

Southern Roadways Ltd. Vs Commissioner of Income Tax

Court: Madras High Court

Date of Decision: Nov. 10, 1997

Acts Referred: Income Tax Act, 1961 " Section 2(47), 28

Citation: (1998) 146 CTR 550

Hon'ble Judges: P. Thangavel, J; N.V. Balasubramanian, J

Bench: Division Bench

Advocate: Deokinandan, for the Appellant; K.M.L. Majele, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

N.V. Balasubramaniam, J.

At the instance of the assessee, the Tribunal, has stated a case and referred the following questions of law for

the opinion of this Court under s. 256(1) of the IT Act, 1961 :

1. Whether, on the facts and in the circumstances of the case, the taking over of the bus transport undertaking by the Government of Tamilnadu

from the assessee under the Tamilnadu Fleet Operators Stage Carriages (Acquisition) Act, 1971 (Act 37 of 1971) amounted to a "Compulsory

Acquisition" as defined in Art. 31(2A) of the Constitution thus attracting the provisions of s. 41(2) and s. 45 of the IT Act ?

2. Whether, in the facts and circumstances of the case, the acquisition of stage carriages of the assessee under s. 3 of the Tamilnadu Fleet

Operators Stage Carriages (Acquisition) Act, 1971 amounted to the assets of the assessee being sold within the meaning of ss. 32 and 41 of the

IT Act or transfer within the meaning of s. 2(47) of the Act ?

3. Whether, in the facts and circumstances of the case, the payment of compensation for acquisition of the transport division of the assessee-

company amounted to slump transaction in respect of which balancing charge under s. 41(2) and capital gains under s. 45 could not be levied ?

2. The assessee is a public limited company running the business of transport of passengers and goods. On 17th January, 1972, the passenger

transport division of the assessee-company was taken over by the Government of Tamil Nadu by a notification issued under s. 2 of the Tamil

Nadu Fleet Operators Stage Carriages (Acquisition) Act, 1971 (Tamil Nadu Act 37 of 1971) (hereinafter referred to as TNFOSCA Act). The

ITO in the assessment order for the asst. yr. 1972-73 held that, by virtue of the vesting of the stage carriage owned or operated by the assessee

with the Government absolutely, there was a compulsory acquisition of the capital assets of the assessee used in his business amounting to the sale

of those assets and accordingly brought to tax the difference between the written down value and the cost of the assets as profits chargeable under

s. 41(2) of the IT Act, 1961 (hereinafter referred to as the "Act"). He also brought to tax the difference between the consideration received and

the cost of the assets as capital gains chargeable under s. 45 of the Act. Further, the ITO did not grant depreciation for those assets for their use in

the business prior to the take over by applying the provisions of cl. (ii) of sub-s. (2) of s. 34 of the Act.

3. The assessee preferred an appeal before the AAC against the order of the assessment made by the ITO. The AAC held that the vesting of the

undertaking did not amount to sale within the meaning of s. 32(1)(iii) of the Act and hence, the assessee was entitled to claim depreciation. In so

far as the application of s. 41(2) of the Act is concerned, he held that there was no transfer of individual items of capital assets, but there was a

vesting of the entire undertaking as a whole as a running concern. He further held that no capital gains arose because the original cost exceeded the

compensation received. In this view of the matter, he deleted the additions made towards the profit under s. 41(2) of the Act and the capital gains

under s. 45 of the Act.

4. Dissatisfied with the order of the AAC, the Revenue preferred an appeal before the Tribunal. Before the Tribunal, there was a wide range of

controversy whether there was a sale when the undertaking was taken over by compulsory acquisition and the compensation paid was illusory etc.

The Tribunal, however examined the provisions of TNFOSCA Act and came to the conclusion that the provisions of ss. 32(1)(iii), 41(2) and 45 of

the Act would apply to the compulsory acquisition of the capital assets also. The Tribunal held that the compulsory acquisition of the assets would

be regarded as a sale within the meaning of ss. 32 and 41 and also it will be a transfer for the purpose of s. 2(47) of the Act. In so far as the

alternative argument advanced on behalf of the assessee that, when the passenger transport division was taken over, it amounted to a slump sale,

and, therefore, the assessment of the balancing charge under s. 41(2) did not arise, was not accepted by the Tribunal. The Tribunal noticed the

provision of s. 3 of the TNFOSCA Act and the negotiations arrived at between the parties and came to the conclusion that this is not a case in

which it could not be said that no part of the compensation received was not attributable to the individual assets acquired. The Tribunal, therefore,

held that the provisions of s. 41(2) of the Act were rightly attracted and the assessment of capital gains under s. 45 of the Act was correct in law.

The assessee challenged the order of the Tribunal and sought for a reference and the Tribunal, as already stated, has stated a case and referred the

questions of law set out above.

