

(2017) 06 BOM CK 0226

Bombay High Court (Nagpur Bench)

Case No: Income Tax Appeal No. 73 Of 2002

B.A. Mohota Textiles Traders Pvt.
Ltd

APPELLANT

Vs

Deputy Commissioner Of
Income Tax And Anr

RESPONDENT

Date of Decision: June 12, 2017

Acts Referred:

- Income Tax Act, 1961 - Section 2(47), 45, 47, 47(v), 260A

Hon'ble Judges: M.S. Sanklecha, J; Manish Pitale, J

Bench: Division Bench

Advocate: C.J. Thakkar, S.C. Thakkar, B.N. Mohta

Final Decision: Dismissed

Judgement

M.S. Sanklecha, J

1. This appeal under Section 260A of the Income Tax Act, 1961 (Act) challenges the order dt.23.4.2002 of the Income Tax Appellate Tribunal,

Nagpur (Tribunal) relating to Assessment Year 1995-96.

2. This appeal was admitted on 23 March, 2007 on the following substantial questions of law:

a) Whether in the facts and circumstances of the case and in law the Tribunal was right in holding that the transaction of transfer of shares by the

assessee company in pursuance of family arrangement amounted to transfer and was exigible to capital gains tax ?

b) Whether in the facts and circumstances of the case and in law the Tribunal was right in not accepting the fact that the transfer of shares by the

assessee company being only incidental and in consequence of allotment and control of management of companies in pursuance of family

arrangement, took the transaction out of purview of Section 2 (47) of I.T. Act, 1961 ?

c) Whether in the facts and circumstances of the case and in law merely because the assessee/company has a corporate veil, will it make the transfer

of shares by it assessable to capital gains tax even though such transaction is in pursuance of family arrangement ?

3. It is agreed between the parties that Question (a) above brings out the real controversy between the parties, Questions (b) and (c) are mere facets

of Question (a).

4. This appeal relates to A.Y. 1995-96.

5. The brief facts leading to this appeal are as under:

(a) The appellant is a Private Limited Company. Over 80 % of its share capital is held by the family members of Mr.Girdhardas Mohota, Mr.Gwaldas

Mohota and Mr.Ranchhoddas Mohota referred to by the Tribunal as Groups 'A', 'B' and 'C' respectively. The Mohota family, besides holding a

majority stake in the appellant/Company, had joint interest in various other Limited Companies and Partnership Firms, besides the family also owned

immovable properties jointly.

(b). Disputes and differences arose between three groups of Mohota family i.e. Groups A, B and C. Consequently, with a view to settle the

differences between them and restore family peace and harmony, it was decided by the three groups to refer their dispute by an agreement

dt.15.1.1994 to the sole arbitration of Mr. Justice S.W.Puranik. The scope of reference to the Arbitration were as under:

(a) Allotment and/or division of properties mentioned in schedule 'B' and related matters;

(b) Allotment, management and control of partnership firms and limited companies mentioned in schedule 'A' and related matters;

(c) All matters connected with or related to or ancillary to the above referred matters; and

(d) To give suitable orders and directions for implementation thereof .

(c). On 30.4.1994, Justice Puranik rendered his Arbitration Award by way of family settlement. The Arbitration Award thereafter became decree of the Court dt.7.11.1994 under the erstwhile Arbitration Act, 1940. The above Award distributed the properties belonging to Mohota family amongst its three groups. The Appellant/assessee was allotted to Group 'B'. M/s.R.S.Rekchand Mohota Spinning and Weaving Mills Ltd. and M/s. Vaibhav Textiles Pvt. Ltd. were allotted to Groups 'A' and 'C' collectively.

(d) Thus, the settlement inter alia required members of Group 'B' (Mr.Gwaldas Mohta group), who were in control of appellant/assessee, to transfer the shares held by the appellant/assessee in M/s.R.S.Rekhchand Mohta Spinning and Weaving Mills Ltd. and M/s. Vaibhav Textiles Mills Ltd. in favour of members of Groups 'A' and 'C' collectively i.e. Mr.Girdhardas Mohota and Mr.Ranchhoddas Mohota. The Award directed the transfer of shares at a consideration of Rs.225/- per share of M/s.R.S.Rekchand Mohota Spinning and Weaving Mills Ltd. and at a consideration of Rs.10/- per share of M/s. Vaibhav Textiles Mills Ltd.

