* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 31 July 2024**
Judgment pronounced on: 07 August 2024

\+ ITA 270/2023

AKASH PODDAR .....Appellant
Through: Mr. Saurabh Kirpal, Sr. Adv. with Mr. Aniket D. Agarwal, Ms. Adya Luthra and Mr. Samarth Chaudhari, Advs.

versus

ACIT CIRCLE 30(1) NEW DELHI .....Respondent
Through: Mr. Shlok Chandra, Sr. Standing Counsel with Ms. Madhavi Shukla, JSC and Ms. Priya Sarkar, JSC with Mr. Sudarshan Roy and Ms. Kavita Rani, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

1. The appellant-assessee impugns the order of the **Income Tax Appellate Tribunal**[1] dated 15 December 2022. We had by our order of 11 May 2023 admitted this appeal on the following question of law:

> "Whether in the facts and circumstances of the case, the Tribunal erred in law in artificially and illegally bifurcating the treatment to be accorded to the composite amount of Rs.3.03 crores received by the appellant in pursuance of a settlement for relinquishment of rights and interests in the shares of Tek Travels Pvt. Ltd. holding

[1] Tribunal

> that part amount is to be treated as capital gains under section 48, and the remaining amount is to be treated as income from salary under section 17(3)(iii) of the Act?"

2. The essential facts which merit notice for the purposes of answering the question which stands posited are as follows. The assessee is an individual resident who was employed with **Tek Travels Private Limited**[2] in the capacity of Chief Operating Officer during the period 01 December 2007 to 24 August 2010. In terms of his employment agreement, apart from yearly compensation, the assessee was also entitled to sweat equity in accordance with the stipulations of the said agreement.

3. It is the case of the assessee that till 31 March 2010, no shares were issued or allotted to him. This issue appears to have been raised with TTPL and which consequently increased its share capital by issuing 6,00,000 fresh equity shares in **Financial Year**[3] 2010-11, taking its total issued share capital to 16,00,000. On 08 June 2010, TTPL issued 50,000 sweat equity shares in the name of the assessee and consequential share certificates were also handed over. Shortly thereafter, on 24 August 2010, TTPL terminated the assessee's employment.

4. According to the assessee, it was at this stage that TTPL took the stand that he was not liable to be recognized as a shareholder and also refused to record his name in the Register of Members. Aggrieved by the aforesaid action, the assessee approached the

[2] TTPL
[3] FY

Company Law Board[4] by way of C.P. No. 8/111 of 2011 seeking to invoke the CLB's powers conferred by Section 111(2) of the **Companies Act, 1956**[5] for appropriate directions being framed requiring TTPL to register the 50,000 shares in his name.

5. During the pendency of the aforesaid petition before the CLB, the assessee and TTPL appear to have agreed to settle all disputes and which led to the signing of a Settlement Agreement on 23 January 2014. In terms of that Settlement Agreement, the assessee received a lump sum consideration of INR 3,03,75,000 towards full and final settlement of all disputes and differences with TTPL. The Settlement Agreement also records the assessee agreeing to unconditionally and irrevocably relinquishing all his rights and entitlement in respect of registration of the 50,000 shares and to consequently hand over the share certificates in original to TTPL. The assessee, further and in terms of the stipulations contained in the Settlement Agreement, gave up all rights to seek enforcement of any title or interest in the said shares.

6. The relevant clauses of the Settlement Agreement are reproduced hereinbelow:

> "**1.** The Second Party shall pay to the First Party, an amount of Rs.3,03,75,000 (Rupees Three Crores Three Lacs Seventy Five Thousand only) ("Settlement Amount"), in full and final settlement of all disputes and differences between the Parties.
>
> **2.** The Parties further agree that it shall be the First Party who shall deposit the applicable taxes on the said amount of Rs. 3,03,75,000 (Rupees Three Crores Three Lacs Seventy Five Thousand only). The Second Party represents that it shall deduct tax at source on the aforesaid Settlement Amount, at the maximum rate of 30%, and the

