurring income.

6. The first point taken goes to the very root of the matter and hence permitted to be taken. The contention is that the assessee-company cannot be assessed at all

since it was not in existence when the assessment order was passed, having been dissolved under Section 560 of the Companies Act, 1956 with effect from 18-9-2001. There can be no doubt about the basic postulate, namely, that the existence of the "person" sought to be taxed at the point of making the assessment is a condition for the validity of the assessment. Under Section 4 of the Income Tax Act, tax is charged on the total income of the previous year of every person. In Ellis C. Reid v. CIT (1930) (5 ITC 100) the Bombay High Court held that an individual, who was alive when the assessment year commenced but had died thereafter could not be assessed through his executor or legal representative. In Patiala State Bank, In re (1941) (9 ITR 95), the Bombay High Court again held that income-tax is not a charge on the business or profession carried on by the assessee, but was a charge on the person carrying on such business or profession, in relation to the income therefrom. The Hon'ble Chief Justice Beaumont observed: "I think that, properly considered, income-tax is a tax on a person in relation to his income. The tax is not imposed on income generally; it is imposed on the income of a person, natural or artificial, as defined in Section 3. The assessment has to be made against a person, and the tax has to be collected form the assessee.

The tax is not made a charge on the income upon which it is levied, and I think, broadly speaking, it is accurate to say that income-tax is a tax imposed upon a person in relation to his income." 617. Therefore, if the charge of tax is on the person in relation to his income and not on the income, the existence of that person at the point of making the assessment is an indispensable requirement. If he is a natural person, and if he dies before the assessment proceedings are set in motion, there have to be express provisions in the Income Tax Act to enable the revenue authorities to initiate proceedings for assessing the person. Such provisions, in the case of an individual, are now to be found in Section 159 and Section 168 of the Act. In the 1922 Act, the provisions of Section 24B were introduced to cover such a case, but they were held applicable only in respect of the income earned by the deceased person up to the date of his death and the income received by his legal representatives or executors up to the end of the previous year in which he died and not beyond (please see Supreme Court judgments in Amarchand N. Shroff (48 ITR 59) and CIT v.James Anderson (51

ITR 345). This lacuna appears to have been filled by the provisions of Section 159 and Section 168 of the present Act. The position under these provisions is as follows. In the year of death, there shall be two assessments, one in respect of the income earned by the deceased up to the date of death and another in respect of the income received by his legal representatives or executors after that date and up to the end of the previous year in which death took place.

Thereafter assessments will be made in respect of the income received by the estate of the deceased person till the estate in distributed to the beneficiaries according to their interests. Such assessments will be made on the executors (or legal representatives) in respect of each assessment year, and they will be separate from the assessments made upon the executors or legal representatives in respect of their individual incomes. The whole procedure comes to an end when the estate left behind by the deceased is completely distributed.

7. In the case of a Hindu Undivided Family (HUF), the position under the 1922 Act initially was that it could not be assessed (as there was no machinery) in respect of the income earned during the previous year if the family was not in existence at the time of making an assessment, having been disrupted by that time. This led to escapement of income and Section 25A was introduced to get over the lacuna (see judgment of the Privy Council in Sir Sunder Singh Majithia (10 ITR 457) and judgment of the Supreme Court in Lakmichand Baijnath v. CIT (35 ITR 416). In the present Act, similar provisions are contained in Section 8. In the case of a firm, special provisions have been enacted in Sections 187 to 189 of the present Act to meet the situation where the firm which earned the income is no longer in existence, having either been dissolved or undergone a change in the constitution. Section 26 and 44 of the 1922 Act dealt with four contingencies - dissolution, discontinuance, succession and change in constitution of the firm. The effect of the relevant sections was discussed by the Supreme Court in the case of Shivram Poddar v. ITO (51 ITR 823). It was held that though under the partnership law every change in the constitution of the firm had the effect of dissolving the firm, the Income Tax Act conferred on the firm a personality which survived such reconstitution and that the assessment should be framed on the firm as constituted at the time of assessment in a such contingencies. In the case of succession of

