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**(1986) 09 KL CK 0036**

**High Court Of Kerala**

**Case No:** Income Tax R. No. 56 of 1980

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| The Commissioner of Income Tax Kerala | | APPELLANT |
| | Vs | |
| M/s. India Sea Foods, Cochin | | RESPONDENT |

**Date of Decision:** Sept. 24, 1986

**Acts Referred:**

- Income Tax Act, 1961 - Section 14, 256(1), 3(1), 3(1)(a), 3(1)(b)

**Citation:** (1986) 23 KLJ 1001

**Hon'ble Judges:** T.L. Viswanatha Iyer, J; T. Kochu Thommen, J

**Bench:** Division Bench

**Advocate:** P.K. Ravindranatha Menon, for the Appellant; B.S. Krishnan and P.R. Raman, for the Respondent

**Judgement**

Viswanatha Iyer, J.
The Income Tax Appellate Tribunal, Cochin Bench has referred the following questions for the opinion of this court u/s 256 (1) of the Income Tax Act, 1961:

(1) Whether, on the facts and in the circumstance of the case, the Tribunal is right in law in allowing the assessee to raise for the first time before the Tribunal a ground pertaining to the correct previous year in so far as the assessment to capital gains was concerned:

(2) If the answer to that question is in the affirmative, whether the Tribunal was right in law in holding that the amount of capital gains of Rs. 5,15,440/- was not assessable in the assessment year 1974-75.

The reference is at the instance of the Revenue. The assessment year is 1974-75. At the hearing question No. 1 was not urged by counsel for the revenue. We, therefore, proceed to deal with the second question which was the one argued at length before us. The assessee is a registered firm. The assessee owned a generator which was acquired on

October 25, 1970. This generator was sold for an amount of Rs. 6,00,000/- to one M/s. Janakiram Mills Ltd. There was controversy in the first instance as to the date of sale. According to the assessee the sale was on November, 28, 1972, whereas according to the Revenue it was in March, 1973. Whatever that be, it was agreed before the Tribunal that the Sale took place on March 3, 1973, which was the finding arrived at by the Income Tax Officer in the order of assessment.

2. An amount of Rs. 5,15,440/- was computed as the capital gain arising out of the sale of the generator. In the return which the assessee filed for purposes of the prior assessment year 1973-74, this amount was included as "capital gains".

3. The assessee had income, assessable in its hands as profits and gains of business. This had also been returned for purposes of the assessment for the year 1973-74. This income pertained to the Calendar year 1972.

4. The Income Tax Officer completed the assessment for the year 1973-74, provisionally, treating the capital gain arising out of the sale of the generator as long term capital gain, subject to his finding; that the capital gain was assessable only in the year 1974-75. This was for the reason that according to the Income Tax Officer, the sale took place only in March 1973, and not in November, 1972, and hence that income was assessable only in the assessment year 1974-75.

5. In the return which was filed for the purpose of assessment for the assessment year 1974-75, the assessee did not include any income by way of capital gains. It is also to be noted that the assessee had not, at any time prior to the assessment year 1973-74, been assessed with respect to any income under the head "capital gains".

6. At this stage, it is necessary to mention that the definition of "short term capital asset" underwent a change with effect from April 1, 1974, relevant to the assessment year 1974-75. Upto that date, a capital asset held by an assessee for not more than twenty four months immediately preceding the date of its transfer was a short term capital asset. However, by the amendment, which came into force on April 1, 1974, a capital asset which was held by an assessee for not more than sixty months immediately preceding the date of the transfer was alone treated as a short term capital asset. The consequence was, the generator in question, which had been sold on March 3, 1973 will be treated as a "long term" capital asset if the capital gain was assessable in the year 1973-74, but as a short term capital asset if it was being assessed to capital gains in the assessment year 1974-75. The assessment year in which the capital gain was therefore liable to be assessed became very material in view of this amendment to the definition of short term capital asset with effect from the assessment year 1974-75.

7. The Income Tax Officer completed the impugned assessment for the year 1974-75 bringing to tax the capital gain arising out of the sale of the generator as if it was a short term capital asset, and as if the capital gain was assessable in the year 1974-75.

According to the Income Tax Officer, the previous year of the assessee for the purpose of assessment of its income, including the capital gain, was the calendar year 1973 and therefore, the capital gains derived on the sale of the generator on March 3, 1973 was properly assessable in the assesement year 1974-75.

8. The assessee took up the matter in appeal before the Appellate Assistant Commissioner. However, the appeal Was not successful on this point. The matter was taken up in second appeal before the Appellate Tribunal. Before the Tribunal the assessee sought leave "to raise an additional ground, which read as follows:-

The assessment of the sum of Rs. 5,15,440/- as short term capital gains in the year 1974-75 ought to have been cancelled on the ground that the "previous year" in respect of capital gains being financial year, the transaction would hot fall within the year ending 31-3-74 even assuming without conceding that the transaction was finalised on 3-3-73, the petitioner having opted for the Financial Year as the "previous year" for capital gains.