(e) Therefore, the appellant/assessee in terms of the Award transferred 25,650 shares held by it in M/s.Rekhchand Mohta Spinning and Weaving Mills Ltd. and 1,22,000 shares held by it in M/s. Vaibhav Textiles Pvt. Ltd. to the members of the family of Group 'A' and Group 'C'.

(f). On 30.11.1995, the appellant/assessee filed return of income for the Assessment Year 1995-96 declaring an income of Rs.58.35 Lakhs. During the Assessment proceedings, the appellant/assessee contended that transfer of shares in M/s.Rekhchand Mohota Spinning and Weaving Mills Ltd. and M/s. Vaibhav Textiles Pvt. Ltd. to members of Group 'A' and 'C' was done in pursuance of family arrangement/settlement as reflected in the Arbitration Award dt.30.4.1995. Therefore, it was contended that no Capital gains would be attracted as there was no transfer as it was working out of family settlement/arrangement. However, the Assessing Officer, by order dt.7.4.1997, negated the same and inter alia held that the Company being a separate legal entity distinct from its share holders, cannot be as part of family settlement/arrangement. Thus, transfer of shares done by independent entity such as the Appellant/assessee would not be covered by the 'Family Settlement' and consequently, brought the transfer of 25,650

shares for consideration of Rs.225/- per share of M/s.Rekhchand Mohota Spinning and Weaving Mills Ltd. and 1,22,000 shares for consideration of

Rs.10/- per share of M/s.Vaibhav Textiles Pvt. Ltd. to Capital Gains Tax. Resultantly, it determined the total income of the appellant for the

Assessment Year 1995-96 at Rs.66.80 Lakhs.

(g). Being aggrieved, the appellant carried the issue in appeal to the Commissioner of Income Tax (Appeals) {CIT(A)}. By an order dt.17.6.1998, the

CIT accepted the position in law that family settlement cannot amount to transfer or create any interest and it is binding upon all the members of the

family. However, the same can only be applied to members of the family who are parties to the settlement. In this case, the appellant/assessee was a

Company incorporated under the Companies Act having a distinct and independent entity from its share holders. Thus, while holding that the Award

dt.30.4.1994 is a family settlement, the same can only be applied to members of Mohota family, who were party to the proceedings before the

Arbitrator and not to a Limited Company such as Appellant/Company. Therefore, notwithstanding the fact that the Appellant/assessee was under

control and management of the members of Mohota family, who were part of family settlement, yet the transfer of shares by the Company would be

covered within the meaning of Section 2(47) of the Act so as to be assessable to Capital Gains Tax. Thus, the appeal of Appellant/assessee was

dismissed by the order dated 17.6.1998 of the CIT (A).

(h) Being aggrieved with the order dated 17.6.1998 of the CIT(A), the Appellant/assessee preferred an appeal to the Tribunal. The impugned order

dtd. 23 April, 2003 upheld the view of the lower Authorities by holding that a family settlement would not amount to transfer as it only recognizes pre-

existing rights. However, it held that the Appellant/assessee (even if controlled by members of a family), on incorporation as a Limited Company

becomes a separate legal entity and the members who own shares in the Company and the Company are in law different persons. It held that there

exists a veil between the members of the Company and the Company. Thus, the family settlement arrived at between the members of a family will not

inure to the benefit of the Appellant/assessee as it is not a member of the family. Consequently, the impugned order dated 23.4.2002 of Tribunal

dismissed the appellant/assessee's appeal.

6. Being aggrieved with the impugned order, the Appellant/assessee is in appeal before us on the substantial questions of law as reproduced above.

7. Mr.S.C.Thakkar, learned Counsel for the appellant/assessee in support of the appeal submits as under:

(a) It is undisputed position as settled by the Apex Court that a family settlement/arrangement would not give rise to any transfer. The transfer of

shares by the Appellant/assessee was in pursuance of and to give effect to the family arrangement as reflected in the Award dt.30.4.1994. There was

no choice with the Appellant/assessee not to transfer the shares and such transfer of shares cannot be seen de hors the family arrangement. Thus, it

is submitted that the entire transaction has to be looked at wholistically.

(b) The corporate veil can be lifted to ascertain the real nature of the transaction and the person behind the transfer. In support, reliance is placed

upon the decision of the Calcutta High Court in the case of Shaw Wallace and Company Ltd. vs. Commissioner of Income Tax reported in 119 ITR

399.