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[4] CLB
[5] 1956 Act

net amount payable to the First Party under this Settlement Agreement, after deduction of an amount of Rs.1,03,24,460 (Rupees One Crore Three Lacs Twenty Four Thousand Four Hundred and Sixty) towards tax at source, by the Second Party, shall be Rs. 2,00,50,540.00 (Rupees Two Crores Fifty Thousand Five Hundred and Forty).

xxxx **xxxx** **xxxx**

5. In consideration for and subject to payment of the Settlement Amount, the First Party: (i) hereby unconditionally and irrevocably relinquishes his claim to any right and entitlement to enforce registration of the Shares in his favour; (ii) shall immediately, upon payment of the Settlement Amount, hand over all share certificates in relation to the Shares, in original, to the Second Party; (iii) shall not seek to enforce any right, title or interest in the Shares or the share certificates; (iv) shall not seek to enforce any right, title or interest in the Second Party arising out of or with respect to his previous employment with the Second Party; and (iv) shall withdraw the Company Petitions filed against the Second Party within 5 business days of receipt of payment of the Settlement Amount.

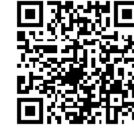
6. The First Party confirms that the Second Party shall be free to deal with the said Shares and the share certificates in any manner it deems fit and proper as per law.

7. The Parties further undertake not to initiate any other legal proceedings against each other, in future, regarding claims of ownership or registration of the Shares or in relation to the First Party's employment with the Second Party.

8. The Parties confirm that, subject to the terms of this Agreement, they do not have any further claims, of any nature whatsoever, against each other concerning their engagement with each other, during the period 01.12.2007 to 24.08.2010 or thereafter."

7. Based on the aforesaid settlement, TTPL paid an amount of INR 3.03 crores to the assessee during FY 2013-14. In the Return of Income for **Assessment Year**[6] 2014-15 which was filed by the assessee thereafter, the settlement amount was duly reported and claimed as Long Term Capital Gains, with the cost of acquisition

[6] AY



being declared to be 'Nil'. The **Assessing Officer**[7], however, while framing an order under Section 143(3) of the **Income Tax Act, 1961**[8] on 30 December 2016 treated the aforesaid amount as liable to be taxed under the head of salaries and more particularly under Section 17(3)(iii) of the Act.

8. According to the AO, the settlement amount was not liable to be treated as capital gains since TTPL had deducted tax thereon under Section 192. It further took the view that the surrender of the claim or a "right to sue" emanated essentially from the employer-employee relationship which had existed between the parties. It also took into consideration the fact that the shares were not registered in the name of the assessee and thus ultimately came to hold that the settlement amount essentially represented *'profits in lieu of salary'*, received in lump sum after cessation of employment.

9. Aggrieved by the aforesaid, the assessee approached the **Commissioner of Income Tax (Appeals)**[9]. The CIT(A) in terms of its order dated 21 February 2018 deleted the sole addition made by the AO and held that the amount of INR 3.03 crores was chargeable to tax as 'capital gains' and not under the head of 'salaries'. We deem it apposite to extract the following passages from the decision of the CIT(A) hereinbelow:

> "**5.2** It is gathered from the appellant's submission that the appellant was employed earlier by M/s. Tek Travels Pvt. Ltd. (TTPL) and entitled to yearly compensation plus 3% ESOP. However, no shares were actually issued to the appellant till 31/03/2010 but after increase in its share capital the appellant's

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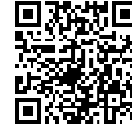
[7] AO
[8] Act
[9] CIT(A)

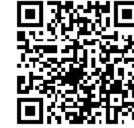


ownership towards 50,000 shares of TTPL. However, due to severance of employment with TTPL, the appellant was refused recognition as a share holder thereby excluding his name in the statutory register of M/s. TTPL. Subsequent to the appellant's petition to Company Law Board, TTPL agreed for a settlement and accordingly Rs.3,03,75,000/- towards full and final settlement in lieu of unconditional and irrevocable relinquishment of his right and enforcing registration and handing over share certificate in original to TTPL.