5. Mr. S. A. Balasubramanian, the learned counsel for the assessee, submitted that the taking over of the bus transport division by the Government

of Tamil Nadu from the assessee under the TNFOSCA Act did not amount to compulsory acquisition. His further submission was that the

acquisition of the stage carriage under s. 3 of the TNFOSCA Act did not amount to sale of the assets within the meaning of ss. 41 and 45 of the

Act. The main submission of Mr. S. A. Balasubramanian, learned counsel for the assessee, is that what was taken over was an undertaking i.e. a

passenger transport division as a whole and the assets, and to entire lock, stock and barrel of the undertaking were taken over by the Government.

His submission was the individual assets were not sold, and the money paid has no relation to the assets taken over by the Government. He

submitted that the figure of Rs. 80 lakhs for the buses would clearly indicate that what was paid was not in relation to the value of the vehicle and it

has no relation to the vehicles taken over by the Government. He would further submit that the sum paid has also no relation to the market value.

He drew our attention to some of the charts filed before the authorities below and submitted that the compensation amount was not relatable to any

of the assets and the facts that the liability was deducted would indicate the compensation cannot be attributed to the assets acquired. He further

submitted that it is not possible to attribute the compensation to the value to each and every asset acquired and the surplus must relate to a specific

asset and in the absence of any evidence to show that the surplus related to the surplus assets, it is not permissible to the ITO to bring the amount

to charge under s. 41(2) or 45 of the Act. Mr. S. A. Balasubramanian, learned counsel for the assessee, strongly placed reliance on a decision of

the Supreme Court in the case of Commissioner of Income Tax (Central), Calcutta Vs. Mugneeram Bangur and Co. (Land Department), , and

submitted that where the sale is of a whole concern and no part of the price is attributable to the cost of the land, it is not possible to levy tax under

s. 41(2) of the Act. He submitted that the decision of the Supreme Court makes it very clear that though in the Schedule certain price was fixed or

shown, it cannot be said that it represented the value of the assets taken over. Mr. S. A. Balasubramanian, learned counsel for the assessee also

placed reliance on the decision of Bombay High Court in Commissioner of Income Tax Vs. Narkeshari Prakashan Ltd., , and submitted that when

the entire business was sold as a whole and the value of the liability was adjusted, the character of the transaction as a slump sale is not changed

and it is not permissible to levy the balance charge under s. 41(2) of the Act. He also referred to the decision of the Karnataka High Court in the

case of Syndicate Bank Ltd. Vs. Additional Commissioner of Income Tax, , and submitted if there was a transfer as a whole concern and no part

of the price can be allocated to the capital assets in specie, and what is taxable in such a case would be the gain in respect of the transaction and

nothing else.

Lastly, he relied upon the decision of the Supreme Court in Commissioner of Income Tax, Gujarat Vs. Electric Control Gear Mfg. Co., , wherein

the Supreme Court has held that where there is nothing to indicate the price attributable to the assets like machinery, plant etc. the provision of s.

41(2) of the Act would not apply. Therefore, he would submit that the case of the assessee would fall squarely within the decision of the Supreme

Court in the case of Electric Control Gear Mfg. Co., cited supra.

6. Mr. C. V. Rajan, learned standing counsel for the Revenue, on the other hand, submitted that under the provisions of the TNFOSCA Act, the

compensation received by the assessee can be attributed to the assets acquired. He referred to s. 5 of the TNFOSCA Act and submitted that the

amount of compensation for the acquired property, was determined by agreement and under the Schedule to the said Act, the compensation paid

by the Government in respect of the acquired properties shall be on the individual value of property on the acquired date. He, therefore, submitted

that the amount was arrived at as agreed to between the parties after some negotiations, and at the time of acquisition of the undertaking the

compensation amount was determined and when the compensation amount was determined or arrived at it was with reference to the stage

carriages owned or operated by the assessee and other assets which were taken over by the Government. He, therefore, submitted it is not

permissible for the assessee to say that the amount of compensation was not relatable to value of the assets taken over by the Government. He

referred to the decision of the Supreme Court in the case of Commissioner of Income Tax, Gujarat Vs. M/s. Artex Manufacturing Co., , and

submitted that where there is a slump transaction, and the business is sold as going concern, it has to be seen that whether any portion of the slump

price is attributable to the assets taken over. He further submitted that on the facts of this case, it is very clear that the price can be attributed to

each and every one if the items taken over by the Government and, therefore, the decision of the Supreme Court in the case of CIT vs. Artex

Manufacturing Co. (supra) would apply to the facts of this case.

