

(2002) 05 DEL CK 0211

Delhi High Court

Case No: IT Reference No"s. 35 of 1985 and 30 of 1986 28 May 2002

Commissioner of Income Tax

APPELLANT

Vs

Sohan Lal

RESPONDENT

Date of Decision: May 28, 2002**Citation:** (2002) 257 ITR 242 : (2002) 123 TAXMAN 660**Hon'ble Judges:** S.B. Sinha, C.J; A.K. Sikri, J**Bench:** Full Bench**Advocate:** Sanjeev Khanna, R.D. Jolly and Ms. Rashmi Chopra, for the Revenue, for the Appellant;

Judgement

S.B. Sinha, C.J.

These references were made at the instance of the revenue u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") by the Income Tax Tribunal, Delhi Bench "B", for opinion of this court on the following questions :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that for ascertaining the trading result on the sale of shares, the value of the opening stock would continue to be taken at cost as followed by the assessed from year to year ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in allowing the amount of Rs. 3,000 as a charge on the income from property received by the assessed on partition and, hence, deductible u/s 24(1)(iv) of the Income Tax Act, 1961 ?"

1. The assessment year in question is 1977-78, the year ending being 31-12-1976. The assessed was being assessed as an individual.

He sold the following shares in the year in question :

	Rs.	
(i) 28,641 ordinary shares of New Indian Industries Ltd. @ Rs. 3	85,923	
(ii) 105870 deferred shares of New India Industries Ltd. @ Rs. 0.30	31,761	
(iii) 120 shares of M. Gulab Singh & Sons (P) Ltd. @ Rs. 35	4,200	
	1,21,884	

The said shares were being held as investment up to the assessment year 1963-64 and from the assessment year 1964-65, they were transferred from investment account to stock-in-trade account, where after the assessed had been dealing in shares and certain sales were made from time-to-time. Allegedly, the assessed had throughout been showing opening stock of shares at cost and the closing stock of shares also for a number of years. The trading result in terms of the aforementioned practice adopted by the assessed was :

	Rs.
Opening stock of share	4,85,898.00
Sale	1,21,884.00
Closing Stock	2,46,510.45
Loss	1,17,103.59

2. The contention of the assessed that the said amount be treated to be a loan was accepted by the assessing officer, inter alia, on the ground that when the assessed transferred the shares from investment account to stock-in-trade account, such transfers would have been assessed at the market value on the date of transfer. The assessing officer for coming to the said conclusion, relied upon a decision of the Apex Court in [Commissioner of Income Tax, Bombay City I, Bombay Vs. Bai Shirinbai K. Kooka](#),

3. On the aforementioned ground, an addition of Rs. 2,37,787 was made. An appeal was taken there against by the assessed wherein the Commissioner (Appeals) came to the conclusion that the shares of Munshi Gulab Singh & Sons (P) Ltd., which had

been shown at Rs. 47.37 per share could be brought down to Rs. 35 in that year. The Commissioner (Appeals) upheld the order passed by the assessing officer. The matter was taken to the Tribunal wherein the learned Tribunal having regard to the fact that the system of valuing the shares at cost had continued in the past held :

"20. It may be mentioned that the value of the shares sold in this year has come in the assessed's trading account from the earlier years and as the closing stock of the earlier year had been valued at cost, the same value has been adopted for the opening stock in this year. . . ."

4. The Tribunal held that the principles laid down by the Apex Court in Bai Shirinbai K. Kooka's case (supra) would not apply as therein the shares had been valued from year-to-year for a long period on cost basis and the trading results had been worked out on that basis, which had been accepted. The Tribunal observed that from the point of view of accountancy where a consistent method is adopted and the valuation of stock is done in a regular manner, the variation adopted by the Income Tax Officer would not be justified. Referring to the decision of the Apex Court in the case of [Investment Ltd. Vs. Commissioner of Income Tax, Calcutta](#),) , the Tribunal observed that the income of the business be properly deducted from the manner in which the assessed was valuing his stocks from year-to-year and, Therefore, no adjustment was required to be made to the trading results shown. It was further observed that it was competent to change the value of opening stock and the value of closing stock of the shares.

