

Calcutta High Court

Gopee Nath Paul And Sons And Anr. vs Deputy Commissioner Of Income Tax on 15 February, 2005

Equivalent citations: (2005) 198 CTR Cal 116

Author: D Seth

Bench: D Seth, S Pal

JUDGMENT D.K. Seth, J.:

The point :

1. In this case, the liability of one of the firms, Gobindo Sheet Metal Works & Foundry, held to be the erstwhile firm under the name and style of which the assessee was carrying on business could satisfy the test of being expenditure incurred wholly and exclusively in connection with the transfer of the assets of the assessee for the purpose of computation of capital gains for asst. yr. 1992-93. In order to ascertain the proposition reference to the factual aspects of the case are required to be referred to.

The submission :

2. Dr. Pal, the learned senior counsel, ably assisted by Mr. J.P. Khaitan, pointing out to the various materials submitted that there is already a finding of fact to the extent that the assessee was carrying on business under the name and style of Gobindo Sheet Metal Works & Foundry (Gobindo Sheet Metal). It is also pointed out that there is nothing on record to show that the Gobindo Sheet Metal was an assessee, on the other hand, the sale proceeds of the said two firms was assessed at the hands of Gopee Nath Paul & Sons, the assessee. Relying on the decision in CIT v. Bradford Trading Co. (P) Ltd. , Dr. Pal contended that this expenditure was incurred wholly and exclusively in connection with the transfer and, as such, is allowable under Section 48(1) of the IT Act, 1961, as it then stood. He also relied on the decision in CIT v. Shakuntala Kantilal as his sheet-anchor and pointed out that the liability of the Allahabad Bank was an absolute necessity to meet in order to effect the sale and without removing this liability the property could not be sold and, as such, this satisfies the test of being an expenditure incurred wholly and exclusively in connection with the transfer.

The opposition :

3. Mr. Som, the learned senior advocate appearing for the Department, strenuously argued that the assessee and Gobindo Sheet Metal were two different firms and the liability of Gobindo Sheet Metal towards the Allahabad Bank seeking declaration of hypothecation of stock-in-trade and other movable goods would not be a liability or encumbrance which was absolutely necessary to be removed for transfer of the assets of the assessee or without removal of which encumbrance the assets could not be sold. He drew our attention elaborately to the records before us, particularly those in the paper book and had attempted to drive home his contention with unparalleled eloquence.

3.1 Mr. Som relied on the decision in D.D. Chittaranjan v. CIT (1992) 193 ITR 238 (Mad) and contended that the amount spent to meet the liability, capital nature, would not be an expenditure incurred wholly and exclusively in connection with the transfer to a post-transfer application of the

sale proceeds or distribution of the sale proceeds after transfer. Pointing out from the materials on record, he contended that this was to be made after 30 days from the date of realization of the full amount. This being a post-transfer affair, this could not be treated to be an expenditure incurred in connection with the transfer. Mr. Som then relied on the decision in CIT v. SRV Press & Publication (P) Ltd. where an amount of finance received from a financial corporation repaid out of the sale proceeds received by the liquidator, was held not to be an expenditure incurred wholly and exclusively in connection with the sale on account of liability being capital in nature met out of the sale proceeds. He also relied upon the decision in R.M. Arunachalam v. CIT in order to contend that this payment was not a cost of transfer but distribution of the sale proceeds to meet the liability of the assessee.

Admitted facts :

4. It appears from the materials on record that there was a suit between the Allahabad Bank and Gobindo Sheet Metal. In the said suit the Allahabad Bank claimed certain amount to the extent of Rs. 25,00,000 appx. on account of Gobindo Sheet Metal's liability towards the loan obtained from the Allahabad Bank which was sought to be recovered together with a declaration of hypothecation of certain movable goods including stock-in-trade. At the same time, there was another suit in which an arbitration agreement was sought to be filed on account of dispute including the dispute involved in respect of the dissolution of the two firms, Gopee Nath Paul & Sons and Gobindo Sheet Metal Works & Foundry between the partners of the respective two firms, i.e., the parties who were common. In the latter suit, there was a compromise in which both the firms stood dissolved from the date agreed in the terms of settlement and the receiver was appointed in terms thereof for the purpose of selling these two firms as going concerns. From the subsequent orders, it appears that those firms could not be sold as going concerns on account of the liability of Gobindo Sheet Metal towards the Allahabad Bank.

