Income Tax Appellate Tribunal - Mumbai
Alcan Inc. vs Dy Director Of Income-Tax ... on 30 April, 2007
Equivalent citations: (2007) 112 TTJ Mum 328
Bench: O Narayanan, R Yadav
ORDER O.K. Narayanan, Accountant Member

1. These are the cross appeals filed by the assessee and by the revenue, respectively. The relevant assessment year is 2001-02. These appeals are directed against the order of the Commissioner (Appeals)-XXXI, Mumbai, dated 15-12-2004 and arise out of the assessment completed under Section 143(3) of the Income Tax Act, 1961 ('Act').

2. The assessee is a Canadian company. The assessee had, over a period of time, acquired 3,88,44,324 shares of an Indian company by name Indian Aluminum Co. Ltd. (Indal). The shares acquired by the assessee-company are of the following categories :

(i) Shares acquired between 1938 and 1968 in Canadian Dollars (CAD);

(ii) Shares acquired in August 1998 in American Dollars (USD); and

(iii) Bonus shares allowed between 1944 and 1996.

3. During the previous year relevant to the assessment year under appeal, the assessee-company sold the entire Indal shares to another company Hindalco Industries Ltd. The shares were sold on at an agreed price of Rs. 190 per share. The long-term capital gains arising oui: of the above transaction was reported by the assessee-company at Rs. 317,71,30,910 in its return of income filed for the impugned assessment year 2001-02. The capital gains tax was computed at Rs. 31,77,13,091 at the rate of 10 per cent as provided under Section 112, Sub-section (1) of the Act.

4. The assessee-company has furnished detailed particulars in the matter of computing the long-term capital gains. In the case of shares acquired between 1938 and 1968, CAD capital gains were computed under the first proviso to Section 48 of the Act. Thus, in the case of shares acquired prior to 1-4-1981, the fair market value (FMV) of the shares as on 1-4-1981 was adopted by the assessee as the cost under Section 55(2)(b)(i) of the Act. The FMV was adopted on the prevailing Stock Exchange rate. The sale consideration pertaining to CAD shares were converted into CAD in pursuance of rule 115A of the Income-tax Rules, 1962. Capital gains were thus initially worked out in CAD and thereafter, reconverted into Indian rupees.

5. In respect of USD shares also conversion was made under rule 115A and thus capital gains were computed.

6. In the case of bonus shares, capital gains were computed in Indian rupees on the basis of cost of acquisition worked out on the basis of FMV as on 1-4-1981 in respect of shares allotted before 1-4-1981. Cost of acquisition was taken at nil in respect of bonus shares allotted after 1-4-1981 in terms of Section 55(2)(aa)(iiia).

7. While assessing capital gains, the assessing officer held that in the case of shares acquired by the assessee prior to 1-4-1981, the assessee could not take the benefit of FMV provided in Section 55(2)(fe)(z), thereby, meaning that the assessee cannot substitute its cost with FMV as on 1-4-1981. This is because, according to the assessing authority, the assessee is nonresident and the non-residents are required to compute the capital gains in terms of the foreign currency conversion in terms of first proviso to Section 48. In other words, the assessing officer held that the capital gains in the case of assessee being a non-resident, has to be computed on conversion of the foreign currency and simultaneously the assessee could not avail the benefit of FMV as on 1-4-1981. The Commissioner (Appeals) concurred with the view of the assessing authority relying on the decision of ITAT, Mumbai, in the case of Novartis AG Basle v. Asstt. CIT (IT Appeal No. 537 (Mum.) of 2002).

8. The above question is one of the points of dispute before us that, whether, the assessee-company can avail the option of substituting FMV as on 1-4-1981 as the cost of acquisition of shares acquired by it before 1-4-1981 in the light of Section 55(2)(b)(i) and, whether, the proviso to Section 48 debars the assessee from opting the FMV for the reason that the said proviso directs the non-resident assessee to compute the capital gains on foreign currency conversion rule.

9. We heard Shri S.E. Dastur, the learned Sr. Advocate, appearing for the assessee; and Shri S.C. Gupta, learned Commissioner of Income-tax, appearing for the revenue.

10. While considering the above issue, we have to refer to the decision of of the Tribunal which held that the non-resident would not be entitled for benefit of Section 55(2)(&)(i) was taken in appeal before the Hon'ble Bombay High Court in Income-tax Appeal No. 788/2004. The said appeal has been heard and disposed off by Their Lordships through judgment dated 19-9-2006. The Hon'ble Bombay High Court observed therein that the Tribunal has accepted the contention of the revenue that a nonresident was not entitled to indexation under Section 48 of the Act and, therefore, was not eligible to rely on Section 55(2)(b)(i). In this respect, the Hon'ble Bombay High Court considered the following two questions :

(i) Whether, on the facts and in the circumstances of the case, the Tribunal erred in holding that the assessee was not entitled to exercise the option under Section 55(2)(&)(i) of the Act to adopt the fair market value of shares as on 1-4-1981 as the cost of acquisition of such shares when computing the capital gain/loss arising on the transfer of the said shares ?

(ii) Whether the Tribunal erred in holding that the first proviso to Section 48 of the Act was charging section and therefore erred in holding that Section 55(2)(b)(i) of the Act was not available to the assessee being a non-resident ?

11. On considering the above two questions, the Hon'ble Bombay High Court held that they direct the Tribunal to decide the liability of the appellant independent of Section 48 of the Act. With the said direction, the case has been revived before the Tribunal.