5. So far as the second question is concerned, the fact of the matter is as follows :

It is not in dispute that the assessed had received certain properties on partition in 1956 in terms of the deed of partition. A stipulation was made in the said deed to the effect that the assessed was to maintain his mother. He claimed Rs. 3,000 towards maintenance of his mother on the ground that the said sum should be allowed as a charge against the income from property. The Commissioner (Appeals) held that the said charge had been created by the assessed voluntarily. The Tribunal, however, directed that the same should be allowed as a deduction and should not be considered to be a charge created by the assessed voluntarily.

6. In the aforementioned situation, the questions, as set out above, were referred to for opinion of this court.

7. Mr. Sanjeev Khanna, the learned counsel appearing on behalf of the revenue, would submit that the assessed could not take benefit of its action of converting into investment shares into the trading shares in the year 1964 and, thus, while making assessment for the assessment year 1977-78, the assessing officer had correctly valued the shares sold at the market price in 1964 and ascertained the property on such transaction.

The learned counsel would contend that only because wrong method had been adopted for a long time by the assessed, the same would not confer any vested right in him.

Such a mistake, contends the learned counsel, could be corrected particularly in view of the fact that even the principles of res judicata cannot be said to have any application whatsoever in the proceedings under the Income Tax Act.

The learned counsel would contend that the conversion of the opening stock and closing stock was wholly irrelevant for the purpose of making assessment in the earlier years and the only relevant year when the same could have been taken into consideration when the sale took place.

Referring to the decision in [Commissioner of Income Tax, Patiala Vs. Groz-beckert Saboo Ltd.](#), the learned counsel would contend that the date of conversion is relevant. As regards his contention that a wrong method could not have been a ground for allowing the claim of the petitioner, strong reliance has also been placed by Mr. Khanna on CIT v. British Paints India Ltd. : [1991]188ITR44(SC) .

8. As regards the second question, the learned counsel would contend that the finding of the learned Tribunal to the effect that section 24(1)(iv) would have no application in the instant case having regard to clause 16 of the deed of partition is erroneous. Reliance in this connection has been placed on [Commissioner of Income Tax Vs. Central Bank Executor and Trustee Co. Ltd.](#), [Commissioner of Income Tax Vs. Murlidhar Kanodia and Sons \(HUF\)](#), and [Commissioner of Income Tax Vs. Smt. Indramani Devi Singhania](#),

Re. : Question No. 1 :

9. In Bai Shirinbai K. Kooka's case (supra), it has been held by the Apex Court that the profit from the sale of shares will be assessable and such profit would be the difference between the sale price of the shares and the market price thereof prevailing on the date when such conversion took place and not the difference between the sale price and the price at which the shares were originally purchased by the assessed.

10. The said decision of the Apex Court, in our considered opinion, could not have been distinguished by the learned Tribunal only on the ground that the assessed had been dealing with trading shares at cost for a period of about 13 years. It has clearly been held by the Apex Court that when the assessed as a trader earned only profit, which was to be from the market value and not from the actual sale price, the same should be the criteria for making assessment.

11. The question as to whether the department has at any point of time disturbed the trading result as shown by the assessed or could direct change in the base of conversion is not relevant. The question, which fell for consideration before the Tribunal, could have been determined only during the relevant assessment year and

not prior thereto.

12. A wrong method of assessment carried out by the assessed per se cannot be a ground for non-levy of tax, if the same is otherwise livable having regard to the decision of the Apex Court.

A wrong method of maintenance of account, in our opinion, can be corrected during the relevant year, particularly when the principles of *res judicata* have no application.

Furthermore, it has rightly been submitted by Mr. Khanna that the conversion of opening stock and closing stock became relevant only when the sale took place.

13. In *Groz-Beckert Saboo Ltd.*'s case (*supra*), the law has been stated in the following terms :

"... It is now well-settled by these decisions that where an assessed converts his capital assets into stock-in-trade and starts dealing in them, the taxable profit on the sale must be determined by deducting from the sale proceeds the market value at the date of their conversion into stock-in-trade (since this would be the cost to the business) and not the original cost to the assessed...."