4.1 After having passed several orders, by an order dt. 27th April, 1989, the Court directed deposit of Rs. 25,00,000 with the Registrar of this Court to be kept in fixed deposit with the Allahabad Bank free from lien and all attachments until further orders of this Court. This was done in order to effectuate the transfer of the assets of these two firms after securing payment of the liability towards the Allahabad Bank in respect of one of the firms. It appears that there was but one sale comprising of the assets of both the firms and the bid of one Ganesh Prasad at Rs. 3,51,00,000 was accepted as the highest bid and that the payment towards the same was made in dribblets from time-to-time.

4.2 From the assessment order, it appears that this whole amount was brought at the hands of the assessee for being assessed for short-term capital gains: There is nothing to show that there was a separate sale of the assets of Gobindo Sheet Metal and those of Gopee Nath Paul. It clearly appears from the orders and the terms of settlement, which was substituted subsequently, as it appears from the supplementary paper book at p. 14, that the assets of both the firms were sold through one auction and the whole receipt was assessed at the hands of the assessee. From the order of confirmation of the sale at p. 186 of the paper book, it appears that the sale was confirmed subject to prior payment of the monies as directed in the said order. The said order indicates that a sum of Rs. 15,59,425.43 was to be deducted by the Allahabad Bank before releasing the balance amount of the

fixed deposit of the said sum of Rs. 25,00,000 set apart for meeting its liability. The sale was confirmed subject to the meeting of the liability of the Allahabad Bank. It appears that until the sale was confirmed the sale could not have been effected and the sale consideration could be received only after meeting the liability of the Allahabad Bank.

Section 48(1) : The principle : The expenditure : Whether incurred wholly and exclusively in connection with the transfer :

5. Section 48(1), as it stood in 1992-93, while providing for computation of capital gains permitted in Clause (i) deduction of the 'expenditure incurred wholly and exclusively in connection with such transfer'. The expression 'in connection with such transfer' is wider than the expression 'for the transfer'. Any amount the payment of which is absolutely necessary to effect the transfer will be an expenditure covered by Clause (i) of Section 48(1). In other words, if without removing any encumbrance, sale or transfer could not be effected, the amount paid for removing that encumbrance will fall under Clause (i).

5.1 From the facts as disclosed above, it appears that the amount was received out of the sale of assets of both the firms under orders of this Court subject to meeting of the liability of the Allahabad Bank since confirmed only upon prior payment. Inasmuch as, unless this liability was met, the transferee could not derive any title. In other words, the sale consideration receivable by the assessee was less the liability of the Allahabad Bank. Thus, meeting this liability of one of the firms, when the entire assets were being sold, was an absolute necessity to effect the transfer. In other words, it was an encumbrance without removing which the sale or transfer could not be effected and the amount spent for removing this encumbrance would definitely attract Clause (i) of Section 48(1).

5.2 From the assessment order (p. 37 of the paper book), it appears that earlier the assessee used to conduct its business under the name and style of Gobindo Sheet Metal Works & Foundry. CIT(A) at pp. 43-44 of the paper book have found that the short-term capital gain arising out of the sale of the assets pertaining to the erstwhile business of the appellant in the name and style of Gobindo Sheet Metal Works & Foundry and on the sale of the factory and assets of the erstwhile business through public auction, the total consideration received was Rs. 3,66,24,005. From the details of the expenses and liabilities claimed, it was seen that an amount of Rs. 27,85,523 had been shown as payable to the Allahabad Bank. However, the CIT(A) found that there was no precondition that the appellant could not sell its assets without settling the dues of the Allahabad Bank and even if it was, it would be a case of application of the income.