5.3 From the impugned order, it is observed that the appellant's claim in respect of the compensation received from TTPL was treated as 'Income from Salary' on the basis of the provisions of the Act u/s 17(1)(iv) and that TDS u/s 192 was deducted by TTPL thereon. However, as contended by the appellant and as per· the extant provisions of law, it is observed that in case of a capital asset u/s 2(14) of the Act, even the right acquired falls under the ambit of Section 2(14). Accordingly, the compensation received for foregoing rights towards equity shares is a transfer of capital assets, taxable as capital gain under the Act. Further, it is observed that capital gains arise on 'transfer' of a capital asset. Section 2(47) of the Act defines 'transfer' in relation to a capital asset which includes the extinguishment of any rights therein [2(47)(ii)]. That being so, whether the appellant receives compensation thereon on the basis of employer-employee relationship or that TDS is deducted u/s 192 hardly matters - the principle of 'Substance over Form' reigns supreme.

Accordingly, the treatment of the compensation received by the appellant as salary as opposed to his claim as LTCG in relation to transfer of a 'capital asset' in the impugned order (Rs.3,03,75,000/) is deleted. The ground at (a) above is allowed. The AO is directed to recompute the income of the appellant accordingly."

10. However, a diametrically opposite view came to be taken by the Tribunal on the appeal which came to be preferred by the respondents. The Tribunal firstly observed that in terms of the employment agreement, the assessee could have at best been eligible to be offered 15,000 shares as sweat equity. It, accordingly, took the position that the 15,000 eligible shares alone should be treated as taxable under the head 'capital gains' while the balance 35,000 shares should be taxed in accordance with the provisions of Section



17(3)(iii). It is aggrieved by the aforesaid decision of the Tribunal that the assessee has approached this Court.

11. Mr. Kirpal, learned senior counsel appearing in support of the appeal, at the outset submitted that the bifurcation of the 50,000 shares received by the assessee which was undertaken by the Tribunal is wholly untenable since no such contention was either raised by the respondents nor was such a submission embodied in the various grounds of appeal which were filed before it. According to Mr. Kirpal, the respondents had at no stage either questioned the issuance of 50,000 shares to the assessee or the fact that the assessee held share certificates in evidence thereof. Bearing in mind the unequivocal stipulations contained in the Settlement Agreement, Mr. Kirpal asserted that the Tribunal was clearly unjustified in taking the view that the assessee was only entitled to 15,000 shares as sweat equity. The Tribunal, in that sense, according to Mr. Kripal has constructed a case which was neither pleaded nor urged for consideration by the respondents.

12. Mr. Kirpal then submitted that as would be evident from a perusal of the Settlement Agreement itself, the amount of INR 3.03 crores, was essentially consideration for the surrender of a "right to sue". According to learned senior counsel, the surrender of a mere right to sue cannot possibly be viewed as transfer of a capital asset. Rather, the entire amount as received by the assessee in pursuance of the Settlement Agreement would constitute capital receipts, and thus not be chargeable to tax at all.

13. In support of the aforesaid contention, Mr. Kirpal firstly placed reliance upon the following passages from the decision of this Court in **Commissioner of Income-Tax, Delhi (Central) vs. J. Dalmia**[10]:

> "**9.** We do not find any exception under the I.T. Act, though the word "transfer" in relation to a capital asset has been defined in s. 2(47) of the Act, which includes "sale, exchange or relinquishment of the asset or the extinguishment of any rights therein". The damages which were received by the assessee cannot be said to be on account of relinquishment of any of his assets or on account of extinguishment of his right of specific performance under the contract for sale.
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> **10.** Under s. 5 of the Transfer of Property Act, transfer of "property" means an act by which a person conveys property to another and "to transfer property" is to perform such act. A mere right to sue may or may not be property but it certainly cannot be transferred. There cannot be any dispute with the proposition that in order that a receipt or accrual of income may attract the charge of tax on capital gains the *sine qua non* is that the receipt or accrual must have originated in a "transfer" within the meaning of s. 45 read with s. 2(47) of the Act. Since there could not be any transfer in the instant case, it has, to be held that the amount of Rs. 1,02,500 received by the assessee as damages was not assessable as capital gains. It was also argued on behalf of the assessee that the cost to the assessee of the acquisition of his aforesaid right under the contract for sale was nil. As such, the transfer would be outside the scope of s. 48 of the Act and in this context reliance was placed on a decision of the Supreme Court in *CIT* v. *B.C. Srinivasa Setty*, [1981] 128 ITR 294. But, the view which we have taken makes it unnecessary to go into this question.
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> **11.** Accordingly, we answer the question in the negative and in favour of the assessee. We leave the parties to bear their own costs."

