

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 549 OF 2000

The Commissioner of Income Tax	]	
Mumbai City II, Mumbai.	]	
Aayakar Bhavan	]	
New Marine Lines,	]	
Mumbai-400 020.	]	.. Appellant
Vs.		

Sham L. Chellaram	]	
Gazdar House, 3 rd Floor, 629, A.J. Shankar	]	
Sheth Road, Mumbai-400 002.	]	.. Respondent

Mr. Suresh Kumar, Advocate for Appellant.
Mr. Ravi Rattsar, Advocate i/b D.M. Harish for Respondent.

**CORAM : M.S. SANKLECHA &
G.S. KULKARNI, JJ.**

**Reserved on : 03 February 2015
Pronounced on : 18 February 2015**

JUDGMENT: (PER M.S. SANKLECHA, J)

This appeal by revenue under Section 260A of the Income Tax Act, 1961 (the 'Act') assails the order dated 12th July 1999 passed by the Income Tax Appellate Tribunal (the 'ITAT').

2 The Assessment Year involved is Assessment Year 1992-93.

3 The appeal was admitted on 10th September 2001 on the following substantial question of law:

“Whether on facts, the ITAT was right in holding that short-term capital gain was derived from foreign exchange asset. If so, whether on sale of bonus shares investment income within Section 115E of the Act accrued?”

4 It is an admitted position that for the purposes of this appeal, the Respondent-Assessee is a non-resident under the Act. During the previous year relevant to the Assessment Year 1992-93, Respondent-Assessee sold 10,000 shares of Tata Chemicals Ltd. received by him as bonus shares. The shares were sold after obtaining permission from the Reserve Bank of India. The original shares on which the aforesaid bonus shares had been received was purchased by Respondent-Assessee in the year 1997 in convertible foreign exchange.

5 In its return of income for the Assessment Year 1992-93, the Respondent-Assessee claimed the benefit of Chapter XII-A of the Act in respect of the short-term capital gains made on sale of 10,000 bonus shares of Tata Chemicals Ltd. This was claimed on the ground that any income earned out of investment would be covered by Section 115E of the Act chargeable to income tax at a concessional rate of 20%. However the Assessing Officer by his order dated 19th August 1993 did not accept the Respondent's contention and held that the benefit of concessional rate of income tax is not available to income earned by way of short-term capital gains. Thus bringing to tax the short-term capital gains on sale of bonus shares to tax at regular rates.

6 Being aggrieved, the Respondent-Assessee carried the matter in appeal to Commissioner of Income Tax (Appeals) ('CIT(A)'). By an order dated 21st September 1994, the CIT(A) allowed the Respondent-Assessee's appeal by following the decision of ITAT in **Smt. Trishala Jain**

v/s. Deputy Commissioner of Income Tax reported in **34 ITD 523**. The CIT(A) held that the concessional rate of income tax at 20% applied not only to long-term capital gains but also to investment income. Thus the sale of 10,000 bonus shares of Tata Chemicals Ltd. although short term capital gains was an investment income and thus covered by Section 115E of the Act attracting concessional rate of income tax.

7 Being aggrieved, the revenue carried the order of the CIT(A) in appeal to the ITAT. By the impugned order dated 12th July 1999, the ITAT upheld the order of the CIT(A) by following its decision in the matter of Smt. Trishala Jain (supra).

8 Before considering the submissions of the respective Counsel, it may be convenient to reproduce the relevant provisions of Chapter XII-A of the Act.

“Definitions.

115C. In this Chapter, unless the context otherwise requires,-

(a) “convertible foreign exchange” means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and any rules made thereunder;

(b) “foreign exchange asset” means any specified asset which the assessee has acquired or purchased with, or subscribed to in, convertible foreign exchange;

(c) “investment income” means any income derived from a foreign exchange asset;

(d) “long-term capital gains” means income chargeable under the head “Capital gains” relating to a capital asset, being a foreign exchange asset which is not a short-term capital asset;’

(e)

(f) “specified asset” means any of the following assets, namely:-

(i) shares in an Indian company;

(ii) to (v)

115E. (1) Where the total income of an assessee, being a non-resident Indian, consists only of investment income or income by way of long-term capital gains or both, the tax payable by him on his total income shall be the amount of income-tax calculated on such total income at the rate of twenty per cent of such income."

9 Mr. Suresh Kumar, learned Counsel for revenue in support of the petition submits as under:

(a) the benefit of Section 115E is available only when there is investment income or income by way of long-term capital gains. In this case, there is no investment income nor income on account of long-term capital gains. Thus the benefit of Section 115E cannot be extended to the respondent-assessee; and

(b) the decision of the ITAT in Smt. Trishala Jain (supra) has not been followed by the subsequent decision of the ITAT (after noticing Smt. Trishala Jain) in Sunderdas Haridas Vs. Assistant Commissioner of Income Tax reported in 67 ITD 89. It is the subsequent decision of the ITAT which lays down the correct position in law.

