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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision : 16th, July, 2012.

\+ ITA 423/2012

AJAY GULIYA ..... Appellant
Through Mr. Gagan Kumar and Mr. Amish Tandon, Advs.

versus

ASST COMMISSIONER OF INCOME TAX,NEW DELHI ..... Respondent
Through Mr. Sanjeev Sabharwal and Mr. Kiran Babu, sr. standing counsels

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

S. RAVINDRA BHAT,J: (ORAL)

The appellant is aggrieved by an order dated 17.2.2012 of the ITAT by which the revenue's appeal, against the order of the CIT(A) was allowed.

2. The assessee claims in this appeal the following substantial question of law arises for consideration i.e. "whether the Tribunal fell into error in holding that the amount of Rs.26,25,000/-, which was yet to be received by the assessee, was subject to tax under the head 'capital gains' under Section 45 of the Income Tax Act ('Act', for short)".

3. The brief facts of the case necessary to decide the appeal are that the appellant is a shareholder of one Orion Dialog Pvt. Ltd. It divested its shareholding (1500 shares) in favour of M/s Essar Investments Ltd. through a Share Purchase Agreement ('SPA', for short) dated 15.2.2006. The appellant had offered a sale consideration of

Rs.60 lakhs being the price of 1500 shares at Rs.4,000/- per share. The SPA was concerned with the sale of 20,000 shares of the Orion Dialog of which the appellant held 1500 shares. The total consideration agreed upon in respect of each share of Rs.5750/- of which Rs.4000/- became payable on the execution of SPA and the balance was payable over a period of two years.

4. The Assessing Officer by assessment order dated 24.12.2008 held that the entire income accruing to the assessee was reckonable as capital gains. Aggrieved, the appellant approached the Commissioner of Income Tax (Appeals) who by the order dated 5.9.2011 allowed the appeal holding that such part of the consideration which was payable in future did not constitute income for the relevant assessment year and that the assessee would become entitled to it on the fulfillment of certain conditions which could not be predicated. On appeal by the Revenue, the ITAT in its impugned order took into consideration the submissions of both sides and posed the issue under :

> *"6. We have considered the facts of the case and submissions made before us. The facts of the case in so far as the assessee is concerned are that he transferred 1500 shares of Orion Dialog to Essar Investments Ltd. The overall consideration was Rs. 86.25 lakh. However, in this year a sum of Rs. 60.00 lakh only was received. The balance was to be received in three succeeding years subject to fulfillment of certain conditions by Orion Dialog. In the course of hearing, it has been ascertained that the whole of the cost has been claimed by the assessee while computing capital gains by taking the sale consideration at Rs. 60.00 lakh. The question is whether, the whole of the sale proceeds of Rs. 86.25 lakh or only a sum of Rs. 60.00 lakh is liable to be considered for the purpose of levy of capital gains?"*

Before the Tribunal, the assessee relied upon the decision of Advance Ruling Authority in ***Anurag Jain*** (2005 (227) ITR 1 (AAR)) and the judgment in ***Commissioner of Income Tax Vs. Bharat Petroleum Corporation*** (1993) 202 ITR 492 (Cal); ***CIT Vs. Ashokbhai Chimanbhai*** (1965) 56 ITR 42 (SC). ITAT

considered and discussed each one of these decisions in the impugned order in paras 6.6 and 6.9. It held in favour of the revenue reasoning as follows :