one firm by another firm, the former was to be assessed in respect of the income until the rate of succession and the latter thereafter. Under the present Act, Section 187 deals with an assessment after a change in the constitution of the firm, the business being continued after the change. Section 188 deals with an assessment on a succession of one firm by another, the business still continuing. It says that assessments shall be made in accordance with Section 170 which provides for general rules for assessment in case of succession to a business otherwise than on death in relation to all entities assessable under the Act, except a natural person such as an individual. The method is not different from the method prescribed under Section 26 of the old Act. Section 189 of the present Act deals with the dissolution of the firm, the business being no longer continued. In such a case, the AO shall make an assessment of the firm as if no such discontinuance or dissolution had taken place. That is, the firm will be assessed as such, notwithstanding the dissolution and every person who was a partner and every legal representative of a deceased partner shall be jointly and severally liable for the amount assessed upon the firm and all the provisions of the Act, such as recovery, penalty, etc. shall apply. The assessment of a dissolved firm was dealt with by Section 44 of the 1922 Act; Section 26 dealt with a change in the constitution of the firm.

9. In the case of dissolution of an association of persons (AOP), section 177 of the present Act makes provision for assessment thereof on the lines of Section 189 noted above.

10. Section 176 of the present Act provides for discontinuance of the business. This section applies to all entities assessable under The Act. A case of the assessable entity itself coming to an end, which also in a sense leads to discontinuance of the business, cannot be said to be covered by the section because separate provisions noted earlier have been made in the Act to deal with such a situation. In another sense, the word "discontinuance" itself supposes that it is only the business that has come to an end and that the entity which carried on the same is in existence or is continuing. A student is said to have "discontinued" his studies if he stops going to school or college, though he may continued to live thereafter. A student who, unfortunately, dies, is not referred to as having

"discontinued" his studies, though that might be the result of his unfortunate death. A railway passenger who unfortunately dies during the journey is not generally referred to as having "discontinued" the journey though that is the result of his death. When Section 176 refers to any business being discontinued, it refers to a conscious or animated or deliberate act of stopping the business. It does not, in our opinion, refer to a discontinuance which is incidental to or the result of the death of the person hitherto carrying on the business. If it were to be so, then the provisions of Section 159 (individual dying) or Section 189 (firm being dissolved) or Section 177 (AOP being dissolved) would become redundant, as they would also cover the same field. Such an interpretation cannot be placed on Section 176.

11. The concept of "discontinuance", in our humble view, presupposes the existence of the entity which carried on the business both before and after the discontinuance. Section 25(3) of the 1922 Act provided for relief from tax in the case of a business which was discontinued in the previous year. This provision was considered by the Bombay High Court in CIT v. Merwanji Kola & Co (68 ITR 663). It was held (at page 670) that the "requirement of the sub-section is that the business should be discontinued and not that the proprietor of the business or the proprietary body which owns the business should be discontinued" and that it was the failure of the AAC, in that case, to make this initial distinction that resulted in an erroneous interpretation of the sub-section. Applying this decision to the present case, it will be seen that since the company itself was dissolved and became extinct with effect from 18-9-2001, it cannot be considered to be a case of "discontinuance" of the business. Section 176 is therefore not attracted.

12. Section 178 of the 1961 Act deals with a company that has gone into liquidation. The general principle in law is that a company under liquidation is still a company within the charging provisions of the At, though it will be represented by the liquidator. He is only an agent of the company; the property of the company does not vest in him.

The legal position is that the liquidator will have to act in regard to the filing of the return after the company goes into liquidation. In Hari Prasad Jayantilal v. V.S. Gupta, ITO, Ahmedabad and Anr. (59 ITR 794) the Supreme Court held so.

13. From the above, he position that emerges is that both under the old Act and the new Act it is absolutely essential that the person sought to be assessed should be in existence at the time of making the assessment and that elaborate provisions were made in the Acts to ensure that if the person sought to be assessed is not in existence at the time of making the assessment, some other person or body or entity was expressly fastened with the liability to be assessed.