14. Mr. Kirpal also sought to draw sustenance from the following pertinent observations as rendered by the Bombay High Court in **Commissioner of Income-Tax vs. Abbasbhoy A. Dehgamwalla**[11]**:**

> "**6.** Placing reliance on the decisions of our High Court in the cases of *CIT* v. *Tata Services Ltd.*, [1980] 122 ITR 594 and *CIT* v. *Vijay*

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[10] 1984 SCC OnLine Del 365

[11] 1991 SCC OnLine Bom 644

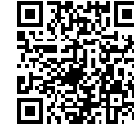
Flexible Containers, [1990] 186 ITR 693, Dr. Balasubramanian, learned counsel for the Revenue, submitted that the assessee's right to get the deed of conveyance executed under the 1945 contract constituted a capital asset and when the amount of compensation was received by the assessee in lieu of that right, the amount so received was taxable as income under the head "Capital gains". Dr. Balasubramanian referred to sections 45, 48 and 2(47) of the Income-tax Act, 1961, to show that capital gains was chargeable on the transfer of a capital asset and that the word "transfer" as defined in section 2(47) included within it not only sale or exchange but also relinquishment of the asset and/or the extinguishment of any right therein. According to him, in the present case, the assessee's right to get the deed of conveyance executed was extinguished. In lieu thereof, the amount of Rs. 2,52,000 was received as compensation. The amount was, therefore, taxable as capital gains.

xxxx **xxxx** **xxxx**

10. It may not be out of place to mention here that Dr. Balasubramanian had strenuously argued that, as a result of the breach of the agreement, the assessee acquired another right, i.e., the right to receive damages and that the right originally acquired in 1945 did not really come to an end on the breach of contract but was converted into another right, i.e., the right to receive damages for breach of contract. When this right materialised and the amount of damages was specified in the consent decree of the court, the amount so received represented the consideration for the transfer of the original right. His contention, thus, was that the assessee's right to have the lease deed executed under the agreement of 1945 was, as a matter of fact, extinguished during the previous year only. We find it difficult to accept this argument of Dr. Balasubramanian for more than one reason. It is trite law that income can be held to accrue only when the assessee acquires a right to receive the income. Unlike compensation payable by the State when it acquires a citizen's land under the Acts such as the Land Acquisition Act where the right to receive compensation is a statutory right, the right that a person acquires on the establishment of a breach of contract is at best a mere right to sue. Despite the definition of the expression "capital asset" in the widest possible terms in section 2(14), a right to a capital asset must fall within the expression "property of any kind" and must not fall within the exceptions. Section 6 of the Transfer of Property Act which uses the same expression "property of any kind" in the context of transferability makes an exception in the case of a mere right to sue. The decisions thereunder make it abundantly clear that the right to sue for damages is not an actionable claim. It cannot be assigned. Transfer of such a right is as much opposed to public policy as is gambling in litigation. As such, it will not be quite correct to say that such a

right constituted a "capital asset" which in turn has to be "an interest in property of any kind". The question of the assessee's right under the agreement of 1945 being converted or substituted by another right which can be said to be a "capital asset" does not, therefore, arise. In the next place, the right to sue for damages for breach of contract no doubt is capable of maturing into a right to receive damages for breach of contract. But that happens only when the damages claimed for breach of contract are either admitted or decreed and not before. For this purpose, the first stage is a finding as to the breach of contract. The second stage will be a finding that the party claiming damages for breach of contract has established that it suffered loss as a result of breach of contract by the other party and is required to be compensated by way of damages for breach of that contract. The last stage is that the amount of loss established to have been suffered by the assessee is either agreed to by the other party or decreed by the court. In the present case, the learned single judge did not even pass a decree for damages. What he decreed was only this that the Commissioner was directed to take accounts and to determine the compensation payable, if any, by way of damages for breach of the contract. Thus, even at that point of time, no right to receive damages as such for breach of contract accrued or can be said to have accrued to the assessee, much less at the point of time when there was breach of contract.