14. In *British Paints India Ltd.*'s case (*supra*), the Apex Court held that a wrong method of accountancy cannot be a defense. As regards wrong practice, the Apex Court stated the law thus:

"The correct principle of accounting is to enter the stock in the books of account at cost unless the value is required to be reduced by reason of the fall in the market value of those goods below their original cost. Ordinarily, Therefore, the goods should not be written down below the cost price except where there is an actual or anticipated loss. On the other hand, if the fall in the price is only such as it would reduce merely the prospective profit, there would be no justification to discard the initial valuation at cost...."

15. There cannot be any doubt whatsoever that the conversion of opening stock and closing stock was relevant when the sale took place.

16. In [GANGADHAR BABU LAL Vs. COMMISSIONER OF Income Tax, U. P.](#), it is stated :

"Property which a coparcener receives on partition would be capital in his hands. It is open to the petitioner on receipt of a capital asset to retain it as such or to convert it into stock-in-trade and it will be a question of fact to be decided on the materials in each case as to whether the assessed had continued to treat the capital asset as an investment or had converted it into his stock-in-trade. No general principle could be laid down which would be applicable to all cases and each case must be decided on its own circumstances according to common sense principles."

17. We, Therefore, are of the opinion that the judgment of the learned Tribunal cannot be upheld.

18. The answer to the second question, which arises for consideration, would depend upon the nature of transaction, namely, whether the charge has been created voluntarily or involuntarily. A deed of partition is a matter of contract between the co-sharers. A person enters into a memorandum of agreement with his co-sharers voluntarily and for the said purpose, the parties to the said memorandum of agreement must be ad idem. It was open to the assessed to enter into or not to enter into the said memorandum of partition. No law imposes any obligation upon the assessed to enter into such memorandum of agreement of partition. Such charge, thus, has not been created by operation of law, nor by reason thereof any devolution subject to charge has taken place.

19. In Central Bank Executor & Trustee Co. Ltd.'s case (supra), the Bombay High Court has stated the law in the following terms :

"A charge which is (1) either not created by the assessed or (2) which is not created by the assessed voluntarily in the sense that it is created or thrust upon the assessed either by operation of law or by a decree of a court or by the act of his predecessor in title or by reason of the property coming into his hands with an existing or overriding charge, will have to be treated as an involuntary charge for the purpose of section 24(1)(iv) of the Income Tax Act, 1961. The language of section 24(1)(iv) incorporates the concept of a charge being voluntarily created by the assessed as against a charge which comes into being by operation of law or by virtue of an order of the court or by the act of parties other than the assessed such as when the assessed gets a property already subject to a charge. Only those annual charges which are not created by the assessed voluntarily in this sense, are capable of being deducted from the income from house property."

20. We may, however, notice that in Murlidhar Kanodia & Sons (HUF) case (supra), a Bench of the Andhra Pradesh High Court held :

"..... that the mortgage was a voluntary act of the assessed and, Therefore, the charge in respect of the interest on the property cannot be said to be an involuntary annual charge within the meaning of section 24(1)(iv) of the Act.. . ."

21. In [Commissioner of Income Tax Vs. Rajah Dhanrajiriji](#), however, B.P. Jeevan Reddy, J. (as his Lordship then was), it was held :

"The word 'voluntarily' cannot be understood as signifying a meaning opposite to the words 'by operation of law'. If that was the intention of Parliament, it would have used the words 'by act of parties', which is the expression generally understood as the opposite of the words 'by operation of law'. In clause (iv), the expression used is 'voluntarily', which must be understood as distinct from, and as opposed to, the expression 'involuntarily'. The word 'involuntarily' means, without

there being any option, i.e., under an enforceable obligation. Hence, where a person creates an annual charge to meet an existing, genuine, legal or contractual obligation, it would not be a case of creating a charge voluntarily."

We, however, for the reasons stated hereinabove, cannot subscribe to the said view.

22. Even on a different occasion, the same learned Judge in Smt. Indramani Devi Singhania's case (supra) has taken a different view.

23. In that view of the matter, we are of the opinion that the impugned judgment of the learned Tribunal cannot be upheld even on the second question.

24. For the reasons aforementioned, we answer the questions referred to for our opinion in the negative, i.e., in favor of the revenue and against the assessed.

This reference is, accordingly, disposed of. However, in the facts and circumstances of the case, there shall be no order as to costs.