> *"6.1 We may at the first instance examine the statutory provisions contained in sections 45 and 48 in so far as they concern us. Section 45(1) provides that the profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to income tax under the head "capital gains", and shall be deemed to be the income of the year in which transfer takes place. There is no doubt that the transfer of shares has taken place in this year. The agreement has been signed in this year and the shares have been delivered in this year. On prima facie reading of this provision, which is in the nature of charging section, it will be clear that the capital gains are chargeable in the year of transfer as they are deemed to be the income of the previous year in which the transfer takes place. Section 48 regarding "mode of computation" is the machinery provision and the computation under it starts with ascertainment of the full value of consideration received or accruing as a result of the transfer. This provision does not speak of the year of accrual or receipt. This provision has to be read in conjunction with section 45 with clear understanding that it cannot over-ride section 45 implicitly. The reason for lack of the year in latter provision is that all sums accruing or received in connection with transfer are liable to be taxed in the year in which transfer takes place. With these preliminary remarks, we may examine the cases relied upon by the ld. counsel.*
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> *6.2 In the case of CIT Vs. Ashokbhai Chimanbhai (1965) 56 ITR 42 (S.C.), the question before the court was-whether, on the facts and in the circumstances of this case, the five annas share of the income of Amrit Chemicals or any part thereof for the year 01.01.1955 to 31.12.1955, accrues to the assessee and whether it could be charged in his hand? At page 45 of the report, it is mentioned that under the Income Tax Act, income is taxable when it accrues, arises or is received, or when it is by fiction deemed to accrue, arise or is deemed to be received. Receipt is not the only test of chargeability to tax; if income accrues or arises it may become liable to tax. For the purpose of this case it is unnecessary to dilate upon the distinction between the income "accruing" and "arising". But there is no doubt that these two words are used to contra-distinguish the word "received". Income is said to be received when it reaches the assessee: when the right to*

receive the income becomes vested in the assessee, it is said to accrue or arise.

6.3 In the case of CIT Vs. Bharat Petroleum Corporation Ltd. (1993) 202 ITR 492, the main question before the court was-whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the sum of Rs. 44,47,482/- representing additional claim under COPE scheme (realized by the assessee during the relevant previous year by way of adjustment and never refunded to the Government) did not accrue to the assessee during the previous year relevant to assessment year 1975-76? At page no. 500 of the report, it is mentioned that the claim made by the assessee for the additional sum of Rs. 44,47,482/- is a mere claim and the said claim apparently was not in accordance with the clear directive of the Ministry of Petroleum, hence, the said amount cannot be said to have ripened into an income accruing to the assessee during the relevant year. The assessee maintains its account on mercantile basis. The said sum cannot be treated as assessee's income because during the relevant year the assessee had not acquired any legal right to receive the same. The amount can accrue or arise to the assessee if it acquires a legal right to receive the amount or conversely said amount has become legally due to the assessee from the debtor. Mere raising of a claim or bill does not create any legal enforceable right to receive the same.

6.4 The ld. counsel drew our attention towards the head notes in the case of Anurag Jain (supra). The Authority ruled that –(i) the contingent payments were in substance and reality payments for ensuring performance under the employment agreement to achieve the desired object in exceeding threshold earnings before interest, tax and depreciation allowance, and had no real nexus with the consideration for sale of shares; (ii) the entire capital gain had to be assessed in assessment year 2004-05 as the sum of US$ 2.30 million was received on 01.07.2003; and (ii) the contingent payment had nexus with performance of the assessee for achieving defined target and had connection with not carrying on any activity in relation to any business. The consequence of failure was termination of the agreement coupled with not making further contingent payments as well as refunds of such payments if already received. These contingent payments did not fall u/s 25(va).

6.5 This decision was a matter of writ petition before Hon'ble Madras High Court. The questions before the Hon'ble Court were as under:-

