

## Commissioner Of Income-Tax, West ... vs George Henderson And Co. Ltd. on 26 April, 1967

**Equivalent citations:** [1967]66ITR622(SC), AIRONLINE 1967 SC 82

**Bench:** J.C. Shah, S.M. Sikri

### JUDGMENT

Ramaswami, J.

1. This appeal is brought on a certificate by the Commissioner of Income-tax, West Bengal, from the judgment of the Calcutta High Court dated July 15, 1963, in Income-tax Reference No. 108 of 1952.

2. Prior to January 1, 1939, the respondent-company (hereinafter referred to as the "respondent") purchased 1,500 shares of Bally Jute Company Limited. During the accounting year ending on March 31, 1947, the respondent was the managing agent of Bally Jute Company Limited. On April 1, 1946, the respondent transferred these shares to one Giridhari Lal Mehta at the rate of Rs. 136 per share. The market value of the shares on that date was Rs. 620 per share. Giridhari Lal Mehta has been described as the beneficial owner of the respondent as he purchased all but five shares of the respondent. On the same date, i.e., April 1, 1946, Giridhari Lal Mehta sold the shares to Jardine Skinner & Co. at the rate of Rs. 100 per share. Giridhari Lal Mehta retained the share scrips with blank transfer forms until May, 1946, when the shares were registered in the name of Jardine Skinner & Co. In November, 1946, Jardine Henderson & Co. Ltd. was incorporated and these 1,500 shares were transferred in March, 1947, by Jardine Skinner & Co. to Jardine Henderson & Co. Ltd. at Rs. 493-10-0 per share. In assessing the respondent to income-tax for the assessment year 1947-48 the Income-tax Officer held that the respondent had sold the shares at the book value of Rs. 136 per share to Jardine Skinner & Co. on April 1, 1946, whereas the market value of the shares on that date was Rs. 620 per share and the difference of Rs. 484 per share on 1,500 shares was capital gain arising from the sale of the shares under section 12B of the Income-tax Act. The Income-tax Officer made the order under the first proviso to section 12B(2) with the previous approval of the Inspecting Assistant Commissioner as required by the proviso apparently on the footing that all conditions of the aforesaid proviso has been satisfied. By his order dated April 25, 1950, the Appellate Assistant Commissioner affirmed the order of the Income-tax Officer but varied the quantum of capital gain at Rs. 6,93,000. The Appellate Assistant Commissioner held that the market value of the shares on January 1, 1939, was Rs. 153 per share and that figure should be taken as the actual cost in view of the third proviso to section 12B(2). The Appellate Assistant Commissioner also considered that the respondent and the transferee were directly connected and the sale was effected with the object of avoidance of tax and the conditions of the first proviso to section 12B(2) were satisfied and the market value of the shares on the date of transfer should be taken as the full value of the consideration for the sale. The respondent appealed to the Income-tax

appellate Tribunal which dismissed the appeal by its order dated August 23, 1951. The Appellate Tribunal held that the sale was not effected with object of avoidance or reduction of liability of the assessee under section 12B and, therefore the first proviso to section 12B(2) did not apply to the case. The Appellate Tribunal, however, felt that the order of the Appellate Assistant Commissioner should be affirmed. The ground upon which the Appellate Tribunal proceeded in the subject-matter of controversy in this appeal and we shall discuss it in detail later on. The order of dismissal of the appeal dated August 23, 1951, was passed by the Appellate Tribunal consisting of Shri S. M. Gupta and Shri B. M. Chatrath. On the application of the respondent the Appellate Tribunal consisting of Shri A. B. Aggarwal and Shri B. M. Chatrath drew up a statement of the case dated July 20, 1952, and referred the following question of law for the determination of the High Court under section 66(1) of the Income-tax Act :

"Whether, on the facts and in the circumstances of the case, the sum of Rs. 6,93,000 has been rightly held to be capital gains of the assessee assessable under section 12B of the Income-tax Act ?"