11. Besides, the judgment and decree of the learned single judge was challenged in appeal and the appeal was dismissed in the year 1965 only. Thus, even a mere right to sue for damages for breach of contract could not be said to have accrued to the assessee until then. The dismissal of the appeal does not certainly improve the mere right to sue qualitatively. At best, the position that the Commissioner was to take accounts for determining the amount of compensation payable by way of damages for the breach of contract, if any, revived thereby. This only meant that the Commissioner would then go into all the relevant questions and recommend damages if he is satisfied that the assessee is entitled to the damages. It is true that, in the year 1968, the Commissioner submitted his report whereby he recommended damages to the extent of Rs. 10,92,000. However, as stated earlier, both the parties filed their objections to the report and but for the compromise reached between the parties, there would have been prolonged litigation between the parties and it is difficult to say with any amount of certainty as to what would have been the fate of the litigation. In our judgment, the only reasonable conclusion is that the right to receive damages in this case accrued to the assessee on the date of the consent decree only. Since, as already stated by us, the right under the agreement came to an end in the year 1961, if

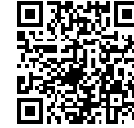


> not earlier, and the right acquired in lieu thereof was only a mere right to sue, it cannot be accepted that the amount of Rs. 2,52,000 was received as consideration for the transfer of a "capital asset", i.e., his right to the execution of a lease deed in terms of the 1945 agreement during the previous year. In that view of the matter, we are in agreement with the Tribunal that no part of the amount of Rs. 2,52,000 was taxable as capital gains. In the premises, it is not necessary to consider the other aspects of the question such as whether there was any transfer at all or whether there being no cost of acquisition of such a capital asset, the amount was taxable."

15. Learned senior counsel then submitted that the amount of INR 3.03 crores even if assumed to be exigible to tax could have, at best, been viewed as capital gains. It was his submission that the Tribunal has committed a manifest illegality while artificially bifurcating a composite settlement amount into 'capital gains' and 'salaries'. According to learned senior counsel, the Tribunal has clearly failed to bear in mind the undisputed fact that the assessee held share certificates in evidence of the 50,000 shares which had been allotted to him and pointed out that the assessee was constrained to approach the CLB since TTPL was refusing to enter his name in the Register of Members and thus formally recognize the allotment of 50,000 shares.

16. Learned senior counsel laid emphasis on the CLB having been petitioned essentially for the purposes of enforcing specific performance and for TTPL being required to give effect to the issue and allotment of shares. According to Mr. Kirpal, the amount of INR 3.03 crores was thus indelibly connected to the claim of the assessee to the 50,000 shares as opposed to any employment condition or the termination of his employment.

17. Mr. Kirpal submitted that it is well settled in law that a right to subscribe to shares is a capital asset and any consideration received as



a consequence of relinquishment of such a right would be assessable as capital gains. Mr. Kirpal drew our attention to the following observations as rendered by the Supreme Court in **Navin Jindal vs. Assistant Commissioner of Income-Tax**[12]:

