
(1993) 10 CAL CK 0019

Calcutta High Court

Case No: IT Reference No. 99 of 1991

Martin Burn Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision: Oct. 13, 1993

Acts Referred:

- Income Tax Act, 1961 - Section 256(2), 48

Citation: (1994) 75 TAXMAN 23

Hon'ble Judges: Shyamal Kumar Sen, J; Ajit K. Sengupta, J

Bench: Division Bench

Advocate: ;R.K. Bagchi and Sunil Kumar Mukherjee, for the Respondent

Judgement

Ajit K. Sengupta, J.

In this reference made at the instance of the assessee, the following questions have been referred by the Tribunal to this Court, u/s 256(2) of the income tax Act, 1961 ("the Act") :

1. Whether, on the facts and in the circumstances of the case, the finding of the Tribunal that the cost of the lease-hold interest of the said premises to the assessee could be envisaged is based on any material ?
2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee was liable to capital gains on surrender of the tenancy rights of the said premises, although there was no cost of acquisition to the assessee for the said tenancy ?
3. Whether, on the facts and in the circumstances of the case, the finding of the Buckingham Street property worth ₹ 4,00,000 is vitiated by reason of non-consideration of the relevant materials on record ?
4. Whether, on the facts and in the circumstances of the case, the Tribunal was right in determining the full value of the said consideration for surrender of the said

tenancy of the premises by taking the value of Buckingham Street property at ₹ 4,00,000 ?

This reference relates to the income tax assessment of the assessee-company for the previous year ending 30-9-1974, corresponding to the assessment year 1975-76. The facts as found by the Tribunal are as under:

The assessee-company had an office in London. This Office space was taken by the assessee-company on lease for a period of 26 years from Balfour Williamson & Co. Ltd. at a yearly lease rent of ₹ 8,000 payable quarterly. The lease was effective from 12-3-1958. The Tribunal found that the assessee did not pay any premium at the time of acquiring the lease-hold interest in the said property. The Tribunal looked into the lease-hold agreement and recorded a finding of fact that the assessee was only to pay the lease rent of ₹ 8,000 per annum payable quarterly and that no other consideration either by way of premium or otherwise was payable by the assessee-company. The assessee-company surrendered the lease-hold interest on 20-9-1973 in favour of Central Land Investment Ltd. of London for a consideration of ₹ 7,10,000. The said consideration was received by the assessee-company partly in cash - ₹ 3,10,000 and partly in the form of a property at Buckingham Street which was valued at ₹ 4,00,000.

2. The case of the assessee-company is that the entire receipt of ₹ 7,10,000 was a capital receipt and since the assessee had no cost of acquisition for the lease-hold interest acquired and held by it in its London office property, no part of the said sum of ₹ 7,10,000 was chargeable to income-tax. The assessee-company placed reliance on the decision of the Supreme Court in [Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty](#),

3. We find that the Tribunal in this case recorded a finding of fact that the said lease-hold interest in London office was acquired by the assessee-company without payment of any premium. The assessee was liable to pay only annual rent, which was payable quarterly, and there was no cost of acquisition whatsoever in respect of the said lease-hold interest acquired and held by the assessee. It is true that the lease-hold interest is a capital asset; since the same was acquired and held by the assessee without any cost of acquisition, the whole of ₹ 7,10,000 is nothing but a capital receipt and, therefore, not chargeable to income tax in view of the principles laid down by the learned Judges of the Supreme Court in B.C. Srinivasa Setty's case (supra). We also find that this Court had also taken a similar view in [Commissioner of Income Tax Vs. Mangtu Ram Jaipuria](#), following the decision of the Supreme Court in the said case.

There is now the decision of the Supreme Court precisely on the issue in [A. Gasper Vs. Commissioner of Income Tax, Calcutta](#), In that case the appellant since 1940 was a monthly tenant in a certain premises. It was a party to an agreement between the landlord and new lessees for leasing out the premises to the new lessees and

permitting them to construct a new building thereon. The appellant was paid a consideration of a lump sum for transferring his tenancy rights to the new lessees so as to clear the way for the new lessees to enter into the monthly lease and put up the construction. The sum received in consideration for surrender of the lease right was entirely brought to tax as capital gains for the assessment year 1967-68. It was the contention of the assessee before the Tribunal that the monthly lease was not acquired by the appellant at any ascertainable cost as no premium was paid and that even assuming the lease to be a capital asset, it was of such a nature that its cost of acquisition is not ascertainable. But the Tribunal took the view that since the appellant had not placed any material regarding the actual cost, the capital gains as computed were taxable without any further deduction. The assessee raised the question of the taxability of the sum as capital gains in a reference petition before the Tribunal which the Tribunal rejected. But the assessee did not pursue the matter u/s 256(2). Nor did the appellant urge before the High Court on a reference of other questions including a question which if widely interpreted might by implication carry consideration of the deduction permissible u/s 48 of the Act. This High Court on the reference held that the appellant's lease-hold right was a capital asset and the amount received was assessable to tax as capital gains. Before the Supreme Court the appellant raised the contention that the monthly lease was not acquired by the appellant at any ascertainable cost and even assuming that it was a capital asset it was of such a nature that its actual cost of acquisition could not be ascertained. The Supreme Court did not, however, allow the contention to be raised as this could not be the issue in the appeal because the very question was raised before the Tribunal and was declined to be referred to the High Court by the Tribunal and the contention was neither raised nor argued before the High Court. However, the Supreme Court observed that in view of the decision of the Supreme Court in B.C. Srinivasa Setty's case (supra) the appellant had a good case. The Supreme Court in that connection observed that it may be open to the appellant to apply to the Board for relief by way of abstention from recovering the levy on the said sum and the Board would consider the application sympathetically. Thus, it was only for the technical reason that the assessee's contention did not succeed but in principle the Supreme Court expressed its agreement with the assessee's contention. In that light of the matter the question may now be taken as a closed one.

4. Respectfully following the said decision, we answer question No. 2 in this reference in the negative and in favour of the assessee. In view of our answer to question No. 2 in favour of the assessee, it is not necessary to answer question Nos. 1, 3 and 4. We, therefore, decline to answer question Nos. 1, 3 and 4.

Sen, J.

I agree.