

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL NO. 736 OF 2008

Sumit Bhattacharya

.. Appellant

Versus

Asst. Commissioner of Income Tax Circle
16(1)

.. Respondent

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- Mr. V.S. Nankani, Sr. Advocate a/w Mr. Balasaheb Yewale and Ms. Rupali Vasaikar for the Appellant
 - Mr. Suresh Kumar for the Respondent
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CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.

DATE : FEBRUARY 6, 2020.

ORAL ORDER (PER UJJAL BHUYAN, J.):

1. Heard Mr. Nankani, learned senior counsel along with Mr. Yewale and Ms. Vasaikar, learned counsel for the appellant and on our request, Mr. Suresh Kumar, learned standing counsel, revenue for the respondent.

2. This appeal under Section 260A of the Income Tax Act, 1961 ("**the Act**" for short) is preferred by the revenue against the order dated 3.1.2008 passed by the Income Tax

Appellate Tribunal, Mumbai Special Bench 'C', Mumbai ("**Tribunal**" for short) in Income Tax Appeal No. 238/M/2015 for the assessment year 1998-99.

3. By order dated 7.10.2008, the appeal was admitted on the following substantial questions of law:-

- (A) Whether on the facts and in the circumstances of the case and in law, the Tribunal is correct in holding that the SARs and stock options are distinct despite Notification No. 323/2001 dated 11.10.2001 and the tax consequences of SARs and stock options are at variance?
- (B) Whether on the facts and in the circumstances of the case and in law, the Tribunal is correct in holding that the impugned receipt pertaining to redemption of SARs is assessable under the head 'salary'?
- (C) Whether on the facts and in the circumstances of the case and in law, an amount can be assessed as salary income in the hands of a person when received from a person other than his employer?
- (D) Whether on the facts and in the circumstances of the case and in law, the Tribunal misdirected itself in holding that even assuming that the impugned receipt is not exigible to tax under the head 'salary' due to the absence of an employer - employee relationship yet the same is liable to be taxed under the head 'income from other sources' in view of the decision of

the Apex Court in **EMIL Webber Vs. CIT**¹. and contrary to **Nalinikant Ambalal Mody Vs. CIT**².?

- (E) Whether on the facts and in the circumstances of the case and in law, the Tribunal is justified in rejecting the argument of the appellant that if at all, the impugned receipt is correctly assessible under the head 'capital gains'?

4. Though, it appears that the issue raised in this appeal has been concluded by the Supreme Court in favour of the assessee and against the revenue, by its judgment and order dated 24.4.2018 passed in Civil Appeal Nos. 4380-4381 of 2018 (**Additional Commissioner of Income Tax Vs. Bharat V. Patel**), to put the controversy in proper perspective, it is necessary to have a brief narration of facts.

4.1. For the assessment year 1998-99, the petitioner - an individual assessee having salary and professional income, filed return of income disclosing total income of Rs. 26,76,900.00. The assessment was reopened on the ground that assessee had received right of redemption in respect of stock appreciation rights ("**SARs**" for short) of M/s. Procter & Gamble (India) Ltd during the relevant previous year. Assessee was an employee of M/s. Procter & Gamble (India)

1 200 ITR 483

2 61 ITR 428

Ltd and by virtue of his employment, he had received the SARs. On redemption, the value of SARs was Rs. 4,79,13,852.00 which was construed to be taxable income of the assessee by the Assessing Officer and which had escaped assessment.

5. On notice, petitioner - assessee submitted his reply contending that the quantum of SARs were in the nature of capital gains and could not be construed as perquisite, not chargeable to tax. Assessing Officer by his assessment order dated 20.3.2002 passed under Section 143(3) read with Section 147 of the Act held that the said amount was part of the salary income of the petitioner and accordingly, was added to the income of the petitioner under the head 'income from salaries'.

6. Aggrieved by the said addition, petitioner preferred appeal before the Commissioner of Income Tax (Appeals)-XVII, Mumbai (referred to hereinafter "**the first appellate authority**"). By the appellate order dated 25.11.2002, the first appellate authority declined to interfere

with the order passed by the Assessing Officer holding that the said amount was rightly treated as part of salary.

7. Petitioner made further appeal against the said order passed by the first appellate authority before the Tribunal. It is seen that Tribunal referred the matter to a special bench. The reference was made considering the conflicting decisions of the Tribunal in case of Bharat V. Patel Vs. Additional Commissioner of Income Tax by the Ahmedabad 'A' Bench and in the case of Infosys Technologies Ltd Vs. DCIT of the Bangalore Bench. The reference reads as under:-

"The learned Commissioner of Income Tax (Appeals) erred in treating the sum of Rs. 4,79,13,851.00 being the amount received on redemption of stock appreciation rights (SARs) by the appellant during the financial year 1997-98, as taxable perquisite under the head salaries."