7. We have carefully considered the rival submissions of the learned counsel for the assessee and the learned counsel for the Revenue. In so far as

question No. 1 is concerned, we are of the opinion that under the provisions of TNFOSCA Act, there was a take over of fleet stage carriage

owned and operated by the fleet operators and on the issue of notification under s. 3 of the said Act, they vested with the Government absolutely

and free from all encumbrances. Sub-s. (2) of s. 3 of the said Act also provides for the vesting of building, workshops and other places etc. A

mere book to provisions of s. 3 of the Tamil Nadu Act 37 of 1971 indicates that the Tamil Nadu Act was passed for the acquisition of stage

carriages of fleet operators holding fifty or more stage carriage permits and for certain other matters connected therewith in the State and the

preamble of the Tamil Nadu Act also mentions that the Tamil Nadu Act was passed in the public interest to acquire all passenger transport

divisions of fleet operators holding fifty or more stage carriage permits and the Act was passed with an intention to give effect to Art. 39(b) and (c)

of the Constitution of India. The Act is protected under Art. 39(b) and (c) of the Constitution of India. The Supreme Court in the case of State of

Tamil Nadu and Others Vs. L. Abu Kavur Bai and Others, upheld the validity of the Tamil Nadu Stage Carriage and Contract Carriages

(Acquisition) Act, 1973 and in our view, the decision of the Supreme Court in L. Abu Kavur Bai cited supra, would equally apply to the

provisions of the Tamil Nadu Fleet Operators Stage Carriages (Acquisition) Act, 1971. Following the decision of the Supreme Court, cited supra,

we hold that there was a compulsory acquisition of the assets within the meaning of the terms "sold" found in ss. 32 and 41 and also within the

definition of "transfer" in s. 2(47) of the Act, when all the assets of the transport division of the assessee vested with the Government of Tamil

Nadu by the operation of law upon the payment of compensation. Hence, we hold that there was a compulsory acquisition of assets under the

provisions of the Tamil Nadu Act 37 of 1971 and it attracts the provision of ss. 41(2) and 45 of the Act.

8. The question whether the payment of compensation for the acquisition of the transport division of the assessee-company would amount to slump

transaction and whether the provisions of s. 41(2) and 45 are attracted have to be considered in the light of the provisions of Tamil Nadu Fleet

Operations Stage Carriages (Acquisition) Act, 37 of 1971. Under s. 3 of the Act, 1971, on and from the date of notification, every stage carriage

owned or operated by the fleet operator shall vest with the Government and free from all encumbrances. Sub-s. (2) of s. 3 of the Tamil Nadu Act

provides that, upon the issue of notification in respect of any fleet owner, all lands, buildings, work-shops and other places and all stores,

instruments, machinery, tools, plants etc. would vest with the Government free from all encumbrances. The compensation for the acquired property

shall be determined under the provisions of s. 5 of the Act and it shall be in accordance with the principles specified in the Schedule to the Tamil

Nadu Act. The manner of determination of the compensation provided in s. 5 of the Tamil Nadu Act, 1971 is that it will be on the basis of the

agreement arrived at between the parties, or where no such agreement can be reached, it shall be based on the award of the arbitrator. It is not

necessary to refer to other provisions of the said Act, but to refer to the Schedule to the Act, which provides that the compensation to be paid by

the Government in respect of the acquired property shall be the market value of such property. It is seen on the facts of this case, the Government

of Tamil Nadu issued a notification on 4th December, 1971 and the stage carriages and other properties of the assessee as mentioned in the Act,

vested with the Government on and from that date. The Government of Tamil Nadu also set up a Corporation called Pandian Roadways and

transferred the properties to it on 17th January, 1972. The Government of Tamil Nadu decided to pay compensation of Rs. 51.50 lakhs initially on

21st March, 1972 pending negotiations. There were negotiations between the chairman and managing director of the assessee and a Committee of

the Secretaries to Government which recommended payment of compensation as follows :

Rs.

Value of 346 buses : 80,00,000.00

Value of 16 other vehicles : 1,50,000.00

Value of land : 4,36,877.66

Value of buildings : 12,62,464.00

Value of unexpired permits : 93,400.00

Value of spares etc. : 26,00,000.00

1,25,42,741.66

Less :

Gratuity liability 30,00,000.00

Leave liability 3,87,484.41

33,87,484.41

91,55,257.25

Less : Part compensation paid 51,50,000.00

40,05,057.25

It is relevant to notice that the assessee-company has accepted the compensation and the arbitration proceedings were not resorted. Sec. 3 of the