14. The contention is that the assessee-company was not in existence after 18-9-2001 on which date it was dissolved under Section 560 of the Companies Act, 1956. In order to appreciate the contention, we need to take a look at Section 560 of the Companies Act. It provides for a summary procedure for putting an end to the corporate existence without going through the cumbersome procedure of liquidation. It confers powers upon the Registrar of Companies to strike the name of the company off the register, if it is a defunct. The Registrar has to follow a prescribed procedure such as giving an opportunity to the company, notification in the gazette and so on. Sub-section (5) provides that after the expiry of the prescribed time, after the publication in the gazette of his intention to strike off the name of the company from his register, during which he has not received any representation from the company, the Registrar may strike the name of the company off the register and shall publish a notification to that effect in the official gazette and "on the publication in the Official Gazette of this notice, the company shall stand dissolved". There is provision for restoration of the name of the company and if the names is restored, Sub-section (7) says that the "company shall be deemed to have continued in existence as if its name had not been struck off".

15. There is a distinction under the company law between winding up or liquidation on the one hand and dissolution of the company on the other. This has been brought out by the Supreme Court in Hari Prasad Jayantilal's case (supra). At page 798, Hon'ble Justice Shah, speaking for the court observed: "On the passing of a special resolution by the company that it be would up voluntarily under the Companies Act, 1956 (1 of 1956), the company does not stand dissolved. That is so expressly provided by Section 487 of the Companies Act. A company which has resolved to be voluntarily wound up may be dissolved in the manner provided

by Section 497(5): till then the company has corporate existence and corporate powers. The property of the company does not vest in the liquidator; it continues to remain vested in the company." 16. The quoted observations show that dissolution is a stage subsequent to the winding up or liquidation, the end of the existence of the company. Till dissolution, the corporate existence continues. It follows, per contra, that once a company is dissolved, its corporate existence comes to an end. It is no longer in existence; it is dead.

17. A reference to page 1901 of A. Ramaiya's commentary on the Companies Act, 1956 (12th Edition by Hon'ble Justice Y.V. Chandrachud (former Chief Justice of India) shows the following extract from Halsbury's Laws of England, fourth edition, Vol.7, para 1448, page 809 under the heading "Effect of dissolution"- "The dissolution puts an end to the existence of the company. Unless and until it has been set aside, it prevents any proceedings being taken against promoters, directors or officers of the company to recover money or property due or belonging to it or to prove a debt due from it. When the company is dissolved, the liquidator's statutory duty towards the creditors and contributories is gone; but, if he has committed a breach of his duty to any creditor by distributing the assets without complying with the requirements of the Companies Act, 1948, he is liable in damages to him".

18. At page 1930 of the same treaties, under the heading "Property after dissolution", it has been stated that the property of the company after dissolution is bona vacantia and escheats to the State. There is also a reference to the judgment of the Supreme Court in Narendra Bahadur Tandon v. Shankar Lal (1982) 52 Comp. Cas. 62, in which it has been held that once a company is dissolved it ceases to exist and thereafter a liquidator cannot represent the company, since it is non-existent.

19. It is thus clear that in the present case the assessee-company ceased to exist after being dissolved under Section 560. Once it ceased to exist, there was no question of assessing it for income-tax, as it appears that there is no provision in the present Act to assess a company which is dissolved. Our attention was not drawn to any provision in the Act enabling the AO to do so. Section 159 of the