3. The reference was heard by a Bench constituted by Sinha and Datta JJ. who did not agree as to how question of law should be answered. By his judgment dated November 30, 1962, Sinha J. answered the question in the affirmative, but Datta J. answered the question in the negative. In view of this difference of opinion the matter was referred to R. S. Bachawat J. who, by his judgment dated March 21, 1963, answered the question in the negative and agreed with the opinion of S. K. Datta J. In view of the opinion of the majority of the Judges the Division Bench passed an order on July 15, 1963, answering the question in the negative in favour of the respondent.

Section 12B of the Income-tax Act as it was in force on April 1, 1947, provided as follows :

12B. Capital gains. - (1) The tax shall be payable by an assessee under the head 'capital gains' in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after the 31st day of March, 1946, and before the 1st day of April, 1948, and such profits and gains shall be deemed to be income of the previous year in which the sale, exchange or transfer took place : .....

(2) The amount of a capital gain shall be computed after making the following deductions from the full value of the consideration for which the sale, exchange or transfer of the capital asset is made, namely :-

(i) expenditure incurred solely in connection with such sale, exchange or transfer;

(ii) the actual cost to the assessee of the capital asset, including any expenditure of a capital nature incurred and borne by him in making any additions or alterations thereto, but excluding any expenditure in respect of which any allowance is admissible under any provision of sections 8, 9, 10 and 12 :

Provided that where a person who acquires a capital asset from the assessee, whether by sale, exchange or transfer, is a person with whom the assessee is directly or indirectly connected, and the Income-tax Officer has reason to believe that the sale, exchange or transfer was effected with the object of avoidance or reduction of the liability of the assessee under this section, the full value of the consideration for which sale, exchange or transfer is made shall, with the prior approval of the Inspecting Assistant Commissioner of Income-tax, be taken to be the fair market value of the capital asset on the date on which the sale, exchange or transfer took place : .....

Provided further that where the capital asset became the property of the assessee, or of the previous owner where the cost of the capital asset to the previous owner is to be taken in accordance with sub- section (3) before the 1st day of January, 1939, he may, on proof of the fair market value thereof on the said date to the satisfaction of the Income-tax Officer, substitute for the actual cost such fair market value which shall be deemed to be the actual cost to him of the asset, and which shall be reduced by the amount of depreciation, if any, allowed to the assessee after the said date and increased or diminished, as the case may be, by any adjustment made under clause (vii) of sub-section (2) of section 10 :....."

4. This section was inserted in the Income-tax Act, 1922, by the Income- tax and Excess Profits Tax (Amendment) Act, 1947 (XXII of 1947), which received the assent of the Governor-General on April 18, 1947, but the amending Act was deemed to have come into force on March 31, 1947.

5. It was conceded by Mr. Narsaraju on behalf of the appellants that the transfer does not come within the mischief of the first proviso to section 12B(2), because the transfer was effected at a time when section 12B had not been enacted and the transfer could not therefore possibly have been made with the object of avoidance or reduction of liability of the respondent under section 12B. But it was contented on behalf of the appellants that the expression "full value of the consideration for which the sale, exchange or transfer of capital asset was made" appearing in section 12B(2) meant the market value of the asset transferred and on this ground the Appellate Tribunal was justified in taking the market value of the shares to be full value of the consideration. We are unable to accept this contention as correct. It is manifest that the consideration for the transfer of capital asset is what the transferor receives in lieu of the asset he parts with, namely, money or money's worth and, therefore, the very asset transferred or parted with cannot be the consideration for the transfer. It follows that the expression "full consideration" in the main part of section 12B(2) cannot be construed as having a reference to the market value of the asset transferred but the expression only named the full value of the thing received by the transferor in exchange for the capital asset transferred by him. The consideration for the transfer is the thing received by the transferor in exchange for the asset transferred and it is not right to say that the asset transferred and parted with is itself the consideration for the transfer. The main part of section 12B(2) provides that the amount of a capital gain shall be computed after making certain deductions from the "full value of the consideration for which the sale, exchange or transfer of the capital asset is made". In case of a sale, the full value of the consideration is the full sale price actually paid. The legislature had to use the