12. In the light of the above judgment of the Hon'ble Bombay High Court, it is to be seen that the decision of the Tribunal, Mumbai, in the case of Novartis AG Basle (supra) does not hold good any more and consequently the substratum of the decision arrived at by the Commissioner (Appeals) has been vitiated. Therefore, it is not permissible for us to rely on the decision of the Tribunal in the case of Novartis AG Basle, (supra) even though a fervent plea was made by the learned Commissioner of Income-tax that the findings of the Tribunal in the said decision have to be acted upon as they decided the matter in the right prospective.

13. We have to still remember that the direction of the Hon'ble Bombay High Court is to consider the issue independent of Section 48 of the Act. Section 55 deals with the meaning of the expression "adjusted", "cost of improvement and" cost of acquisition". These definitions have been made in Section 55 for the purpose of Sections 48 and 49 of the Act. Section 48 p deals with the mode of computation and Section 49 refers to cost with reference to certain modes of acquisition. Therefore, it is to be seen that these provisions are machinery provisions embedded in the provisions of statute relating to the assessment of capital gains meant for computing the capital gains under different circumstances. Therefore, at the first instance itself, we have to state that the Sections 48, 49 and 55 are not charging sections, as tried to explain by the lower authorities.

14. Section 55(2) deals with the cost of acquisition for the purpose of Sections 48 and 49. Clause (b) and Sub-clause (f) thereof deals with the capital asset which became the property of the assessee before 1-4-1981. In such cases, the law provides that the cost of acquisition of the asset can be taken as the FMV of the asset as on 1-4-1981 or at the actual cost incurred by the assessee, at the option of the assessee. This option is really given to an assessee to come out of an unfair situation. That is, in respect of assets acquired in the old past, if a reasonable value is not assigned to it as cost of acquisition, the cost would be always the historical cost for which the assets were acquired, which would be having no relevance at all in a contemporary computation of capital gains. Therefore, to bring out such assets acquired long back in the past, the law has provided the assessee to opt for the FMV as on 1 -4-1981 if it is beneficial to it so that the said value would be more reasonable and realistic. This option is an independent provision provided by the statute in Section 55. It is independent of Section 48. Section 48 deals with mode of computation. Section 55 deals with the meaning of cost of acquisition which is only one limb in the computation. The difference is obvious. It is only after working out the cost of acquisition within the meaning of Section 55 that the capital gains could be computed under Section 48. That must be the reason why the Hon'ble Bombay High Court has directed the Tribunal to consider the issue independent of Section 48 while disposing the matter in the case of the Novartis AG Baste (supra).

15. First proviso to Section 48 permits a non-resident to compute the capital gains after converting the concerned variables into the foreign currency in which the shares were first acquired. This facility of conver sion is provided for the reason that the conversion rate difference between Indian currency and foreign currency is different from currency to currency and fluctuate from time to time and not stable and also not comparable. Therefore, if no conversion is made and the capital gains is computed in Indian currency, the computation will not reflect the " real capital gains". If the facility of currency conversion is not available and if the capital gains are computed throughout in Indian currency, the computation would be distorted and unrealistic. It is a rule of income taxation that

what is to be taxed is real income. For that matter, capital gains is also treated as income. Accordingly, it is necessary that what is assessed is real capital gains. It is for that purpose proviso to Section 48 is provided in that section. The said proviso does not restrict or undo the option available to an assessee under Section 55(2)(>)(). They are operating in two different realms.

16. Not only that, the plain reading of the language of the provision contained in Section 55, nowhere make the said Section 55 subservient to Section 48. In fact, Section 55 defines the value of the variables necessary for competing the capital gains as provided in Section 48.

17. In the facts and circumstances of the case, we find that the assessee is entitled to for the benefit of the option available under Section 55(2)(b)(i) of the Act. Therefore, the assessing authority is directed to compute the capital gains attributable to the shares acquired by the assessee-company before 1-4-1981, after giving the benefit of FMV as on 1-4-1981.

18. This issue is decided in favour of the assessee.

19. The assessing officer has further determined the capital gains tax at the rate of 20 per cent whereas, the assessee claimed the rate of 10 per cent under Section 112(1) of the Act. The Commissioner (Appeals) also has held that the rate of tax should be 20 per cent. The Authority for Advance Ruling (AAR) in the case of In re University Superannuation Scheme Ltd. (2005) 275 ITR 434,' has considered and held in favour of the assessee in stating that the assessee is entitled to concessional rate of tax at 10 per cent. Therefore, this issue is also decided in favour of the assessee and direct the assessing authority to levy tax at the rate: of 10 per cent.

20. The next issue to be considered in this appeal is regarding the cost of acquisition of bonus shares allotted to assessee prior to 1 -4-1981. This issue was considered by ITAT, Mumbai, in the case of Heinrich De Fries GMBH v. Joint CIT . The Tribunal has held that in the case of bonus shares issued prior to 1-4-1981, the assessee has the option to take the cost of acquisition at the FMV as on 1-4-1981. This decision has been taken by the Tribunal in the light of the Section 55(2)(aa)(iiia). Following the above decision, we hold that in the case of bonus shares acquired by the assessee prior to 1-4-1981, the assessee's contention for adopting the FMV as on 1-4-1981 as the cost of acquisition should be accepted. We D direct the assessing authority accordingly.

21. In the case of bonus shares acquired after 1-4-1981, the cost of acquisition shall be nil

22. The appeal filed by the assessee is allowed to the above extent.

23. Next we will consider the appeal filed by the revenue.

24. The only ground raised by the revenue is that, the Commissioner (Appeals) has erred in E holding that the assessee is not liable to interest under Section 324B of the Act as the income was liable to deduction of tax at source.

25. As the dispute relating to the computation of capital gains has been decided by us on merit, we find that this ground raised by the revenue has become infructuous.

26. In the result, appeal filed by the assesses is allowed and the appeal filed by the revenue is dismissed.