present Act does not cure the lacuna. It correspondent to Section 24B of the 1922 Act. Sub-section (1) says that where a person dies, his legal representatives shall be liable to pay any sum which the deceased would have been liable to pay if he had not died, in the like manner and to the same extent as the deceased. Sub-section (2)(b) enables the AO to take any proceeding against the legal representative of a deceased person, which he could have taken against the deceased himself if he had not died and Clause (c) of the sub-section says that the other provisions of the Act shall apply accordingly. Sub-section (3) says the legal representative of the deceased shall, for the purposes of this Act, be deemed to be an assessee. Sub-section (4) makes each and every legal representative personally liable for the tax payable by him in such capacity and Sub-section (6) says that such liability will however be limited to the extent to which the estate is capable of meeting the liability. This section, in the very nature of things and considering the language employed in Sub-section (1), can apply only to individuals or natural persons. In CWT v. G.E. Narayana (193 ITR 41 @ 49) the Karnataka High Court held, while interpreting Section 19 of the Wealth Tax Act which is in pari material with Section 159 of the IT Act, that the word "dies" is normally referrable to the life of a living person, animal or plant and in the absence of any statutory fiction cannot be extended to cover a case of a disruption of a joint family. Similarly, it cannot also cover a case of a dissolution of a company, and there is no statutory fiction extending Section 159 to a case of dissolution of a company under Section 560 of the Companies Act. In the above judgment, it was held (@ page 48 that "a specific provision is necessary to make an order of assessment against a taxable entity which does not exist on the date of the assessment even though the said entity was in existence when the liability to tax arose".

20. The Ld. DR referred to two judgments of the Supreme Court, one in S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. (in liquidation) v. V.M. Deshpande, ITO and Anr., 83 ITR 685 and Imperial Chit Funds Pvt. Ltd. v. ITO, 219 ITR 498. These two judgments, in our opinion, do not affect the point which has arisen in the present case. In S.V. Kondaskar (supra), it was held that the liquidation Court cannot perform the functions of the ITO while assessing the amount of tax payable by the company, even if the assessee is a

company which is being wound up under orders of the Court. The Liquidation Court is not vested with the powers to stop the assessment proceedings for determining the tax payable by the company which is being wound up. It will have full power to scrutinize the claim of the I.T. Department after the tax has been determined and the payment thereof is demanded from the Liquidator. At this stage, it would be open to the Liquidation Court to decide how far under the law, the income-tax assessed by the Department should be accepted as a lawful liability on the funds of the company under liquidation. At this stage, the winding up court can fully safeguard the interest of the company and its creditors. In the case of Imperial Chit Funds Pvt. Ltd. (supra), it was held that while determining the priority of debts in the case of a company which is being would up, the IT. Department is to be treated as a secured creditor. No doubt, the provisions of Section 178 of the I.T. Act were referred to, but they were referred to in an entirely different context, a context which is not similar as in the present case. The Supreme Court in this case pointed out the difference between the Section 530 of the Companies Act and Section 178 of the I.T. Act, a distinction which is not relevant and does not arise for consideration in the case before use. Basically, what was decided in the judgment was the question of priority of department have nothing to do with the controversy that arises in the present case.

21. That takes us to the next question regarding the validity of an assessment on a non-existent person. It is a nullity. Reference may be made to the judgments of the Supreme Court in CIT v. Amarchand N.Shroff (48 ITR 59) and ITO v. Ram Prasad and Ors. (86 ITR 145). These are cases of an individual and a joint family respectively, but the ratio is that there can be no assessment on a dead person. Just as an individual ceases to exist on death and a joint Hindu family ceases to exist on being disrupted, a company cases to exist on being dissolved under Section 560 of the Companies Act. We have already noted the judgment of the Supreme Court in Hari Prasad Jayantilal (supra) as to the effect of dissolution and the treatise of A. Ramaiya on Company Law in this behalf. If the company is not in existence at the time of making the assessment, no order of assessment can be validly passed upon it under the Income Tax Act and if one is passed, it must be a nullity.