> "**8.** For the purposes of Section 48 of the Act, one must keep in mind an important principle, namely, that chargeability and computation has to go hand in hand. In other words, computation is an integral part of chargeability under the Act. It is for this reason that we have opined that the right to subscribe for additional offer of shares/debentures comes into existence only when the company decides to come out with the rights offer. It is only when that event takes place, that diminution in the value of the original shares held by the assessee takes place. One has to give weightage to the diminution in the value of the original shares which takes place when the company decides to come out with the rights offer. For determining whether the gain/loss of renunciation of right to subscribe is a short-term or long-term gain/loss, the crucial date is the date on which such right to subscribe for additional shares/debentures comes into existence and the date of renunciation (transfer) of such right.
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> **9.** Our view is based on the judgement of this Court in *Dhun Dadabhoy Kapadia* v. *CIT* [(1967) 63 ITR 651 (SC)] which has taken the view that, for computing capital gains on renunciation of right to subscribe for additional shares, diminution in the value of original shares would be regarded as the cost of acquisition for such right (*see* ITR pp. 654-55 of the said judgment).
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> **10.** We quote hereinbelow the relevant portion of the said judgment which further indicates that the right to subscribe for new shares/debentures is a separate capital asset which comes into existence only when the company passes resolution for the issue of new shares: (*Dhun Dadabhoy Kapadia case* [(1967) 63 ITR 651 (SC)], ITR pp. 654-55)
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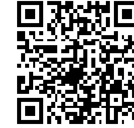
>> "… *The capital asset which the appellant originally* possessed consisted of 710 ordinary shares of the company. There was already a provision that, if the company issued any new shares, every holder of old shares would be entitled to such number of ordinary shares as the Board may, by resolution, decide. *This right was possessed by the appellant because of her ownership of the old 710 ordinary shares, and when the Board of Directors of the company passed a resolution for issue of new shares, this right of the*

[12] (2010) 2 SCC 525



*appellant matured to the extent that she became entitled to receive 710 new shares. This right could be exercised by her by actually purchasing those shares at the prescribed rate, or by renouncing those shares in favour of another person and obtaining monetary gain in that transaction. At the time, therefore, when the appellant renounced her right to take these new shares, the capital asset which she actually possessed consisted of her old 710 shares plus [**Ed.**: The word "plus" is emphasised in original also.] this right to take 710 new shares.*

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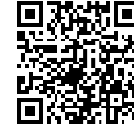
In the alternative, the case can be examined in another aspect. At the time of the issue of new shares, the appellant possessed 710 old shares and she also got the right to obtain 710 new shares. When she sold this right to obtain 710 new shares and realised the sum of Rs 45,262.50p., she capitalised that right and converted it into money. The value of the right may be measured by setting off against the appreciation in the face value of the new shares the depreciation in the old shares and, consequently, to the extent of the depreciation in the value of her original shares, she must be deemed to have invested money in *acquisition of this new right*. A concomitant of the acquisition of the new right was the depreciation in the value of the old shares, and the depreciation may, in a commercial sense, be deemed to be the value of the right which she subsequently transferred. The capital gain made by her would, therefore, be represented only by the difference between the money realised on transfer of the right, and the amount which she lost in the form of depreciation of her original shares in order to acquire that right. Looked at in this manner also, it is clear that the net capital gain by her would be represented by the amount realised by her on transferring the right to receive new shares, after deducting therefrom the amount of depreciation in the value of her original shares, being the loss incurred by her in her capital asset in the transaction in which she acquired the right for which she realised the cash. This method of looking at the transaction also leads to the same conclusion which we have indicated in the preceding paragraph."

(emphasis supplied)

11. Section 48 deals with mode of computation of income chargeable under the head "Capital gains". Under that section, such income is required to be computed by deducting from the full value of the consideration received as a result of the transfer of the capital asset, the expenditure incurred wholly and exclusively in connection with such transfer and the cost of acquisition of the



asset. Under Section 48(1)(*b*) of the Act, it is further stipulated that where the capital gain arises from the transfer of a long-term capital asset, then, in addition to the expenditure incurred in connection with the transfer and the cost of acquisition of the asset, a further deduction, as specified in Section 48(2) of the Act, which is similar to standard deduction, becomes necessary.

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16. As stated above, we have opined that the loss suffered by the assessee amounting to Rs 2,43,750 was a short-term loss. Therefore, in our view, the computation of income under the head "Capital gains", as projected in the chart submitted by the assessee and as computed by the assessee is correct. In other words, the computation of income under the head "Capital gains" submitted to this Court by the assessee is correct and the computation of income made by the Department is erroneous.

17. Accordingly, the civil appeals filed by the assessees stand allowed with no order as to costs."

18. It was his submission that viewed in the aforesaid light, it would be manifest that the right to the sweat equity issued to the assessee, including the right to enforce the same, would constitute a capital asset as understood in terms of Section 2(14) of the Act and the surrender or relinquishment of the capital asset qualifying as a 'transfer' under Section 2(47).