> *"(i) Whether the gains arising from the transfer of 15,000 equity shares in M/s Vision Health Source India (P) Ltd. covered by the share purchase agreement dated 15th April, 2003 read with exhibits A and B namely which are share purchase agreement and associated employment agreement respectively is chargeable to capital gain taxes or not either wholly or in part ?*
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> *(ii) If the aforesaid gains arising from the above transfer is liable to be charged to capital gain tax either wholly or in part, in which year of assessment does the liability to pay capital gain taxes arise for the following amount received/receivable as consideration for the transfer of shares aforesaid, which, in aggregate amounts to 93 lakh US dollars (9.3 million U.S. dollars) termed as purchase price as per clause 1 of the share purchase agreement dated 15th April, 2003?*
>
> *(i) Initial lump sum payment equal to 23 lakh US dollars (2.3 million US dollars) (referred in the share purchase agreement as the closing payment) received on July 1, 2003 in the previous year relevant to assessment year 2004-05.*
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> *(ii) Contingent payment as per clause (1) of the share purchase agreement dated April 15, 2003 (exhibit A) receivable for each of the three years in the following terms:*
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> *Having regard to the fact that these amounts, contingent on the existence of the EBITDA, namely earnings before interest-tax depreciation allowance, can be determined only when the EBITDA as per clause (1) of the said share purchase agreement dated April 15, 2003 relating to the three contingent payments as defined in clause (1) therein is computed.*

By whom paid and Nature of payment	*Year in which to be paid*	*Where defined*
Payer and provider first year contingent	*For year ended 31.3.2004*	*Exhibit A*

payment

Payer and provider second year contingent payment	*For year ended 31.3.2005*	*Exhibit A*
Payer and provider third year contingent payment	*For year ended 31.3.2006*	*Exhibit A*

(iii) If the gains arising from transfer of shares aforesaid are not to be charged as capital gains, either wholly or in part, under what head of Income the contingent payments made to/received by the applicant towards the transfer of shares covered by the aforesaid share purchase agreement dated April 15, 2003, read with exhibit attached thereto are taxable and in which of assessment ?

6.6 The Hon'ble Court dismissed the writ petition by mentioning that the two documents, namely, associated employment agreement and share purchase agreement cannot be said to be totally different as one document is inter-linked with the other. This becomes clear from question no. 3. Therefore, the AAR was competent to take into consideration the share purchase agreement and other exhibits connected thereto. Since the associated employment agreement is exhibit B, which forms part of the agreement, therefore, it cannot be said that the Authority has acted beyond its power while deciding the reference.

6.7 We may now consider the facts of the case in the light of these decisions. In the case of Ashokbhai Chimanbahi (supra), the Hon'ble Court has distinguished between the word "received" and the words "accruing" and "arising". But it is also mentioned that under the Income tax Act, income is taxable when it accrues, arises or is received, or when it is by fiction deemed to accrue, arise or is deemed to be received. Section 45 contains a fiction that profits and gains arising from transfer of a capital asset shall be deemed to be the income of a previous year in which the transfer takes place. Therefore, the words "received" or "accruing" in section 48 shall have to be read in conjunction with the provision contained in section 45(1). This

means that full value of consideration received or accruing in any year as a result of transfer of the capital asset shall be taxed in the year in which transfer takes place irrespective of the year of accrual or receipt.

6.8 In the case of Bharat Petroleum Corporation Ltd. (supra), it has been held that an income accrues when the assessee gets a legal right to enforce the amount against the debtor. In this sense, income might have accrued in different years but by dint of fiction contained in section 45(1), income accruing in different years or received in different years is chargeable in the year in which transfer takes place.

6.9 The decision in the case of Anurag Jain (supra) has been rendered under totally different set of facts. In this case, the payment for consideration of shares was inter-linked with the performance of the assessee and not the company whose shares were transferred. The question was regarding taxation of the capital gains and contingent payments under the head "salary". The instant case is one of transfer of shares simpliciter. The payment of additional consideration does depend upon performance of the assessee. There is no provision regarding cancellation of the agreement in case of failure to achieve targets. Therefore, the facts of the case distinguishable.

6.10 In view of the deeming fiction contained in section 45(1), it is held that the whole of consideration accruing or arising or received in different years is chargeable under the head capital gains in the year in which the transfer of shares has taken place. It may be mentioned here that the exception to sub-section (1) are provided in other sub-sections. The case of the assessee does not fall in any of the exceptions. Undoubtedly and admittedly the shares have been transferred in this year. Therefore, we agree with the AO that the whole consideration of Rs. 86.25 lakh is chargeable to tax as capital gains in this year. The assessee has also claimed the whole cost. Therefore, the order of the ld. CIT(Appeals) is set aside and that of the AO is restored.