22. The next question for our consideration is whether by filing the return of income in October 2001 the assessee-company can be said to have admitted that it continued to be in existence so that the assessment made upon it may be held to be valid. This raises the question whether the assessee can consent to the AO making an assessment upon it, though there is no provision in the Income Tax Act to do so. In Asit Kumar Ghose v. Commissioner of Agricultural Income Tax (22 ITR 77) the Calcutta High Court held that should an assessee file a return or intervene in an assessment proceeding pending against an executor of an estate under the impression that he is liable to be charged as beneficiary of the estate, it is open to him, if he not really liable at law, to appeal in proper time against the order of assessment against him and point out the invalidity of the assessment though he might have, by his conduct, acquiesced in the assessment proceedings. There can be no estoppel against statute. An assessment is to be governed by the provisions of the Act and not on the view which the parties may take as to their rights and liabilities. In CIT v.Bharat General Reinsurance Co. Ltd. (81 ITR 303), the Hon'ble Delhi High Court held, where the assessee itself included the dividend in his return but later challenged the assessment of the same in the year in question, that it must be taken that the assessee had resiled from the position which it had wrongly taken while filing the return. Int eh light of these authorities, the conduct of the assessee before us in filing the return of income and in participating in the proceedings for assessment do not confer jurisdiction upon the AO to assess it, which must really depend upon the effect of the provisions of the Income Tax Act. In the absence of any provision int eh Act to assess a company that has been dissolved and thus ceased to exist, no assessment order can be made against it by the AO. The absence of a provision enabling the AO to do so cannot be supplied by the assessee by merely filing a return and participating in the proceedings.

23. For the above reasons, we accept the first contention and hold that the assessment order passed on the assessee-company is a nullity.

24. The only other point which remains for consideration is whether the share application monies waived by the Argentinian Co. can be assessed as casual or non recurring receipt. The receipt has to be in the nature of income so that it could

be brought to tax. This position is indicated by the opening words of Section 10, which says that in computing the total income of a previous year of any person, any "income" falling within any of the following clauses shall not be included. Clause (3) exempts receipts which are of a casual and non-recurring nature to the extent that they do not exceed Rs. 5,000 in the aggregate. Reading the opening words of the Section together Clause (3), it is clear to us that the receipt referred to should be of income nature. Another aspect of the matter is that the casual and non recurring receipt sought to be assessed by the AO must have been received in the relevant previous year. These two conditions must, in our opinion, co-exist so that the receipt can be brought to tax. In the present appeal, we are concerned with the AY 2001-02, for which the previous year ended on 31.3.01. The share application monies were not received during this previous year. Admittedly, they were received partly in the previous year ended 31.3.96 and partly in the previous year ended 31.3.97. What provoked the AO to treat the share application monies as having been received in the relevant previous year is the fact that the Argentinian Co. wrote a letter to the assessee waiving the monies on 24.10.2000, which date falls within the previous year relevant to the asstt. year under appeal. In our opinion, the waiver cannot be construed as actual receipt of the monies during the relevant year.

25. The next question to be considered, assuming for the sake of argument that the waiver amounts to constructive receipt of the share application monies during the relevant previous year, is whether those monies can be treated as the assessee's income. On this question, we are of the view that the monies cannot be treated as income. The monies were received by the assessee towards issue of shares. If the V. Sat project had taken off and had proceeded as per the assessee's plans, there is no doubt that the company would have become operational and, therefore, the share application monies would have been converted into share capital. The receipt of share capital by issue shares can never be considered as the income of a company. What unfortunately has happened is that the project was aborted and had to be abandoned. In the normal course, the share application monies would have had to be returned to the Argentinian Co., at least to the extent of the assets held by the assessee company, under the relevant provisions of the Companies Act, 1956. That would

have only amounted to the return of the capital. By waiving their right to get back the capital contributed by them or any part of it, the Argentinian Co. was only giving up its right over the capital contribution. This, by any stretch of imagination cannot result in the assessee retaining the share application monies as its income.