This was the only ground urged at the hearing of the appeal. The argument was that the previous year for the assessment of capital gains was the financial year and since the sale took place in March 1973, the capital gain was properly assessable in the assessment year 1973-74.

9. The Revenue contested the assessee"s right to raise this additional ground before the Tribunal. The Revenue further contended that the assessee had opted for the calendar year in respect of all its sources of income including capital gains and hence the capital gain in question was assessable only in the year 1974-75:

10. The Tribunal allowed the assessee to raise the additional ground of appeal, in the view that the assessee was only urging a new aspect in support of its ground of non-assessability of the capital gain in the assessment year 1974-75, and that it was not a new ground of further relief, not claimed before the authorities below. The Tribunal then went into the question whether the assessee could be said to have opted for the calendar year in respect of the income from capital gain also, and accepted the assessee"s contention that the previous year for capital gains was the financial year 1972-73 and hence the capital gain in question was properly assessable in the assessment year 1973-74. The assessee"s appeal was allowed.

11. The Department has therefore sought reference of the questions of law mentioned in paragraph 1 above.

12. Learned counsel for the Revenue contended that in the return filed by the assessee for the assessment year 1973-74 it had mentioned the "previous year" as the year ending December 31, 1972, that the said return disclosed income from the business as also the capital gain of Rs. 5,15,440/- and that, as such, the assessee must be deemed to have opted for the calendar year as the previous year for capital gain as envisaged in Section 3(1)(b) of the Income Tax Act, 1961. He argued further that while an assessee was

entitled to have different previous years in respect of separate "sources" of income, he was not permitted to have different previous years in respect of the different "heads" of income enumerated in Section 14. In other words, his argument was that while an assessee could have different previous years in respect of different sources of income within the same head he cannot be permitted to have different previous years in respect of different heads. Counsel sought to draw support for this proposition from Section 3(3) of the Act and the user of the word "source" of income therein in contradistinction to ""heads" of income in Section 14.

13. On the other hand Sri. P. R. Raman, Counsel for the assessee, pointed out that the inclusion of the capital gain in the return for 1973-74 and its admitted non-inclusion in the return for 1974-75 clearly negatived the exercise of any option, for the calendar year as the previous year, in respect of the capital gain. He drew our attention to the decisions of the Privy Council in AIR 1938 232 (Privy Council) , and of the Bombay High Court in Kusumben D. Mahadevia Vs. Commissioner of Income Tax, Bombay City, wherein it had been pointed out that "sources" and "heads" of income are used in one and the same sense in the Income Tax Act.

14. It is now an accepted fact that the sale took place on March 3, 1973 and not in November, 1972. As per the scheme of Section 3(1) (a) and (b) of the Act, the financial year immediately preceding the assessment year is normally the previous year for purposes of assessment, in respect of the cases falling under these two sub clauses. However, an assessee is given the option in certain cases to opt for a different period or periods. The assessee is also given the liberty of having different previous years in respect of separate sources of his income. Therefore the previous year for purposes of assessment will be different from the financial year, only if the assessee opts therefor. Exercise of option by the assessee is imperative before any period other than the financial year is liable to be treated as the previous year for any source-of income. If no such option is exercised expressly or by necessary implication, the assessing authority has to proceed on the basis that the financial year is the previous year in respect of that source of income.

15. The facts of this case do not disclose that the assessee has opted for the calendar year in respect of the source of income "capital gains". In this connection the following facts are relevant:-

(a) The transfer, which gave rise to the capital gains, took place admittedly on March 3, 1973.

(b.) The assessee had included this amount as assessable in the return for 1973-74.

(c) The assessee had not included this amount as assessable in the assessment year 1974-75.

16. The two sources, the income from which was included in the return for the purpose of assessment for 1973-74, were the business income derived during the calendar year 1972 and the capital gains derived on March 3. 1973. The assessee had not derived the capital gains during the calendar year 1972. Therefore, this amount of capital gain could not have been included in the return for the assessment year 1973-74, if the calendar year were to be treated as the previous year. The assessee cannot be said to have opted for the calendar year 1972 as the previous year, in regard to an item of income which had not at all been derived during that calendar year. The position would have been different if the assessee had returned this amount in the assessment for 1974-75 in which case we could have inferred an option for the calendar year in regard to the source, capital gain, also. The very inclusion of the amount of capital gain in the return for 1973-74 and its non-inclusion in the return for 1974-75 militate against the case of the Revenue that the assessee had exercised an option for the calendar year in regard to the capital gain. As a matter of fact, the financial year ending March 31, 1973 is the previous financial year for the assessment year 1973-74 and hence the inclusion of the amount of capital gains derived on March 3, 1973 in that return obviously points to an intention on the part of the assessee to treat only the financial year as the previous year for the capital gains. Otherwise it is not explainable how this capital gain could have been included in that return. The Tribunal was, therefore, right in concluding that the financial year was the previous year for the capital gains and that the income was properly assessable in 1973-74. In this view of the matter. the decision of the Gujarat High Court, relied on by counsel for the Revenue, in Commissioner of Income Tax v. Kirthi Kumar Amu Bhai (ITR No. 109 of 1974) a brief review of which is given at page 4 of Section 1 of 1977 Taxation, docs not arise for consideration.

