

(1991) 12 BOM CK 0055

Bombay High Court (Nagpur Bench)

Case No: Income-tax Application No. 305 of 1983

Commissioner of Income Tax

APPELLANT

Vs

Narkeshari Prakashan Ltd.

RESPONDENT

Date of Decision: Dec. 17, 1991

Acts Referred:

- Income Tax Act, 1961 - Section 28, 41(2)

Citation: (1992) 196 ITR 438

Hon'ble Judges: V.A. Mohta, J; G.D. Patil, J

Bench: Division Bench

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

Judgement

V.A. Mohta, J.

This is an application by the Commissioner of Income Tax, Nagpur u/s 256(2) of the Income Tax Act, 1961, for calling upon the Tribunal to state the case and to refer the following questions said to be of law for the opinion of this court :

"(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in deleting the addition of Rs. 38,908, made under the provisions of section 41(2) of the Income Tax Act, 1961, on the ground that liability to tax u/s 41(2) was not attracted where the business was transferred as a going concern ?

(2) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in holding that the provisions of section 41(2) were not applicable to this case to tax the profits arising out of sale of branches ?

(3) Whether the Appellate Tribunal was correct in relying upon the Board's Circular No. 23-D (XXIII-6) of 1965 while holding that the provisions of section 41(2) were not applicable when the circular referred to stock-in-trade and not to the profit u/s 41(2) of the Income Tax Act ?

2. The assessee, Messrs. Narkeshari Prakashan Ltd., Nagpur, is a publishing house which, in the year 1972, had also branches at Raipur and Jabalpur from where a daily (Yugadharma) was published. Those two branches along with all assets and liabilities were sold to two different co-operative societies, respectively, for a sum of Rs. 2,65,179 and Rs. 1,04,454. The assets included buildings, machinery, furniture, fixtures, loans and advances to the staff, stock, security deposit, goodwill, etc., and the liabilities included loans, unpaid bonus and wages, outstanding liabilities, etc.

3. While assessing the income for the assessment year 1974-75, the Income Tax Officer added a sum of Rs. 38,908 as profit arising on the aforesaid sale of the two branches u/s 41(2) of the Income Tax Act. The Commissioner of Income Tax confirmed the said addition. The second appeal filed by the assessee before the Tribunal was allowed. The Tribunal came to the conclusion that the entire business activity of each branch was going concern which was sold for a slump price and hence section 41(2) was not attracted. In arriving at that conclusion, the Tribunal relied upon the decision of the Supreme Court in the case of [Commissioner of Income Tax \(Central\), Calcutta Vs. Mugneeram Bangur and Co. \(Land Department\)](#), and the Board Circular No. 23D(LXXVIII-6) of 1965 explaining the said decision and reading thus :

"Recently in the case of Mugneeram Bangur and Co. (Land Department) [1965] 56 ITR 13 , the Supreme Court considered the question about the taxability of the surplus amount arising on the sale of a business as a going concern. The decision of the Supreme Court was that where the sale was of the concern as a whole and a slump price was paid, no portion of this price was attributable to the stock-in-trade and, therefore, it was not possible to hold that there was a profit other than what resulted from the appreciation of capital. It follows, therefore, that where a business is sold as a going concern, the excess may not be a business profit, but will be a capital gain chargeable to tax. This view also finds support from the case of [R. B. LACHMAN DAS MOHANLAL and SONS Vs. COMMISSIONER OF Income Tax, U. P.,](#)."

4. Only two contentions are raised before us on behalf of the Revenue :

(i) Each branch could not be treated as a separate entity and, therefore, did not have independent goodwill.

(ii) In view of the specification of the price of items of assets and liabilities in the agreements, it could not be said that the sale were of the going concerns as a whole for a slump price.

5. It is not possible to accept these submissions. The first submission pertains to a factual aspect. As a matter of pure principle, even a branch of a publishing house like this can have different goodwill which depends upon a host of factors such as popularity, performance, circulation, peculiarities of the region, etc. As regards the second submission, a mere look at the agreements would clearly indicate that what was sold was the entire branch business as a whole - lock, stock and barrel. Several

items were such as would not be independently purchased. The value of the liabilities is adjusted against the value of assets. An inventory has to be made for the purpose of identification, because inventory was made and the value was indicated against each item and the overwhelming character of the transaction was not changed. The supreme Court decision in [Commissioner of Income Tax \(Central\), Calcutta Vs. Mugneeram Bangur and Co. \(Land Department\)](#), also pertained to the agreement containing a schedule indicating the item wise value of different assets and liabilities. The 1965 Circular clarified the principle involved in the said decision.

6. Our attention was invited by the Revenue to the decision of the Gujarat High Court in the case of [Jayantilal Bhogilal Desai Vs. Commissioner of Income Tax, Gujarat-II](#). Attention of the Tribunal was also drawn to the said decision. Rightly has the Tribunal come to the conclusion that the ratio of that decision would not apply to the instant case since it pertains to a different backdrop and two separate and individual agreements of sale.

7. The Tribunal has rightly held that no question of law arose for reference. The present application is, therefore, rejected and rule discharged. No order as to costs.