Thus, it is submitted that the appeal be allowed.

10 On the other hand, Mr. Ravi Rattsar, learned Counsel for the respondent in support of the impugned order submitted as under:

(a) short-term capital gains also falls within the definition of Income under Section 2(24) of the Act. Thus, the amount received on sale of shares is income

received on investment and it would be covered by scope of Section 115E of the Act;

(b) the decision of the ITAT in the matter of Smt.Trishala Jain (supra), following the decision of the Supreme Court in Shevantilal M. Sheth Vs. CIT reported in 68 ITR 503 has held that the income arising from transfer of an asset i.e. investment would be covered as income arising from investment. This lays down the correct law;

(c) the decision of the ITAT in Smt. Trishala Jain (supra) has been accepted by the revenue as no appeal therefrom has been filed by the revenue. The benefit of the same should be available to all assessees;

(d) Section 115E does not specifically exclude short-term capital gains from the definition of investment income. Thus, the benefit cannot be denied by reading the short-term capital gains into Section 115E of the Act; and

(e) in any view of the matter, if two views are possible then, the view in favour of the assessee has to be adopted in the matters of interpretation of fiscal statutes.

11 It is an admitted position between the parties that 10,000 bonus shares of Tata Chemicals is a specified Foreign Exchange Asset in the hands of the Respondent-Assessee who is a non-resident. Thus, Chapter XII-A of the Act is undisputedly arises for consideration in the present facts.

12 The preliminary objection on behalf of the assessee is that in view of the decision of the Delhi High Court in ITAT in Smt. Trishali Jain (supra) on identical issue not being challenged by the Revenue, this Court should dismiss this appeal as the law should be uniformly applied. However, this submission ignores the fact that the Mumbai Bench of ITAT in the case of Sunderdas Haridas (supra) on identical facts has taken a different view from Smt. Trishala Jain (supra) and accepted the contention of the Revenue. Therefore, in view of the above differing views, it is incumbent upon us to resolve the difference by deciding the issue. Therefore, the preliminary objection need not detain us.

13 It is a settled position of law that normally a taxing statute has to be strictly construed i.e. one has to read the statute as it stands, nothing has to be read in nor anything has to be implied nor is any part of the statute to be ignored. It is equally well settled rule of interpretation that a person who claims exemption or concession in payment of tax, has to establish that he strictly falls within the plain terms of the exemption/concession granted by the taxing statute. One more settled principle of interpreting taxing statute is that whenever there is an ambiguity or a doubt with regard to a construction of a particular taxing provisions, then the doubt or ambiguity must be resolved in favour of the assessee. Keeping these above broad well settled principles of interpretation of statute in mind, we shall now examine the issue arising for our consideration.

14 Section 115E which is part of Chapter XII-A of the Act at the relevant time granted benefit of concessional rate of tax at 20% to the extent the income of the Non-resident consists of '*Investment Income*' or

'Income by way of long term capital gains' or both arising out of assets specified in Chapter XII-A of the Act. A plain reading of Section 115E of the Act would thus indicate that the benefit of concessional tax would be available to a Non-resident on specified assets only to the following extent:

- (a) Investment Income; and
- (b) Income by way of long term capital gains.

Admittedly, the Respondent-Assessee has earned short term capital gains and not long term capital gains.

However, it is the case of the Respondent-Assessee that income by way of short term capital gains is also *'Investment Income'*. Therefore, it is contended that the benefit of Section 115E of the Act would be available even in respect of income by way of short term capital gains.

15 Chapter XII-A of the Act is a special provision relating to income of Non-residents. The object seems to have been to make investment in India an attractive proposal for the Non-residents, subject to the investment being made in convertible foreign exchange. Chapter XII-A of the Act itself sets out the products/ assets which are covered by it and shares in an Indian Company, is a specified asset.

16 The impugned order of the ITAT has extended the benefit of Section 115E of the Act to the Respondent-Assessee, as the issue stands covered by virtue of its decision in *Trishala Jain (supra)*. The ITAT in *Trishala Jain (supra)* held that income on account of short term capital gain was income derived out of investment income i.e. equity shares. This was on the ground that the *'Investment Income'* as defined in Chapter XII-A of the Act is income derived from Foreign Exchange Assets. Thus, the

gain made by sale of shares although a short term capital gain would fall under head 'Investment Income'. For the purpose of coming to the aforesaid conclusion, reliance was placed upon the decision of the Apex Court in ***Sevantilal M. Sheth v/s. CIT 68 ITR 503***. In *Sevantilal M. Sheth* (supra), the Supreme Court while dealing with the issue of clubbing of income has held under the Income Tax Act, 1922 (the '1922 Act') that there is no difference between the income arising from assets and that arising from the sale of the assets in the context of sale of Agricultural Lands. It held that income in both cases arise/ spring from the asset. If asset produces income, it arises out of asset and if income arises out of sale of asset, it still arises/ spring from the asset. The Court held that though the process involved is different, income in both cases arise from the asset.