words "full value of the consideration" because it was dealing not merely with sale but with other types of transfer, such as exchange, where the consideration would be other than money. If it is therefore held in the present case that the actual price received by the respondent was at the rate of Rs. 136 per share the full value of the consideration must be taken at the rate of Rs. 136 per share. The view that we have expressed as to the interpretation of the main part of section 12B(2) is borne out by the fact that in the first proviso to section 12B(2) the expression "full value of the consideration" is used in contradistinction with "fair market value of the capital asset" and there is an express power granted to the Income-tax Officer to "take the fair market value of the capital asset transferred" as "the full value of the consideration" and "fair market value of the capital asset transferred" and it is provided that if certain conditions are satisfied as mentioned in the first proviso to section 12B(2), the market value of the asset transferred, though not equivalent to the full value of the consideration for the transfer, may be deemed to be the full value of the consideration. To give rise to this fiction the two conditions of the first proviso are : (1) that the transferor was directly or indirectly connected with the transferee, and (2) that the transfer was effected with the object of avoidance or reduction of the liability of the assessee under section 12B. If the conditions of this proviso are not satisfied the main part of section 12B(2) applies and the Income-tax Officer must take into account the full value of the consideration for the transfer.

6. For the reasons already stated, we are of the opinion that the expression "full value of the consideration" cannot be construed as the market value but as the price bargained for by the parties to the sale. The dictionary meaning of the word "full" is "whole or entire, or complete" (Shorter Oxford English Dictionary). The word "full" has been used in this section in contrast to "a part of the price". Consequently, the words "full price" mean "the whole price". Clause (2) of section 12B itself clearly suggests that if no deductions are made as mentioned in sub-clause (ii) thereof, then that amount represents the full value of the consideration or the full price. In other words, when deductions are made as specified in sub-clauses (i) and (ii), then that amount does not represent the full value. The expression "full value" means the whole price without any deduction whatsoever and it cannot refer to the adequacy or inadequacy of the price bargained for. Nor has it any necessary reference to the market value of the capital asset which is the subject-matter of the transfer.

7. The question, therefore, arises in the present case as to what is precisely the finding of fact arrived at by the Tribunal as regards the full value of the consideration. It is necessary to state at the outset that the Income-tax Officer and the Appellate Assistant Commissioner assessed the tax on the footing that the first proviso to section 12B(2) applied and, therefore the market value of the shares must be taken to be the full value of the consideration for the transfer. The Appellate Tribunal, however, rejected the contention of the appellants that the first proviso to section 12B(2) applied to the case, but nevertheless proceeded to affirm the order of the Appellate Assistant Commissioner. In paragraph 7 of the order dated August 23, 1951, the Appellate, Tribunal stated that "these shares were transferred by the assessee-company to one Giridharilal Mehta on 1st April, 1946, at the book value of Rs. 136 per share, though the market value of those shares on that date was admittedly Rs. 620 per share." In paragraph 8 of the order the Appellate Tribunal has remarked that the assessee refused to give any further facts to explain why it sold the share to Giridharilal Mehta at Rs. 136 per share when the market price of the shares stood at Rs. 620 per share and also why Giridharilal Mehta again sold the shares on the same date at Rs. 100 per share at a loss of Rs. 54,000, and then

again within a few months thereafter, why Jardine Skinner & Co. sold the shares at Rs. 493-10-0 per share. In paragraph 9, the Appellate Tribunal recorded the finding that, prima facie, the transaction was not a bona fide one, and proceeded to say that, "if the assessee refuses to disclose all the facts leading to the transaction and the facts immediately after the transaction, we must hold that it will react to the prejudice of the assessee." In paragraph 10 the Appellate Tribunal has observed that under section 12B(2) of the Income-tax Act, the Income-tax Officer has to compute the capital gains after making certain deductions from the full value of the consideration for the sale and he, therefore, has a right to know the full value. The Appellate Tribunal added :

"The assessee cannot shut out the Income-tax Officer from finding out what is the full value of the asset transferred by merely putting a figure on the document of transfer. The Income-tax Officer in this case took the value to be the market price of the shares. There is no dispute that the market price of the shares was Rs. 620 per share. We cannot say therefore, that in the circumstances the Income-tax Officer was in any way wrong in determining the full value of the shares."