19. Mr. Kirpal further submitted that High Courts across the country have consistently recognized the right of subscription to shares as being a capital asset as would be evident from the decisions in **Hari Brothers Pvt. Ltd. vs. Income Tax Officer**[13] and **Chittharanjan A. Dasannacharya vs. Commissioner of Income-Tax & Anr.**[14]

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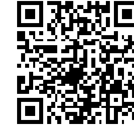
[13] 1963 SCC OnLine Punj 398

[14] 20`20 SCC OnLine Kar 3442



20. Mr. Kirpal lastly relied upon the following passages from the decision of the Court in **M/s Simka Hotels & Resorts vs. Deputy Commissioner of Income-Tax**[15]**:**

> "**13.** The decision in *J.K. Kashyap* (supra) is an authority for the proposition that even when an assessee becomes entitled to an undefined and undivided share in a property, through an agreement, which he later relinquishes, the gain has to be assessed as income from capital gain, and not as income from other sources. This much is clear from the following observations of the court:
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> **xxxx xxxx xxxx**
>
> **14.** This Court is in agreement with the above reasoning. That apart, in the present case, the Petitioner had acquired right to a specific plot; furthermore, the interest was in the nature of an actionable claim, which could be asserted in a legal proceeding. The tax authorities had issued a no objection certificate in respect of the transaction. In these circumstances, the reporting of the amount received as capital gains was correct. Moreover, *Calcutta Discount Ltd.* v. *ITO*, 1961 (41) ITR 191 (SC) is an authority for the proposition that as long as the assessee makes a full and true disclosure of the income, the fact that it might claim that as falling under one head which is ultimately not accepted, would not make it a wrong disclosure, or suppression. The question as to the proper assessability of any amount, to income tax falls within the domain of the tax adjudicator.
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> **15.** In view of the above discussion, the writ petition is entitled to succeed; the reassessment proceedings are hereby quashed. The petition and accompanying application consequently are allowed, without any order as to costs."

21. It was then submitted by learned senior counsel that the Tribunal has clearly erred in failing to appreciate the fact that the provisions of Section 17(3)(iii) were clearly not attracted since the amount received by the assessee had no nexus or correlation with the cessation of his employment with TTPL. According to learned senior

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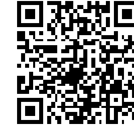
[15] 2013 SCC OnLine Del 244

counsel, both the Tribunal as well as the AO have clearly misconstrued the scope and ambit of Section 17(3)(iii).

22. Seeking to support the view taken by the Tribunal, Mr. Chandra, learned counsel appearing for the respondent, submitted that the settlement consideration received by the assessee was rightly placed in the category of 'profits in lieu of salary' since it answered to the description of compensation received by an employee from its former employer. According to learned counsel, the sweat equity was clearly connected with the employment conditions of the assessee. It was Mr. Chandra's submission that the settlement consideration would thus clearly fall within the residuary clause comprised in Section 17(3)(iii), since the same clearly amounted to a lump sum amount received after cessation of employment.

23. It was also Mr. Chandra's submission that the Revenue rightly took into consideration the admitted fact that the name of the assessee was not entered in the Register of Members and thus the Tribunal was justified in ultimately bifurcating and restricting the compensation amount between the sweat equity which could have been allotted to the assessee in terms of his employment contract and the balance being liable to be taxed as capital gains.

24. Having noticed the rival submissions, we at the outset note that while Mr. Kirpal did contend that the consideration received should be placed in the genre of monies received for giving up a right to sue, the record would reflect that the assessee had consistently taken the position that the settlement consideration was liable to be viewed as capital gains. Even before us, the argument resting on principles of the



right to sue and the consequences recognizable in law in relation to the relinquishment of that right was addressed in the alternative.

25. However, we find no justification to tread down this path since the Tribunal was essentially called upon to examine the challenge raised by the Revenue in the appeal which had come to be laid before it and even before the Tribunal, the principal argument of the assessee had proceeded on capital gains. We, consequently, find no justification to test the correctness of the view expressed by the Tribunal based on the argument of relinquishment of a right to sue.