26. We may briefly refer to ta few authorities that were cited before us. The assessee heavily relied on the judgment of the Supreme Court int eh case of Travancore Rubber and Tea Co. Ltd. v. CIT, 243 ITR 158; the importance of this judgment, so far as the present case is concerned, is that it considers the earlier judgment of the Supreme Court in CIT v. Karam Chand Thapar, 222 ITR 112, a judgment on which heavy reliance has been placed by the I.T. Authorities. In the case of Karam Chand Thapar, it was held that the proposition enunciated by the Court of Appeal in the case of Morley v. Jattersall (7 Tax Cases 316) (CA), to the effect that the quality of nature of a receipt for income-tax purposes was fixed once and for all when the subject of the receipt was raised and any subsequent operation could not change the nature of the receipt, was not an absolute rule and that in given cases amounts which were not received initially as trading receipts could eventually be regarded as business income by reason of subsequent event, provided the subsequent events is such that a different quality is imprinted on the receipt. An example of such subsequent event was given in the case of Jay's - Jewellers (29 Tax Cases 247), a decision which was cited in Karam Chand Thapar's case (supra). In this case, the firm sold certain property belonging to the customers. The money was to be paid over to the customers. However, the customers did not make any claim against the firm and, therefore, the firm took it to the P&L A/c.

In this situation, it was held by the Court in England that when no demand for payment was made, common sense requires that the amount should be entered into the P&L A/c for the year and be treated as taxable. Dealing with this decision of the Court in England as well as its earlier judgment in the case of Karam Chand Thapar (supra), the Supreme Court in the case of Travancore Rubber & Tea Co. Ltd. (supra) held that a cancellation of a sale of a capital assets would not be such a subsequent event so as to change the nature of the receipt of the forfeited amounts. In this case, the assessee entered into agreements for sale of old and

unyielding rubber trees and received advance consideration. The sale did not go through. The Civil Court ruled that the assessee could retain the advance monies received from the prospective purchasers. The I.T. Authorities treated the amounts as the assessee's income. The matter ultimately reached the Supreme Court.

The Supreme Court observed that had the sale gone through, there would be no question that the advance would have been subjected to capital gains tax (and not as income). The question was whether the character of the receipt changed because the sale was not subsequently effected.

The Supreme Court referred to Section 51 of the I.T. Act where it was provided that any advance monies received and retained by the assessee shall be deducted from the cost in computing the capital gains. If the advance monies are to be reduced from the cost of the capital asset, then according to the Supreme Court there was a clear indication that such monies, when retained because of forfeiture can only be treated as capital receipt. The Supreme Court also held that the matter can be looked at from another angle, namely, that the amount was received for breach of contract and, therefore, cannot be treated as income of the assessee. In this connection, it was held that if the agreed sums of money under the sale agreements had been received by the assessee, they would have been credited in its account as a capital receipt and that being so, the forfeited amounts must also be treated as capital receipt. In the present case, though there is no breach of contract, the principle laid down by the Supreme Court applies with equal force.

As already noted by us, if the company had become operational, there is no doubt that the share capital received from the Argentinian Co. would have been credited in its account as a capital receipt and that, if so, the share application monies waived by the Argentinian Co. must also be treated as a capital receipt. The waiver of the amount by the Argentinian Co. is not such a subsequent event imprinting a different quality to the original receipt so as to change the nature of the receipt itself. The original receipt was undoubtedly capital and the waived does not have the quality of changing the same into a revenue receipt.

27. We are not referring to the other authorities cited on behalf of the revenue, because its main reliance was on the judgment of the Supreme Court in the case of Karam Chand Thapar (supra). The other authorities cited by it are not similar to the present case on facts.

The only other authority which we need to refer is the judgment of the Supreme Court in the case of Emil Webber v. CIT 200 ITR 483. This case is not a case similar on facts to the present case. The general proposition laid down is that the definition of income in Section 2(24) is an inclusive definition adding several artificial categories to the concept of income, but on that account it does not lose its natural connotation. Anything which can be properly described as income is taxable unless exempted. It is equally true that what is taxable under the Act is only income and not capital and if a capital receipt is to be treated as income there has to be specific provision to that effect.

The artificial categories of income added Under Section 2(24) do not cover a receipt of the kind with which we are concerned in the present case. The natural connotation of the expression "income" does not take in the receipt of share application monies. This judgment of the Supreme Court does not, therefore, assist the revenue.

28. For the above reasons, we hold that the amount of Rs. 1,65,29,255 cannot be assessed as casual and non-recurring receipt Under Section 10(3) of the Act. Ground Nos. 1, 2 & 3 are accordingly allowed.