Act provides for acquisition of fleet stage carriage and all other items mentioned in the section and s. 3 contemplates vesting of all the assets of the

assessee contemplated in s. 3 of the Act. Sec. 2(a) defines the expression, "acquired property" which means the stage carriages and other

properties vested in the Government under s. 3 of the Act. Sec. 5 of the Act provides for compensation for the acquired property. It is clear that

there was a statutory liability on the part of the Government of Tamil Nadu to pay compensation at the market value of the property for the

acquired property, and correspondingly, there was a statutory right vested with the assessee to receive the compensation. It cannot be predicated

that the amount of compensation paid by the Government of Tamil Nadu was not on the basis of the principles laid down in TNFOSCA Act, as it

is not expected that the Government would pay something more, or something less, than that was provided in TNFOSCA Act. It is significant to

notice that the compensation has to be determined by the Government for each and every one of the assets mentioned in s. 3 of the Act, and

consequently, when the Government paid the compensation which the assessee received, after negotiation and without protest and without resort

to arbitration proceedings, it must be taken that the Government reckoned the compensation for each and every item of the assets taken over from

the passenger transport division of the assessee. Even though the break up of the figure of Rs. 1,25,42,741.66 was not made available to us, since

the compensation determined was with reference to items of assets taken over, natural corollary is that the said sum represented sum total of the

value of the various assets taken over and in the absence of any evidence or material contra it must be held that it is possible to attribute the

compensation amount received to each and every one of the assets taken over by the Government. That apart, the Tribunal noticed GO Ms. No.

713 dt. 7th September, 1972 and found that on the basis of negotiations between the assessee and the Government, the compensation was fixed.

Furthermore, the assessee, when it filed the return, apportioned the compensation among various assets. Consequently, we are of the opinion that

the compensation received by the assessee is attributable to various assets acquired by the Government of Tamil Nadu under Act 37 of 1971.

9. In this factual background, various decisions relied upon by the learned counsel for the assessee as well as the learned counsel for the Revenue

have to be considered. In its decision in CIT vs. Artex Manufacturing Co. (supra), the Supreme Court considered the question of applicability of

balancing charge under the provisions of s. 41(2) of the Act in detail and after noticing various decisions of the apex Court as well as High Courts,

the Supreme Court laid down the following test. The test laid down by the Supreme Court is that even when there is a slump sale and the sale of

business is a going concern, what has to be seen is whether any portion of the slump is attributable to the assets transferred and if, on the basis of

the facts, it can be found that a particular price is attributable to a particular item, the excess amount is chargeable to tax under s. 41(2) of the Act.

It is in the light of the test laid down by the Supreme Court, the factual situation of this case has to be considered and, therefore, it is not necessary

to consider in detail all case laws cited by both the parties, as the test is a common test and only on the application of the said test, there is a

divergent view on the topic. The decisions in CIT vs. Mugneeram Bangur & Co. (Land Department) (supra), CIT vs. Electric Control Gear Mfg.

Co. (supra) and CIT vs. Narkeshari Prakashan Ltd. (supra) all fall on one side of the line. On the other hand, the decision relied upon by the

learned counsel for the Revenue in Artex Manufacturing Co. case, cited supra, falls on the otherside of the line. Applying the test laid down by the

Supreme Court in Artex Manufacturing Co. case, cited supra, it is clear that on the facts of the case the compensation received by the assessee is

attributable to the various assets taken over by the Government of Tamil Nadu and it is also possible to attribute the compensation to the particular

items of assets taken over by the Government. Therefore, the provisions of s. 41(2) of the Act are clearly attracted to the case.

10. Further, the assessee had also disclosed the profits under the provisions of s. 41(2) of the Act and it cannot be held that it is not a case in

which it cannot be said that the price attributable to the items transferred is not traceable, attributable or is not indicated and therefore, it cannot

also be held that the provisions of s. 41(2) of the Act are not attracted. Accordingly, we hold that the Tribunal has come to a correct conclusion in

holding that the compensation received was attributable to the individual assets and the facts of the case rightly attracted the provisions of s. 41(2)

of the Act.

11. The questions referred to us also refer to capital gains under s. 45 of the Act. The Tribunal was of the view that the provisions of s. 45 of the

Act is attracted on the basis that in the case of depreciable assets written down value will be taken as a cost of the acquisition instead of original

cost for the purpose of computing capital gains. Therefore, we are of the opinion that the liability under s. 41(2) of the Act is limited to the amount

of surplus to the extent of difference between the written down value and the actual cost and if the compensation amount exceeds the difference

between the written down value and the actual cost, then, the surplus to the extent of such excess is liable to be treated as capital gains for the

purpose of levy under s. 45 of the Act. We, therefore, hold that the Tribunal was correct in holding that the payment of compensation for

acquisition of a bus transport undertaking of the assessee-company would attract the provisions of the capital gains under s. 45 of the Act. In this

view of the matter, we answer the questions of law referred to us as under :

(a) First question of law :- It is answered in the affirmative and against the assessee.

(b) Second question of law :- It is answered in the affirmative and against the assessee.

(c) Third question of law :- It is answered in the affirmative and against the assessee.

The assessee will pay the cost of the reference. Counsel fee is fixed at Rs. 500.