(c) The transfer of shares was mere adjustment of rights between the parties and no consideration has been received by the appellant/assessee The

fair market value attributed to the shares by the Arbitrator was only for ascertaining and adjusting the rights of the parties to reach a family

settlement.

8. As against this, Mr.Mohta, learned Counsel appearing for the Revenue submits as under:

a) The appellant/assessee is a Company incorporated under the Companies Act having a separate and independent existence, different from that of

it's share holders/members. Thus, the distinction between the incorporated Company and it's members cannot be ignored.

b) It is undisputed that the appellant/assessee who has transferred the shares of M/s.R.S.Rekhchand Mohota Spinning and Weaving Mills Ltd. and

M/s. Vaibhav Textiles Pvt. Ltd. are not members of Mohota family and therefore, they were not part of family settlement. Consequently, the

Arbitration Award dt.30.4.1994 arrived at as a family settlement cannot, in any manner, have any impact on the appellant/assessee's liability to tax

under the Act.

c) Transfer done by the appellant/assessee of its shares in M/s.R.S.Rekhchand Mohota Spinning and Weaving Mills Ltd. and M/s. Vaibhav Textiles

Pvt. Ltd. to members of Groups 'A' and 'C' is a transfer within the meaning of Section 2(47) of the Act. It does not fall under any of the exclusions

provided in Section 47 of the Act. Thus, the impugned order dated 23 April, 2002 calls for no interference.

9. We have considered the rival submissions. There is no dispute before us that a family arrangement/settlement would not amount to a transfer. In

fact, all the three Authorities under the Act have not disputed the aforesaid position in law. So far as the members of Mohota family are concerned,

who are parties to the family settlement, any transfer inter se between them on account of family settlement would not result in a transfer so as to

attract the provisions of the Capital gain tax under the Act. However, in the present case, we are not concerned with the members of Mohota family

who were parties to the family settlement, but with transfer of share done by the Company incorporated under the Companies Act having

separate/independent corporate existence, perpetual succession and common seal. This Company is independent and distinct from its members. In

fact, this principle dates back to the decision of House of Lords in Saloman .vs. Saloman & Co. Ltd., 1897 AC 22. Our Court in T.R. Pratt (Bombay)

Ltd. vs. E.D. Sassoon and Co. Ltd., AIR 1936 (Bombay) 62 has observed as under:

As held in 1897 A.C. 22 (23), under the law, an incorporated Company is a distinct entity and although shares may be practically controlled by one

person, in law a Company is a distinct entity and it is not relevant to enquire whether the directors belonged to the same family or whether it is

compendiously described 'a one-man Company'.

10. However, the Courts have permitted the lifting of corporate veil to prevent injustice. One such class of cases, where the Court has disregarded the

corporate entity is where it is used for tax evasion. A classic illustration of this is found In Re. Dinshaw Maneckjee Petit, AIR 1927 (Bombay) 371,

where the Court lifted the corporate veil as it found that "the Company in this case was formed by the assessee purely and simply as a means of

avoiding super tax and that the Company was nothing more than the Assessee himself. It did no business but was created purely and simply as a legal

entity to ostensibly receive dividends and interest and handed them over to the assessee as pretended loan". In the present case, the Revenue does not

seek to lift the corporate veil. It is not the case of the Revenue that the Corporate identity is a sham and it has been formed only to circumvent the

law. In this case, it is the Assessee which seeks to lift the corporate veil so as to identify the members of the Assessee/Company as those who

entered into family settlement as reflected in the Arbitration Award dt.30.4.1994 and call upon the authority to ignore the corporate existence of the

Appellant. This lifting of the corporate veil is not allowed when it is not for the benefit of the Revenue. The Apex Court in the case of M/s. Bacha F.

Guzdar vs. CIT, 27 ITR 1 has inter alia observed that "A shareholder has no interest in the property of the Company..... It has only a right to

participate in the profits of the Company as and when the Company decides to divide them. The Company is a juristic person and is distinct different

from its share holders. It is the Company which owns the property and not the share holders." Therefore, the attempt of the share holder to lift the

corporate veil at the instance of the share holder was rejected. In this case also, shares in M/s.R.S.Rekhchand Mohota Spinning and Weaving Mills

Ltd. and M/s. Vaibhav Textiles Pvt. Ltd. are held by the appellant/assessee and not its members. The members, therefore, cannot claim any rights to

the property of appellant/assessee Company i.e. shares of M/s.R.S.Rekhchand Mohota Spinning and Weaving Mills Ltd. and M/s. Vaibhav Textiles

Pvt. Ltd. as rightly held by the Authorities under the Act.