17 It is also relevant to note that Bombay Bench of the ITAT in *Sunderdas Haridas*(supra) did not agree with the view taken in *Trishala Jain* (supra). The Tribunal held that the decision of the Apex Court in *Sevantilal Sheth* (supra) was rendered in the context of whether income arises on agricultural land is to be clubbed under the provisions of Section 16(3)(a)(iii) of the 1922 Act. This decision of the Supreme Court dealt with 1922 Act with specific reference to clubbing of income for the purposes of avoidance of taxes and/or reducing the incidence of tax. The Tribunal in *Sunderdas Haridas* (supra) also observed that in *Sevantilal Sheth* (supra) had interpreted the provision to advance the remedy in a different context. Thus, the Tribunal in *Sunderdas Haridas* (supra) on reading Section 115E of the Act concluded that the income earned on short term capital gains would not be entitled to concessional tax thereunder.

18 Investment income it is contended by the Respondent-Assessee would be a genus and include all income arising out of investment, including the sale of the investment. This for the reason that although sale of investment would normally be on capital account, yet in view of the artificial definition of income under Section 2(24)(vi) of the Act, capital gains chargeable to tax under Section 45 of the Act would be income for purposes of the Act. If the aforesaid interpretation to Section 115E of the Act as canvassed by the Respondent-Assessee is accepted, then the explicit mentioning of the words “income by way of long term capital gains” would not have been necessary in addition to “Investment Income”.

19 As pointed out above, a settled rule of construction of statutes is that it is not open to ignore words in the statute rendering a part of the statute redundant. Thus if the line of reasoning adopted in *Trishala Jain* (supra) and canvassed by the Respondent-Assessee is accepted, then the words by way of long term capital gains would be rendered nugatory. In any case, the amounts received on sale of the shares/ asset is not ordinarily an income but a receipt on capital account. It is only in view of the definition of income as provided in Section 2(24) of the Act that capital gains chargeable to tax under Section 45 of the Act would be income for the purposes of this Act. However, Section 2 of the Act itself makes it clear that the definition as given in Section 2 of the Act would apply unless the context otherwise requires. If we apply the definition of income as provided in Section 2 of the Act to the use of the word 'Investment Income' found in Chapter XII-A of the Act and particularly in Section 115E thereof, we would render the words 'Income by way of long

term capital gain' therein redundant. This is not permissible in a taxing statute. Therefore, the definition of income as given in the Act which covers capital gains can not be applied in the context of Section 115E of the Act, as its application would render a part of the statute otiose.

20 It is equally true that in exceptional cases, additional words may be ignored on the basis that they were introduced only to allay the fears of those who would otherwise feel that exemption would not be extended to long term capital gains. However, if this was so then the words Income by way of short term capital gains would have been introduced in Section 115E of the Act along with the words long term capital gains. This not having been done is a clear indication that Parliament restricted the benefit of Section 115E of the Act only to long term capital gains and Investment Income.

21 The reliance in the impugned order by the ITAT on Trishala Jain (supra) was on the definition of 'Investment Income' in Section 115C of the Act i.e. definition section of Chapter XII-A of the Act to mean any income derived from a Foreign Exchange Asset. The words “derived from” was a subject matter of consideration by the Supreme Court in ***Cambay Electric Supply Industrial Company Ltd v/s. CIT 113 ITR 84***. In the above case, the Apex Court held that the expression “attributable” to wider then the expression “derived from”. Thus, the sale of old machinery was held not to be a profit and gains derived from the conduct of the business of generation of electricity. It was held in the above case that whenever Parliament wanted to give a restricted meaning, they use the word 'derived from'. This also support the Revenue's contention that any income earned by the sale of the investment cannot be said to be

derived from a Foreign Exchange Assets. The words 'derived from' would normally indicate in case of shares, the dividend received on shares and not the sale of the shares. The amount received on sale of shares is not derived from it as it is received on the transfer of shares leading to extinguishment of all rights in the shares so sold. Thus the interpretation by the Revenue also find support from the fact that Section 115E of the Act specifically indicates income by way of long term capital gains to be entitled to the benefit of Section 115E of the Act as it is not considered to be an income derived from an investment. Chapter XII-A of the Act itself makes a distinction between income derived from an asset and an income arising on sale of assets, leading to long term capital gains. The later is a case of income being attributable to sale of assets. We hold that the income arising on sale of assets leading to short term capital gains is not income derived from foreign exchange asset so as to qualify as investment income within the meaning of Section 115E of the Act.

22 In the view we have taken, according to us there is no ambiguity in the reading of Section 115E of the Act. Therefore, there is no occasion to deal with the submissions of the Respondent-Assessee that in case of doubt/ ambiguity, an interpretation in favour of the subject be adopted.

23 Accordingly, substantial questions of law as formulated for our consideration is answered in the negative i.e. in favour of the Revenue and against the Assessee.

24 **Appeal allowed.** No order as to costs.

(G.S.KULKARNI,J.)

(M.S.SANKLECHA,J.)