8. Thereafter, the appeal was heard by a special bench of the Tribunal comprising two judicial members and one accountant member. Ultimately, the special bench held that the assessee's receipts of whatever nature in connection with his employment are to be treated as salary. Therefore, the view taken by the revenue authorities was upheld.

8.1. Hence, this appeal.

9. Submissions made by learned counsel for the parties have been considered.

10. Chapter IV of the Act deals with computation of total income. Section 14 provides for different heads of income, such as, salaries, income from house property, profits and gains of business or profession, capital gains and income from other sources. Income under the head 'salaries' is provided under Section 15. Section 16 provides for the deductions which are allowable from income from salaries. Section 17 defines 'salary', 'perquisite' and 'profits in lieu of salary'. Sub-section (2) thereof defines the word 'perquisite'. Clause (iiia) was inserted in Section 17(2) of the Act by the Finance Act, 1999 w.e.f. 1.4.2000. However, subsequently, this provision was omitted by the Finance Act, 2000. However, since clause (iiia) of Section 17(2) of the Act is relevant, the same is extracted hereunder:-

“(iiia) the value of any specified security allotted or transferred, directly or indirectly, by any person free of cost or at concessional rate, to an individual who is or has been in employment of that

person:

Provided that in a case where allotment or transfer of specified securities is made in pursuance of an option exercised by an individual, the value of the specified securities shall be taxable in the previous year in which such option is exercised by such individual.

Explanation - For the purposes of this clause,-

- (a) "cost" means the amount actually paid for acquiring specified securities and where no money has been paid, the cost shall be taken as nil;
- (b) "specified securities" means the securities as defined in clause(h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and includes employees' stock option and sweat equity shares;
- (c) "sweat equity shares" means equity shares issued by a company to its employees or directors at a discount or for consideration other than cash for providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called; and
- (d) "value" means the difference between the fair market value and the cost for acquiring specified securities;"

10.1. Therefore, as per this provision, a perquisite would also include the value of any specified security allotted or transferred, directly or indirectly by any person free of cost or at concessional rate to an individual who is or has been in employment of that person.

11. It may be mentioned that the Tribunal's findings in the case of Bharat V. Patel (supra) holding that value of SARs

on redemption could not be treated as taxable salary income, was challenged by the revenue before the Gujarat High Court in Tax Appeal Nos. 6 and 14/2014. Gujarat High Court by the judgment and order dated 23.12.2014 dismissed the appeal of the revenue. It may be pointed out that since there were two assessment years in question, there were two appeals before the Gujarat High Court.

11.1 The decision of the Gujarat High Court was assailed by the revenue before the Supreme Court in Civil Appeal Nos. 4380 & 4381/2018. Before the Supreme Court, revenue relied upon the full bench decision of the Tribunal in case of the present petitioner to contend that the amount received on redemption of SARs as an employee of the company, there being an employer-employee relationship subsisting at the relevant time, the same should be treated as taxable income under the head 'income from salaries'. On the other hand, on behalf of the respondent, reliance was placed in the case of Infosys Technologies Ltd. It may be mentioned that in **Commissioner of Income Tax Vs. Infosys Technologies Ltd**³ it was held that such benefit

3 [2008] 297 ITR 167 (SC)

could not be construed as income of an employee chargeable to tax under the head 'income from salaries'.

11.2 Supreme Court referred to clause (iiia) inserted in Section 17(2) of the Act by the Finance Act 1999 w.e.f 1.4.2000 and held that the said provision could not be applied retrospectively. Ultimately, Supreme Court held that the respondent got SARs and eventually, received an amount on account of its redemption prior to 1.4.2000 on which date the Finance Act, 1999 came into force. In the absence of any express statutory provision regarding applicability of such amendment with retrospective effect, revenue's contention could not be accepted. Accordingly, the appeals filed by the revenue in the case of Bharat V. Patel were dismissed.

12. Reverting to the facts of the present case, it is seen that Assessing Officer himself had recorded in the assessment order that the petitioner had redeemed the SARs during the financial year 1997-98 relating to the assessment year 1998-99 which is prior to insertion of clause (iiia) to Section 17(2) of the Act w.e.f 1.4.2000. Therefore,

the said amount could not have been treated as a perquisite to be included as income under the head 'salaries' and taxed accordingly. Following the decision of the Supreme Court in the case of Bharat V. Patel (supra), we answer the substantial questions of law framed in favour of the assessee and against the revenue.

13. Consequently, the appeal is allowed. However, there shall be no order as to cost.

[MILIND N. JADHAV, J.]

[UJJAL BHUYAN, J.]

Ravindra
M.
Amberkar

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by Ravindra M.
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