11. The submission of learned Counsel Mr.Thakkar that the entire transaction should be looked at holistically bearing in mind the purpose and object

of the settlement as recorded in the Arbitration Award dt.30.4.1994 so as to settle the dispute between members of the family and it was to achieve

aforesaid objective that the shares in the appellant/assessee were directed to be transferred. The objective/purpose of family settlement would restrict

itself only to the persons who entered into the family arrangement and are part of the settlement. It cannot extend to the persons who are strangers to

the settlement. In this case, admittedly, the Appellant/assessee is not a member of Mohota family so as to be a part of the family settlement. The

appellant/assessee having been formed under the Companies Act have certain advantages and disadvantages attached to it. But once a Company

comes into existence under the provisions of the Companies Act and it is considered to be an independent entity, then it's obligation under the law as a

separate legal entity has to be complied with and settlement arrived at between it's members cannot discharge the appellant/assessee from complying

with it's obligations under the Law. It was also contended that the Appellant/assessee had no volition in transferring the shares. This submission

overlooks the fact that an artificial entity such as a Company only acts through it's Directors and in no case, does the Company has a mind of it's own

to decide the course of action to be adopted.

12. It was also submitted that no consideration was received by the Appellant/assessee for the transfer of shares. It is submitted that the fair market

value of M/s.R.S.Rekhchand Mohota Spinning and Weaving Mills Ltd. arrived at Rs.225/- per share and that of M/s. Vaibhav Textiles Pvt. Ltd.

arrived at Rs.10/- per share by the Arbitrator was only for the purposes of adjustment of rights amongst the parties. This submission overlooks the

fact that the Arbitration Order annexed to the decree (Page 62 of the Appeal memo) itself records that the shares in M/s.R.S.Rekhchand Mohota

Spinning and Weaving Mills Ltd. and M/s. Vaibhav Textiles Pvt. Ltd. are to be transferred at a consideration of Rs.225/- and Rs.10/- per share

respectively. Thus, the consideration has been determined and accepted by the members of the family, who are in management of the

Assessee/Company.

13. Mr.Thakkar, learned Counsel also placed reliance upon the decision of the Calcutta High Court in the case of Shaw Wallace and Co. Ltd. (supra)

in support of the submission that one is entitled to lift corporate veil and look behind to find out who are the real persons in control of the incorporated

Company. In the aforesaid case, the issue was with regard to amalgamation of 100% subsidiary company to it's holding company. The question which

arose for consideration before the Calcutta High Court was whether an amalgamation between holding and subsidiary Companies would amount to

transfer of capital asset in terms of Section 45 r/w. 2 (47) of the Act. The Calcutta High Court specifically referred to Section 47 of the Act and in

particular, to Section 47, sub-clause (v) of the Act to hold that a transfer by a subsidiary company to the holding Company of the whole of its share

capital will not be regarded as transfer for the purposes of computing capital gains under Chapter IV-E of the Act. Further observations made by the

Calcutta High Court to the effect that, on looking behind the facade of the Company, one would notice that all the assets of the subsidiary company

are held by its parent company which owns 100 % of its shares. The aforesaid observations of the Calcutta High Court seems to provide the

rationale for Section 47(v) of the Act in excluding a transfer of the entire share capital of a subsidiary to its holding company which owns 100% of its

shares from being considered a transfer. In the present facts, we are not concerned with transfer between holding and subsidiary companies. It is not

the case of the appellant that Section 47 of the Act is applicable.

14. Further, lifting of corporate veil at the instance of the assessee would mean that it is denying its corporate existence. This, after taking advantage

of the separate existence of a Company under the Act. Therefore, after having incorporated the Limited Company and given it separate existence

from its share holders, it is not open to the Company to urge ""Please ignore my separate existence and look at the persons behind me."" If that be so,

the Appellant/Company must opt for voluntarily winding up and then the shares being allotted to the individual members on liquidation would be

governed by the family arrangement/settlement.

15. In the above view, the Tribunal was correct in holding that the transaction of transfer of shares by the independent corporate entity was

assessable to capital gain tax. Therefore, the substantial questions of law which arise for our consideration are all decided in favour of the

respondent/revenue and against the appellant/assessee. Accordingly, the appeal is dismissed. No order as to costs.