26. That then takes us to the principal question of whether the Tribunal was justified in bifurcating the settlement consideration between salary and capital gains. We note that a bifurcation of the consideration amount between salary and capital gains was one which was never advocated by the respondents. It thus clearly appears to represent an exercise which the Tribunal undertook of its own volition.

27. We bear in mind the undisputed fact that TTPL had never doubted the fact that the assessee did possess share certificates of the 50,000 sweat equity shares which had been allotted to it. This aspect is also liable to be viewed in light of the well settled position in law of a share certificate being prima facie evidence of valid title. The litigation before the CLB had ensued only because of a refusal on the part of TTPL to record the name of the assessee in the Register of Members. It was in the aforesaid context that the assessee had addressed a prayer for specific performance before the CLB.

28. From a plain reading of the various clauses of the Settlement Agreement which have been extracted hereinbefore, it is manifest that

the consideration was concerned with an unconditional and irrevocable relinquishment of the right of the assessee to seek and enforce the registration of the shares held by it. As it is apparent from a reading of Clause 5 of the Settlement Agreement, it was the relinquishment of the aforesaid right which formed the basis for the assessee being compensated by TTPL. This is further fortified by the fact that the assessee undertook not to take any steps to enforce any right, title or interest in the shares in question. The consideration thus appears to be undeniably connected with the relinquishment of all claims which could have been raised by the assessee in respect of sweat equity.

29. Regard must be had to the fact that Section 17 of the Act, while seeking to define the expression 'salary', includes 'perquisites' in terms of sub-section (2) and sweat equity being a constituent of perquisites by virtue of clause (vi) thereof. Sub-section (3) to Section 17, on the other hand, deals with 'profits in lieu of salary'. In our considered opinion, the fundamental mistake which the Tribunal committed was failing to bear in mind the distinction between a 'perquisite' and 'profits in lieu of salary' and both of which are dealt with separately in Section 17. 'Profits in lieu of salary', which is spoken of in Section 17(3), deals with compensation received by an assessee from his employer or former employer in connection with the termination of his employment or on a modification of terms and conditions of service. However, the Tribunal has fundamentally erred in ignoring the indubitable position of the employment of the assessee having been brought to an end on 24 August 2010 itself and thus before the action came to be even laid or instituted before the CLB.

30. Regard must also be had to the fact that in the petition, which was filed before the CLB, there was no relief which was sought with respect to the cessation of employment of the assessee or the validity of termination of employment. As noticed hereinabove, the principal relief sought by the assessee in those proceedings was for the registration of the 50,000 sweat equity shares in his name and thus essentially of specific performance. Viewed in light of the above, it becomes apparent that the Tribunal clearly erred in viewing the settlement consideration as being payment connected to the termination of the assessee's employment.

31. We find that it is essential to note at this juncture that clause (iii) of Section 17(3) is liable to be construed bearing in mind the subjects which are covered in the preceding parts of that sub-section. Consequently, the lump sum amount which is spoken of in clause (iii) would also have to draw colour and meaning from compensation received in connection with termination of employment or modification of terms and conditions of service and which are the principal subjects of 'profits in lieu of salary'.

32. The ultimate exercise undertaken by the Tribunal of segregating the consideration into two components is thus clearly rendered unsustainable considering the reasons recorded hereinabove. Since the respondents had failed to either doubt or question the entitlement of the assessee to the 50,000 shares, there existed no justification to enter that thicket. All that the Tribunal was called upon to examine was whether the settlement consideration was liable to be construed as capital gains or taxed as 'profits in lieu of salary'. In light of what we

have found above, the consideration could not have possibly or justifiably been placed in the category of 'profits in lieu of salary'.

33. We, consequently, allow the instant appeal and set aside the order of the Tribunal dated 15 December 2022. The question of law shall stand answered in favour of the appellant-assessee. We, consequently, hold that the settlement consideration as received was liable to be recognized as capital gains.

YASHWANT VARMA, J

RAVINDER DUDEJA, J

AUGUST 07, 2024/kk