5. The appellant's counsel relied upon the judgments cited before the Tribunal. He submits that decision of the Supreme Court in ***CIT Vs. B C Srinivasa Shetty***, AIR 1981 SC 972 = (1981) 128 ITR 294 (SC) lays down that the provisions of Section 45 are not to be read in isolation but have to be read along with Section 48 which have to be

considered by the Court in order to arrive at the true nature of the transactions. Particular emphasis was given to the following observations :

> "*Section 45 charges the profits or gains arising from the transfer of a capital asset to income-tax. The asset must be one which falls within the contemplation of the section. It must bear that quality which brings section 45 into play. To determine whether the goodwill of a new business is such an asset, it is permissible, as we shall presently show, to refer to certain other sections of the head, "Capital gains". Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All transactions encompassed by section 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by section 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the Income-tax Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head.*

6. Ld. counsel submitted that the entire consideration agreed in the present case of Rs.86.25 lakhs was not payable at one go and that the parties had specified conditions which were to be fulfilled before the balance of Rs.26.25 lakhs was to be received. Ld. counsel emphasizes that even though the parties have agreed upon the valuation, much depends on the performance of the company which were the subject matter of sale. Therefore, the balance amount of Rs.1750/- per share (Rs.5750 – Rs.4000) depended on the performance of the company and fulfillment of the aggravated parameters and that it could never be said to have "arisen" or "accrued" during the relevant assessment year as the assessee became entitled to the same only upon fulfillment of these conditions. In other words, ld. counsel emphasizes that the transferor/assessee could not claim the balance amount unless the essential pre-requisites had been fulfilled. Counsel also relied upon the newly added provisions of Section 50D and contended that having regard to the complexities of modern day transactions in capital assets, the rules have to be restated. In the extract reproduced above it has been clarified by the Supreme Court that Section 45 charges the profits or gains arising from the transfer of a capital asset to income-tax. The Court was clear that Section 45 is the charging section and ordinarily acquires primacy whereas Section 48 is merely computing mechanism. However, the Court at the same time said that in order to arrive at chargeability of taxation both the sections have to be looked into and read together. There cannot be any quarrel with that proposition. Equally, the decision of Ashokbhai Chimanbhai (supra) was in the context of disruption of Hindu Undivided Family where profits of business have to be accounted for in different periods. The observations made by the Court as to what constitutes accrued for the purpose of income tax no doubt would apply but at the same time this Court notices that they are of a general character.

7. The reasoning of the Tribunal is premised upon the fact that capital assets were transferred on a particular date the asessees passed on the execution of the agreement.

There is no material on the record or in the agreement suggesting that even if the entire consideration or part is not paid the title to the shares will revert to the seller. In that sense the controlling expression of "transfer" in the present case is conclusive as to the true nature of the transaction. The fact that the appellant assessee adopted a mechanism in the agreement that the transferee would defer the payments would not in any manner detract from the chargeability when the shares were sold.

8. It was lastly submitted that the Tribunal's findings are based upon its understanding about the characterization of the receipt and it has not dealt with the deeming fiction about the accrual which is dealt with by Section 48. We are unable to agree. The tenor of the Tribunal's order is that the entire income by way of capital gains is chargeable to tax in the year in which the transfer took place. This is what is stated in Section 45(1). Merely because the agreement provides for payment of the balance of consideration upon the happening of certain events, it cannot be said that the income has not accrued in the year of transfer.

9. In view of the above reasoning we are of the opinion that no substantial question of law arises for consideration. We are in agreement with the decision of the Tribunal. The appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

R.V.EASWAR, J

JULY 16, 2012
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