17. This would have been sufficient to dispose of the reference. However, and in deference to the elaborate arguments addressed before us by counsel for the Revenue, that there cannot be different previous years tor different "heads" of income, we are adverting to that aspect of the matter and dealing with it here

18. Section 3(1) of the Act defines "previous year". Sub Section (3) of the Section provides that subject to the other provisions of the Section an assessee may have different previous years in respect of separate "sources" of his income. Section 14 classifies the different heads of income for the purpose of charge of income tax and computation of total income. The effect of this section is to classify profits and gains under different heads, according to the character of the source, for the purpose of providing for each head appropriate rules for computing the amount of income. Income Tax is only one tax and the different heads of income constitute one income liable to assessment in an year. this court has in the decision reported in A. V. Thomas & Co. Ltd. v. Commissioner of Income Tax (1986 KLT 522) stated:

The heads of income described under S. 14 are intended merely to indicate the classes of income. They do not exhaustively delimit the sources from which income arises Business income is broken up under different heads for the purpose of computation of the

total income. But income by reason of such break up does not cease to be income of the business. Each head refers to income, profits and gains attributable to that particular source. Each head, though separate, exclusive and specific, refers to income, profits and gains. The profits of a company do not change their character as profits merely because they are classified under different heads for the purpose of assessment under the income tax Act. The heads of income describe different kinds of profits chargeable under the Income tax Act,

It is possible for income in each head to be derived from various sources. What Section 3(3) does is to clarify that an assessee is not precluded from having different previous years in respect of separate sources of income within the same head. The sub-section is of a clarificatory nature intended to enable an assessee to opt for different previous years for different sources of income within the same head. It is an enabling provision meant for the benefit of the assessee and not one intended to confine all "heads" of income in one previous year. Such an interpretation will run counter to Section 3(3) itself. We do not find any rhyme or reason why, when an assessee can have different previous years for different sources within the same head, he should not be permitted to have different previous years in respect of different heads of income. The distinction sought to be made with reference to the user of the word "source" in Section 3(3) is not warranted. In fact, each head of income is itself a source of income. This is evident from head "F" of Section 14 which reads:

Income from other sources,

implying thereby that the other heads of income are also sources of income. We do not, therefore, find any substance in the argument of the counsel for the Revenue that Section 3(3) precludes an assessee from having different previous years in regard to different "heads" of income.

19. This view of ours is fortified by the decision of the Privy Council reported in AIR 1938 232 (Privy Council) whether it was observed that the list of heads (in Section 6 of the 1922 Act) was a list of "sources"..... The same view was reiterated by the High Court of Bombay in the decision reported in Kusumben D. Mahadevia Vs. Commissioner of Income Tax, Bombay City, in the following terms at page 321.:

It thus appears that in the Act, the expression ""source" and the expression "heads of income" are used in one and the same sense and it means property, moveable or immovable, belonging to an assessee or the activity of an asscssee that yields or brings income to him, within the meaning of the Act.

We may mention that the decision of the Andhra Pradesh High Court in Additional Commissioner of Income Tax, Andhra Pradesh Vs. K. Ramachandra Rao, also lends support to our view.

Incidentally it was argued by counsel for the Revenue that there was a likelihood of part of the receipts from the transaction (which led to the derivation of the capital gain) being assessed by virtue of Section 41(2) as business income in the assessment year 1974-75. The argument was that such receipts could be assessed only in the assessment year 1974-75 and that therefore there cannot be a different previous year in relation to the capital gain arising out of the same transaction. We are not inclined to accept this submission. Section 41(2) takes back from the assessee what had been given earlier by way of depreciation allowance and brings the amount to tax as Income of the business or profession. This does not in any manner affect the assessment of the capital gain in accordance with the other provisions of the Act. We do not find any analogy or anomaly in the situation apart from the fact that there is no assessment in this case u/s 41 (2).

We therefore, answer both the questions referred to us in the affirmative. that is, in favour of the assessee and against the Revenue.

A copy of this judgment under the signature of the Registrar and the seal of this court will be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.