8. In paragraph 11, the Appellate Tribunal held that the first proviso to section 12B(2) did not apply to the case and the sale was not effected with the object of avoidance or reduction of the liability of the assessee under that section, and then observed as follows :

"But the right of the Income-tax Officer to determine the full value of the assets is always there specially in a case where the assessee refuses to give all the information to the Income-tax Officer and the value of the assets given by him is so suspiciously low. We, therefore, think there is no substance in the points raised by Mr. Issac."

9. It was contended by Mr. Asoke Sen on behalf of the respondent that there was no express finding of the Appellate Tribunal that the respondent actually sold the shares at the market price of Rs. 620 per share and that the respondent received that market price of the shares as consideration for the transfer. Reference was made to paragraph 7 of the order of the Appellate Tribunal wherein there is an express finding that the shares were transferred by the respondent to Giridharilal Mehta on April 1, 1946, at the book value of Rs. 136 per share, though the market value on that date was Rs. 620 per share. Mr. Asoke Sen further submitted that it could not be argued from paragraphs 8 to 11 of the order of the Appellate Tribunal that there was an inferential finding that the shares were actually sold at Rs. 620 per share by the respondent. On behalf of the appellants Mr. Narsaraju pointed out that in the statement of the case dated July 29, 1952, the Appellate Tribunal has said that by the previous order dated August 23, 1951, the Appellate Tribunal had come to the conclusion that the sale had been effected at Rs. 620 per share and that the market price of the shares must have been paid. It was, however, pointed out on behalf of the respondent that the statement of the case was not agreed statement and that it was drawn up by the Appellate Tribunal whose constitution was different from that of the Appellate Tribunal which made the order dated August 23, 1951. It is true that the court is bound to proceed normally on the findings of fact which are mentioned in the statement of the case. But if the statement of the case does not correctly summarise or interpret the finding recorded in the order of the Appellate Tribunal which has been made part of the case, the court is entitled to look at the order itself in order to satisfy itself what was actually the finding of the

Appellate Tribunal.

10. After having heard counsel for both the parties and having scrutinized the order of the Appellate Tribunal dated August 23, 1961, and the statement of the case dated July 29, 1952, we have reached the conclusion that the question of law referred to the High Court cannot be answered as the language used by the Appellate Tribunal in recording its finding as to the actual contract price paid to the respondent by Giridharilal Mehta for the sale of 1,500 shares is obscure and its import cannot be determined. In these circumstances we consider that the best course is for the Appellate Tribunal to rehear the appeal and record a clear finding after hearing the parties and after giving an opportunity to the respondent to explain the unusual nature of the transaction and the conduct of the parties concerned therein. After recording a clear finding as to what was the actual price received by the respondent for the sale of shares to Giridharilal Mehta the Appellate Tribunal will finally dispose of the appeal. On behalf of the respondent Mr. Asoke Sen said that his client will give a proper explanation of the transactions and of the conduct of the parties involved before the Appellate Tribunal at the time of the further hearing of the appeal. If the assessee gives explanation of the transaction the Tribunal will be entitled to call upon it to produce documentary or other evidence in support of the explanation. The Tribunal will also be entitled to call for elucidation of the explanation of the evidence. The appellants will be entitled to give evidence in rebuttal.

11. We accordingly set aside the judgment of the Calcutta High Court dated July 15, 1963, and allow this appeal to the extent and manner indicated above. The parties will bear their own costs upto this stage.

12. Case remanded.