5.3. As discussed above, in this case the sale could not be effected without meeting the liability, as it appears from the different orders passed by this Court in the latter suit wherefrom it is apparent that the former suit was transferred to this Court and was ultimately settled between the parties through Lok Adalat.

5.4 But from the facts as discussed above, we are of the view that the orders passed by this Court directing the sale of the assets of the two firms and its confirmation thereof are staring on the face of the inference drawn by the CIT(A). Thus, we are of the view that the liability met by the assessee

towards the dues of the Allahabad Bank was an expenditure incurred wholly and exclusively in connection with the transfer.

The citations :

6. We are supported in our above view by the decision in the case of CIT v. Shakuntala Kantilal (supra), and we are in agreement with the view taken in the said decision. Reference was also made to the case of CIT v. Abrar Alvi , wherein, relying on Shakuntala Kantilal (supra), it was held that an expenditure in removing encumbrance would be deductible in computation of capital gains. However, the discharge of mortgage created by the assessee after he acquired the property would not be deductible.

6.1 On the other hand, the decision cited by Mr. Som in D.D. Chittaranjan v. CIT (supra) is distinguishable on facts, inasmuch as in this case, the amount of the sale proceeds was paid to a third party with whom there was certain dispute between that third party and the wife of the assessee in respect of a different property of which the wife was the absolute owner and as such the amount paid to meet the liability of the wife in respect of another property could not be held to be an expenditure incurred for the purpose of transfer of the assessee's own property different from the property of his wife. On facts, it was found that there was no connection of this expenditure with the transfer.

6.2 The decision in SRV Press & Publication (P) Ltd. (supra) cited by Mr. Som is also distinguishable and would have no manner of application in the present case in view of the fact that the amount was spent in that case after the receipt of the consideration by the liquidator to discharge the liability of the assessee in respect of finance received from the Kerala Finance Corporation on the security of the property which was created after acquisition in course of a winding up proceeding. There was nothing from which it could be held that such payment was absolutely necessary. On the other hand, the learned Counsel for the assessee in that case had conceded that Section 48 of the Act had no application to the facts of the said case. However, the alternative, argument of the assessee was that the corporation had overriding title over the property. The amount paid was clearly relatable to title. Thus, it appears that there was no claim that the payment of that amount was an expenditure incurred wholly and exclusively in connection with the transfer. There is another distinguishing feature so far as the present case is concerned. Here the entire assets of the business of the two firms as a going concern were sought to be sold, but could not be sold without removing the liability towards the Allahabad Bank. The assets included the whole business of the two firms and if the liability, was not met before the sale, in that event, in this present case the sale consideration would have been reduced by the liability payable to the Allahabad Bank. Therefore, the decision cited does not help us in the facts and circumstances of the case to take a different view.

6.3 The decision in R.M. Arunachalam (supra) dealt with the question of cost of acquisition, which is not a case here. It was not related to the perfection of title. Therefore, this decision does not help us in the context in which we are supposed to decide the present case.

Conclusion :

7. The criteria is the perfection of title in order to effect the sale. In this present case, without removing the liability of the Allahabad Bank, the title of the purchaser could not be perfected. Having regard to the facts and circumstances of this case and the position in law as discussed above, the meeting of the liability of the Allahabad Bank relating to the assets of Gobindo Sheet Metal was an expenditure incurred wholly and exclusively in connection with the transfer.

Order :

8. For all these reasons, the appeal succeeds. The order of the learned Tribunal is hereby set aside.

8.1 The question is answered in the negative in favour of the assessee in respect of a sum of Rs. 15,59,425 and against the Revenue.

8.2 The appeal, thus, stands allowed. There will, however, be no order as to costs.

Soumitra Pal, J.

8.3 I agree.